H.R. 3094, THE WORKFORCE DEMOCRACY AND FAIRNESS ACT

HEARING

BEFORE THE

COMMITTEE ON EDUCATION AND THE WORKFORCE U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, OCTOBER 12, 2011

Serial No. 112–43

Printed for the use of the Committee on Education and the Workforce

Available via the World Wide Web:
www.gpo.gov/fdsys/browse/committee.action?chamber=house&committee=education
or
Committee address: *http://edworkforce.house.gov*

U.S. GOVERNMENT PRINTING OFFICE

70–580 PDF WASHINGTON : 2011

For sale by the Superintendent of Documents, U.S. Government Printing Office
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Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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C O N T E N T S

H.R. 3094, THE WORKFORCE DEMOCRACY AND FAIRNESS ACT

Wednesday, October 12, 2011
U.S. House of Representatives
Committee on Education and the Workforce
Washington, DC

The committee met, pursuant to call, at 10:04 a.m., in room 2175, Rayburn House Office Building, Hon. John Kline [chairman of the committee] presiding.

Present: Representatives Kline, Petri, Biggert, Goodlatte, Roe, Thompson, Walberg, DesJarlais, Rokita, Bucshon, Gowdy, Barletta, Roby, Heck, Ross, Miller, Kildee, Payne, Andrews, Woolsey, Hinojosa, McCarthy, Kucinich, Holt, Bishop, Loebsack, Hirono and Tierney.

Staff present: Katherine Bathgate, Press Assistant/New Media Coordinator; Casey Buboltz, Coalitions and Member Services Coordinator; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Barrett Karr, Staff Director; Ryan Kearney, Legislative Assistant; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Todd Spangler, Senior Health Policy Advisor; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Kate Ahlgren, Investigative Counsel; Aaron Albright, Communications Director for Labor; Daniel Brown, Junior Legislative Assistant; Jody Calemine, Staff Director; Brian Levin, New Media Press Assistant; Celine McNicholas, Labor Counsel; Richard Miller, Senior Labor Policy Advisor; Michele Varnhagen, Chief Policy Advisor/Labor Policy Director; and Michael Zola, Senior Counsel.

Chairman KLINE. A quorum being present, the committee will come to order. Good morning. Welcome to the committee's legislative hearing on H.R. 3094, the Workforce Democracy and Fairness Act.

I would like to thank our witnesses, all four, for joining us today. We are here today for one simple reason. The National Labor Relations Board is wreaking havoc on the nation's workforce, and it must be stopped. In recent months, the NLRB has taken a number of steps that move federal labor policy in a radically new direction.

Under the board's ambush elections proposal, employers will have just 7 days to find legal representation and prepare the case they must present before an NLRB election officer. If they fail to raise an issue before the start of a preelection hearing, with few

exceptions employers lose the ability to address a concern during the hearing process.

Let me just raise this little tome right here. This is what an employer is supposed to be able to navigate—"How to Take a Case Before the NLRB," 8th Edition. Seven days. Workers will also be harmed by this troubling change in policy. The board's proposal would leave employees with as little as 10 days to consider all the consequences of joining the union before casting a ballot.

Additionally, the board's plan would delay answers to questions often critical to an employee's decision, and undermine employer access to a fair hearing. When coupled with its Specialty Healthcare decision, which enables union leaders to manipulate the workplace for their own gain, it becomes clear the board is promoting unionization by stifling employers' free speech and crippling workers' free choice.

I am open to ideas that will modernize the election process, but those efforts should never undermine the fundamental rights of employees and employers. Expansive changes to workforce policy should be vetted by the people's elected representatives, first by this committee and then by the full Congress.

Hundreds of millions of workers and employers will be forced to live with the consequences of these dramatic changes, and they deserve a congressional response. The legislation before us today will require the NLRB to change course and reaffirm key protections workers and employers have received for decades.

The Workforce Democracy and Fairness Act provides employers at least 14 days to prepare for the election hearing, thereby ensuring access to a full and fair hearing. This provision removes an arbitrary deadline and restores board discretion over the election process. By affording workers at least 35 days to hear both sides of the debate before casting their ballot, the legislation guarantees their ability to make an informed decision.

In addition to these workforce protections, H.R. 3094 also reinstates the traditional stand for determining which employees will participate in union representation and an individual's ability to request board review before the election takes place.

Finally, the bill safeguards privacy by empowering workers to determine the personal information provided to the union. As we saw with the release of the latest employment data last week, our nation is still struggling to create the jobs we so desperately need. The American people have asked Congress to do everything possible to encourage economic growth and investment.

While some may insist this can only come through more temporary stimulus spending and permanent tax increases, my colleagues and I know the one thing business owners and entrepreneurs need right now is certainty. The policies advanced by the NLRB are dramatically increasing the pressure and uncertainty facing business owners, making it more difficult to create jobs and plan for the future.

One employer in particular has voiced his concern about the board's actions and the implication it bears on the economy. Michael Whalen is the founder of Heart of America Group, a business that operates hotels and restaurants throughout the Midwest and employees 3,000 workers.

In the days before the release of the board's ambush election proposal, he wrote, quote—"The impact of this decision is clear. American businesses will have yet another reason to invest elsewhere rather than creating new jobs here at home." Rather than doubling down on the failed policies of the past, we have a responsibility to remove the regulatory hurdles facing employers.

Congress can either support an activist agenda, or listen to the voices of employers like Michael Whalen, who strive every day to grow their businesses and create new opportunities for America's workers.

I look forward to the hearing this morning, hearing the views of our excellent panel of witnesses, and will now yield to the senior Democratic member of the committee, Mr. Miller, the gentleman from California, for his opening remarks.

[The statement of Mr. Kline follows:]

Prepared Statement of Hon. John Kline, Chairman, Committee on Education and the Workforce

Good morning, and welcome to the committee's legislative hearing on H.R. 3094, the Workforce Democracy and Fairness Act. I would like to thank our witnesses for joining us.

We are here today for one simple reason: the National Labor Relations Board is wreaking havoc on the nation's workforce and it must be stopped. In recent months, the NLRB has taken a number of steps that move federal labor policy in a radically new direction.

Under the board's ambush elections proposal, employers will have just seven days to find legal representation and prepare the case they must present before an NLRB election officer. If they fail to raise an issue before the start of a pre-election hearing, with few exceptions employers lose the ability to address the concern during the hearing process.

Workers will also be harmed by this troubling change in policy. The board's proposal would leave employees with as little as 10 days to consider all the consequences of joining a union before casting a ballot. Additionally, the board's plan would delay answers to questions often critical to an employee's decision and undermine employer access to a fair hearing. When coupled with its Specialty Healthcare decision, which enables union leaders to manipulate the workplace for their own gain, it becomes clear the board is promoting unionization by stifling employers' free speech and crippling workers' free choice.

I am open to ideas that will modernize the election process, but those efforts should never undermine the fundamental rights of employees and employers. Expansive changes to workforce policy should be vetted by the people's elected representatives—first by this committee, and then by the full Congress. Hundreds of millions of workers and employers will be forced to live with the consequences of these dramatic changes and they deserve a Congressional response.

The legislation before us today will require the NLRB to change course and reaffirm key protections workers and employers have received for decades. The Workforce Democracy and Fairness Act provides employers at least 14 days to prepare for the election hearing, thereby ensuring access to a full and fair hearing. This provision removes an arbitrary deadline and restores board discretion over the election process. By affording workers at least 35 days to hear both sides of the debate before casting their ballot, the legislation guarantees their ability to make an informed decision.

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As we saw with the release of the latest employment data last week, our nation is still struggling to create the jobs we so desperately need. The American people have asked Congress to do everything possible to encourage economic growth and investment. While some may insist this can only come through more temporary stimulus spending and permanent tax increases, my Republican colleagues and I know the one thing business owners and entrepreneurs need right now is certainty.

The policies advanced by the NLRB are dramatically increasing the pressure and uncertainty facing business owners, making it more difficult to create jobs and plan for the future. One employer in particular has voiced his concerns about the board's actions and the implications it bears on the economy.

Michael Whalen is the founder of Heart of America Group, a business that operates hotels and restaurants throughout the Midwest and employs 3,000 workers. In the days following the release of the board's ambush election proposal, he wrote, "The impact of this decision is clear: American businesses will have yet another reason to invest elsewhere rather than in creating new jobs here at home."

Rather than doubling-down on the failed policies of the past, we have a responsibility to remove the regulatory hurdles facing employers. Congress can either support an activist agenda or listen to the voices of employers like Michael Whalen, who strive every day to grow their businesses and create new opportunities for America's workers.

I look forward to hearing the views of our excellent panel of witnesses, and will now yield to the Senior Democratic Member of the committee, Mr. Miller, for his opening remarks.

Mr. MILLER. Thank you very much, Mr. Chairman. Today this committee meets for the fifth time this year on the issues relating to the National Labor Relations Board. Rather than focusing on getting Americans back to work, the majority is stubbornly continuing their ideological war against workers and their unions, with the majority's laser-like focus on the special interest battle, one could be led to think that our economic problems are the American, and his or her rights at work.

That the worker who exercises his or her right to bargain for a better life is bringing America's business to its needs. That a group of employees who ask for safe working conditions have created high unemployment. Or that a massive economic uncertainty is ensuing because employers may have to put up a poster outlining the rights under the National Labor Relations Act.

Of course, this is complete nonsense. Our nation's workers exercising their rights did not cause the current economic problems. We all know what did. By exercising their rights, they help build the middle class. These rights have been on the books for more than 75 years, and are not now all of a sudden causing this uncertainty.

We should, however, be certain about one thing. Working families are hurting through no fault of their own, and need this Congress to take action to create jobs. Instead of addressing their concerns, we are discussing a bill that should be even more appropriately named the "Election Prevention Act" because it does just that.

Its singular goal is to delay, and openly prevent, union representation elections. This legislation with regard to elections is a little bit like that cab in Compton. It is always coming, but it never arrives. And the idea is to deny workers' opportunity and their voice at work.

The Election Prevention Act does this in three key ways. First, rather than minimizing undue delay in elections, a long-standing problem because of the current law's loopholes, the Republican bill mandates delays. In provision after provision, the bill's overarching concern is that workers' choice be postponed with mandatory waiting periods.

Second, rather than discovering frivolous litigation, the Election Prevention Act encourages it. Unscrupulous employers will have an incentive to appeal all preelection decisions regardless of merit be-

cause no election could proceed until all appeals, frivolous or not, are reviewed. They and their union-busting consultants know that the delay gives them more time to use any means legal or illegal to overcome employee interest in forming a union.

These appeals will create a massive, wasteful backlog on the taxpayer's dime, and a mountain of frivolous litigation. As a result, workers will increasingly have to wait months or years for an election. And as the months and years tick by, this bill clearly hopes that those workers will simply give up.

Third, the bill manipulates the procedure for deciding who is in a bargaining unit. Employers will have a larger role in determining who can potentially be part of the union, rather than the workers and the union that they seek to join. The practical impact of this change is that employers are going to find it much easier to gerrymander elections.

It will increase the changes of an election ultimately never being ordered, and employers will stuff the ballot box with voters who were never engaged by the organizing drive. In summary, by favoring delay at every turn this bill denies workers their rights to a free and fair election. It is a cynical bill, it takes time away from what we should be doing.

We should be acting on America's most urgent priority of creating jobs, instead of undermining workplace democracy. This bill does not help a single laid off worker get retained in a new career, and it does not create a single construction job or an education job.

It does create a lot of work for union-busting law firms. They get to file frivolous appeals on the taxpayer dime. It does make it harder for workers to have a voice at work. It does make it harder for working people to rebuild the middle class. Cynical misnamed bills like this only increase discontent among those who sent us here.

They see a special interest bill getting the time of day, while they struggle to keep a roof over their heads. Is it any wonder Congress has such a historical low approval rate? It is well past the time to get back on track and work on the side of middle class Americas.

That is precisely why I asked this committee to take immediate action on President Obama's job bill nearly a month ago. It is the only comprehensive bill that will immediately create jobs, that will lay a foundation for future economic growth. And it is fully paid for.

But the majority has done nothing, and that is why I have asked Americas to write and tell us how the economy is impacting them. Over 2 weeks, more than 700 people throughout the country wrote in. Reading their responses, there is no lack of motivation on the part of the unemployed Americas. They want us to act on jobs now so that they can start earning a paycheck.

But the time is running short. The longer we ignore the millions of Americas struggling in this economy the worse that economy will get—more foreclosures, more layoffs, and higher deficits. This committee should be doing everything we can to get Americas back to work, not taking away their rights at work.

[The statement of Mr. Miller follows:]

Prepared Statement of Hon. George Miller, Senior Democratic Member, Committee on Education and the Workforce

Good morning, Chairman Kline.

Today, this committee meets for the fifth time this year on issues relating to the National Labor Relations Board. Rather than focusing on getting Americans back to work, the majority is stubbornly continuing their ideological war against workers and their unions.

With the majority's laser-like focus on this special interest battle, one could be led to think our economic problems are the American worker and his or her rights:

- That a worker who exercises his or her right to bargain for a better life is bringing American business to its knees.
- That a group of employees who ask for safer working conditions have created high unemployment.
- Or, that massive economic uncertainty is ensuing because employers may have to put up a poster outlining rights under the National Labor Relations Act.

Of course, this is complete nonsense. Our nation's workers exercising their rights did not cause our current economic problems. By exercising their rights, they helped build the middle class.

These rights that have been on the books for more than 75 years are not now all of a sudden causing 'uncertainty'.

We should, however, be certain about one thing: Working families are hurting through no fault of their own and need this Congress to start paying attention. Instead of addressing their concerns, we are discussing a bill that should be more appropriately named the 'Election Prevention Act' because it does just that.

Its singular goal is to delay and ultimately prevent union representation elections. Its aim is to deny workers the opportunity for a voice at work.

The 'Election Prevention Act' does this in three key ways.

First, rather than minimizing undue delay in elections, a long-standing problem because of the current law's loopholes, the Republican bill mandates delay. In provision after provision, the bill's overarching concern is that workers' choice be postponed with mandatory waiting periods.

Second, rather than discouraging frivolous litigation, the Election Prevention Act encourages it. Unscrupulous employers will have an incentive to appeal all pre-election decisions, regardless of merit, because no election could proceed until all appeals, frivolous or not, are reviewed.

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But, time is running short. The longer we ignore the millions of Americans struggling in this economy, the worse it will get. More foreclosures, more layoffs and higher deficits.

This committee should be doing everything we can to help get Americans back to work, not taking away their rights.

Chairman KLINE. I thank the gentleman. Pursuant to committee rule 7-C, all committee members will be permitted to submit written statements to be included in the permanent hearing record. Without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce our distinguished panel of witnesses. First, Charles I. Cohen is currently senior counsel at Morgan Lewis. From 1994 to 1996, Mr. Cohen served as a member of the National Labor Relations Board. Prior to being appointed by President Clinton, he held executive and staff labor law positions with the NLRB as well as in private practice.

Bob Sullivan is president of RG Sullivan Consulting. Prior to forming his own consulting group in 2009, Mr. Sullivan was vice president and associate general counsel for one of the nation's largest privately-held companies.

Michael Hunter is a partner with Hunter, Carnahan, Shoub, Byard & Harshman. After working as a union organizer and local union president, Mr. Hunter began practicing union-side labor law in 1985. He represents unions in the private and public sector.

And now let me turn to my colleague from Florida, Mr. Ross, to introduce our final witness. Mr. Ross?

Mr. ROSS. Thank you, Mr. Chairman. I am happy to introduce a fellow Floridian, Mr. Phillip Russell. Phil is a shareholder at Ogletree Deakins, a law firm which was founded in 1977 and has offices in 23 states. Phil had been designated an employment super-lawyer for the past 2 years, a distinction which places him among the top 5 percent of all attorneys in his field.

He also maintains an AV peer review rating from Martindale-Hubbell, the highest rating possible. Phil believes in protecting employers' investments in their people, and has earned a reputation as one of the leading labor attorneys in Florida. I very much appreciate his willingness to testify before us today, and am happy to welcome him here.

I yield back.

Chairman KLINE. Thank the gentleman. Welcome to all of you. Before I recognize each of you to provide your testimony, let me again briefly explain our lighting system. You will each have 5 minutes to present your testimony. When you begin, the light in front of you will turn green. When one minute is left the light will turn yellow. And when your time has expired the light will turn

red, at which point I would ask you to wrap up your remarks as best that you are able.

After everyone has testified, members will each have 5 minutes to ask questions of the panel. You will find that I am reluctant to drop the gavel while you are still speaking. I will be less reluctant with my colleagues on both sides of the aisle. But I would encourage you, when you see that light go red to try to move quickly to wrap up that testimony.

Let us start with Mr. Cohen.

STATEMENT OF CHARLES COHEN, SENIOR COUNSEL, MORGAN, LEWIS & BOCKIUS, LLP, FORMER MEMBER, NATIONAL LABOR RELATIONS BOARD

Mr. COHEN. Chairman Kline, Ranking Member Miller, and members of the committee, thank you for your invitation to participate in this hearing. I am honored to appear before you today.

The Workplace Democracy and Fairness Act would restore the critical role that Congress should play in formulating our national labor and employment policy. The legislation constitutes a measured response to actions by a majority of the NLRB members, especially over the past 4 months, that would substantially change our federal laws without an appropriate mandate from Congress.

In my testimony today, I will describe why congressional action is needed to restore the law, and procedures guaranteed by the NLRA. On June 22 of this year the NLRB published an extensive proposed rule regarding union elections that would, among other things, dramatically shorten the period of time between a union filing and election petition with the board and the actual holding of the election.

The proposed rule would also effectively gut an employer's ability to mount a lawful, effective information dialogue with its employees on whether or not to select union representation. What has the board come up with in these proposed rules?

It has proffered the gimmick of an emasculated hearing, summary judgment standards, offers of proof, preclusive rules to limit issues, regional director decisions devoid of explanation at time of issuance, and frenetic time deadlines that disregard other obligations of employers and their counsel—all in an attempt to get to that election as soon as humanly possible and without giving the employer time to communicate with its employees.

Boardmember Brian Hayes, dissenting from the issuance of the proposed rules, wrote, quote—"Make no mistake. The principle purpose of 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 collective bargaining."

By definition, this is a quickie election, as that term was used liberally throughout the debate over the Employee Free Choice Act and potential alternative legislation in the 111th Congress. Nor is the election process too slow. Over the past decade, as noted in the proposed rule, elections have occurred within a median time of 38 days after the filing of a petition.

And in fiscal year 2010, the average time from petition to an election was 31 days. Because employers exercise no control over pre-petition union activities, because unions always have only

needed to select an appropriate unit rather than the most appropriate unit, and often because employers have no knowledge of union organizing attempts that occur employers exclusively bear the burdens and limitations resulting from this proposed shorter election period.

This renders disingenuous the proposed rule statement that its changes would apply equally to all parties, and do not impose any limitations on the election-related speech of any party. Turning now to Specialty Healthcare, the board's June 22 rule is not the only problematic issue that I believe brings us here today.

As representatives who stand for election, you instinctively know that if you control who comprises the electorate, including reducing the size of the electorate to artificially low numbers, you will have a key to winning an election. That is what the NLRB has done for unions. On August 26 this year, in Specialty Healthcare, the board announced a new standard for determining whether a petition for unit of employees is appropriate for collective bargaining.

For decades, when determining if an exclusion is appropriate, the board has examined whether the excluded group of employees is sufficiency distinct to warrant their exclusion. The board's new standard in Specialty Healthcare, however, reverses that inquiry so that employers will have the burden of proving that the excluded employees share an overwhelming community of interest with the employees included in the union's petition.

The board's new standard, predictably, will facilitate union organizing by rendering appropriate extremely small bargaining units, even though employees perform work functions and are managed in a manner that logically connects them to the larger group.

This measured legislative proposal is needed to restore the proper functioning of the NLRB's election procedures and to reaffirm that Congress is responsible, in the first instance, for establishing and making any fundamental changes in our national employment labor law policy.

Based on my review, the Workplace Democracy and Fairness Act essentially seeks a return to the status quo of the long-standing and effective election procedures that have been in place at the NLRB. The legislation introduced would codify a reasonable time framework for conducting NLRB elections—reasonable for employers, employees, and unions.

Under this language, the required pre-election hearings may not be held until at least 14 days after the filing of the petition, which ensures that all parties have at least some time to analyze the issues involved, and prepare for the potential hearing. The election could not take place within 35 days, also a reasonable period of time.

This concludes my prepared testimony. Thank you again for the invitation to appear today. I would be happy to answer any questions that members of the committee have.

[The statement of Mr. Cohen follows:]

Prepared Statement of Charles I. Cohen, Senior Counsel, Morgan, Lewis & Bockius LLP

Chairman Kline, Ranking Member Miller, and Members of the Committee, thank you for your invitation to participate in this hearing. I am honored to appear before you today.

By way of introduction, I am a senior counsel in the law firm of Morgan, Lewis & Bockius LLP, where I represent employers in many industries under the National Labor Relations Act (NLRA). From 1994 to 1996, I had the privilege of serving as a Member of the National Labor Relations Board (NLRB or Board), and was appointed by President Clinton and confirmed by the U.S. Senate.[1]

The Workforce Democracy and Fairness Act (H.R. 3094) would restore the critical role that Congress should play formulating our national labor and employment policy. The legislation constitutes a measured response to actions by a majority of NLRB Members, especially over the past four months, that would substantially change our federal labor laws without an appropriate mandate from Congress. In my testimony today, I will describe why Congressional action is needed to restore the law and procedures guaranteed by the NLRA.

A. NLRB's Attempt to Pass Labor Law Reform Through New Regulations

On June 22, 2011, the NLRB published an extensive Proposed Rule regarding union elections ("Proposed Rule") that would, among many things, dramatically shorten the period of time between a union filing an election petition with the Board and the actual holding of the election.[2] The Proposed Rule also would effectively gut an employer's ability to mount a lawful, effective information dialogue with its employees on whether or not to select union representation.

The Proposed Rule is a transparent attempt to circumvent Congress on the issue of how, if at all, to reform the nation's labor laws after the failure of the prior 111th Congress to pass the Employee Free Choice Act (EFCA), legislation supported by the labor movement that would have all but ended secret ballot elections at the NLRB in favor of "card check" recognition.

In greater detail, the Board's Proposed Rule would result in an array of changes to decades-old representation procedures under the NLRA. These are not merely technical changes—they would dramatically shorten the time for employees to decide whether or not to vote for union representation, and would severely prejudice employers by imposing unrealistic deadlines and limiting employer speech (even though it is explicitly protected in the statute). Among other things, the Proposed Rule would:

- Require that all pre-election hearings take place seven days after the filing of a petition (absent special circumstances), eliminate all pre-election review by the Board, and require that the election date be set at "the earliest date practicable."[3]
- Require employers to provide unions, within seven days of the filing of a petition, with a list of employee names, work locations, shifts, and job classifications, and to provide, within two days of a direction of election, employee addresses, telephone numbers, and email addresses (to the extent available).[4]
- Require employers to file a "Statement of Position"—a new form—that must be filed no later than the seven day hearing date. It must set forth the employer's position on a host of legal issues. Any issues not identified in the Statement would be forever waived.[5]
- Significantly limit the scope of issues and the type of evidence that may be litigated before an election, including most questions regarding the eligibility of particular individuals or groups of potential voters, and dispense with post-hearing briefs unless permission is obtained from the hearing officer.[6]
- Permit the Board to decline to review many of the Regional Directors' decisions, substantially limiting the review options available to employers.[7]
- Permit electronic filing of election petitions, and potentially allow the use of electronic signatures to support the "showing of interest"—in other words, possibly allow employees to sign union authorization cards electronically via the Internet or email.[8]

Board Member Brian Hayes, dissenting from the issuance of the proposed rules, wrote that it is "certain" that the proposed rules would "substantially shorten" the time period from petition filing to election date, suggesting that under the proposed rules elections would be held "in 10 to 21 days from the filing of the petition."[9] Member Hayes also stated in dissent: "Make no mistake, the principal purpose of 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 collective bargaining."[10] By definition, this is a "quickie" election, as that term was used liberally throughout the debate over EFCA and potential alternative legislation in the 111th Congress. And as outlined below, the Proposed Rule suffers from a number of substantive, fatal flaws that require an appropriate Congressional response.

"Speed" Over All Other NLRA Goals. The first flaw is the incorrect premise that the current procedures for conducting secret-ballot elections "take too long" or are "broken," and that this delay causes unions to lose more elections. Unions already

win far more elections than they lose. While union members currently comprise only 6.9 percent of private sector employees,[11] unions have prevailed in a majority of elections (where there was no incumbent union) every year from fiscal year 1997 to the present. And the margin by which unions prevailed in these elections has increased from 50.4 percent (in fiscal 1997) to 64.8 percent (in fiscal year 2010).[12] Even if these numbers were lower, the Board in its neutral role has no business "taking sides" on how often unions prevail in elections.

Nor is the election process too slow. Over the past decade, as noted in the Proposed Rule, elections have occurred within a median time of 38 days after the filing of a petition. And in fiscal year 2010, the average time from petition to an election was 31 days.[13] Those numbers include cases in which a pre-election hearing is held. In Fiscal Year 2010, NLRB Regional Offices conducted 1,790 representation elections. Of those, 1,648 cases or 92.1 percent were held without either party exercising their right to a hearing.[14] And even among the small number of cases in which a hearing was held (142 cases or 7.9 percent), the median number of days from the filing of a petition to a Regional Director decision was 37 days in 2010, significantly shorter the Agency's "ambitious" target of 45 days.[15] This time frame has been consistent for the last several years, with the median number of days from petition to Regional Director decision in contested cases at 34 days in 2009, 36 days in 2008, and 36 days in 2007.[16] In spite of these figures—which demonstrate the great majority of elections already take place quickly—a selective emphasis of "speeding up" elections is pervasive throughout the Proposed Rule.[17]

The solitary focus on speed constitutes a fundamental distortion of the Act's primary election objective stated in Sections 1 and 7, which is protecting "the exercise by workers of full freedom of association" encompassing employee rights to "self-organization" by having "representatives of their own choosing," with an equivalent right "to refrain from any or all of such activities."[18] Employers and unions also have important rights and obligations including those set forth in Sections 8(a) and 8(b), which enumerate employer and union unfair labor practices; plus the employer's right of free speech set forth in Section 8(c). And there is a complex assortment of employee, union and employer rights incorporated into the Act's statutory provisions regarding elections, set forth in Section 9. Most significantly, Section 9(b) states that the "Board shall decide in each case" what constitutes the appropriate bargaining unit, which is designed "to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act]."[19] Nowhere does the NLRA contain a mandate from Congress giving speed paramount importance at the expense of the other objectives explicitly referenced in the statute. Speed alone cannot be trumpeted while other statutory goals and obligations are trampled upon.

Employer Free Speech Undermined. Another flaw in the Proposed Rule is the unprecedented impact on employer free speech rights. The Proposed Rule's shortening of the election time period inevitably will undermine the ability of employers—after a petition is filed—to engage in speech protected by Section 8(c) of the Act. Section 8(c) states:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit.[20]

Because employers exercise no control over pre-petition union activities—and often have no knowledge of union organizing—employers exclusively bear the burdens and limitations resulting from a shorter election period. This renders disingenuous the Proposed Rule's statement that its changes "would apply equally to all parties" and "do not impose any limitations on the election-related speech of any party."[21] Invariably, the Proposed Rule's impact on the timing of elections will diminish the employer's right to express views under Section 8(c). As noted by Member Hayes, shortening the election period "broadly limits all employer speech and thereby impermissibly trenches upon protections that Congress specifically affirmed for the debate of labor issues when it enacted Section 8(c) in 1947."[22]

Lack of Due Process and Employer "Waiver" of Rights. Under the Proposed Rule, it is highly likely that a great number of employers will be forced to waive many substantive legal arguments and positions based on the abbreviated timeframe in which employers are required to enumerate them in the "Statement of Position." But, for the litigious employer, there will be an incentive—when confronted by such an onerous timetable—to exhaustively identify every potential alternative bargaining unit, argument and position that could conceivably have compromised employee rights. Like so many other areas governed by the Proposed Rule, the predictable outcome would be a proliferation of additional issues, more litigation, and a longer overall timeframe for representation issues to be resolved. Ironically, these

"shortcuts" are being advanced at a time when we are at historic percentage lows in federal court challenges to union certifications.

Employee Rights Negatively Impacted. The Proposed Rule negatively impacts employee rights under the NLRA by making the election period so short that it would deprive most employees of the time needed to reasonably understand the potential benefits or consequences of union representation. As noted previously, NLRB elections currently involve a median election time period of 38 days, and an average time period of 31 days.[23] There is no reasonable justification for reducing this period further, given that the NLRA states employees "in each case" should be "assure[d] * * * the fullest freedom" to make their own choice about union representation.[24] Employee decision-making about union representation involves a multiplicity of more significant complex rights and obligations that take time to fully understand. Regardless of whether or not a particular employee group ultimately favors or opposes union representation, such a decision unquestionably produces substantial long-term and day-to-day consequences, including:

- the potential conferral of "exclusive representative" status of a labor organization regarding all matters of wages, benefits, hours and terms and conditions of employment, whether or not the individual employee so chooses,[25]
- the loss of individual rights to deal with the employer in relation to those same subjects,[26]
- uncertainty associated with the consequences of collective bargaining,[27]
- possible resort by the union or employer to economic weapons like strikes, slowdowns, lockouts and possible temporary or permanent replacements,[28]
- financial and other obligations and restrictions—including fees, dues, fines and assessments—that unions may lawfully impose on employees, consistent with union constitutions and by-laws,[29]
- and complex rules regarding how collective bargaining works, and significant restrictions on union decertification if employees later become dissatisfied with union representation and the outcome of bargaining.

The Proposed Rule's adverse impact on informed employee decision-making is made worse by the Rule's additional provisions which, among other things, would curtail pre-election hearings and defer the resolution of many unit issues, including basic eligibility and scope questions, until after the election takes place. Consequently, not only would the Proposed Rule impair employee free choice by requiring an election much more quickly with little time for consideration, the Proposed Rule would deprive employees of important information, including whether they are even eligible voters, substantially increasing the number of employees who may cast votes based on incorrect assumptions. This subverts employee free choice.

Mandated Disclosure of Employee Phone Numbers and Email Addresses. Moreover, the Proposed Rule would impose a new requirement on employers to disclose "available email addresses" and "available telephone numbers" of bargaining unit employees on every voter eligibility list.[30] The Proposed Rule identifies no statutory mandate warranting an expansion beyond existing Excelsior list home address requirements, and Congress has never sought to change or expand the Excelsior list disclosures. There is no rationale provided in the Proposed Rule except for the Board's observation that an "evolution" towards electronic communications is taking place in "pre-election campaign communication."[31] The existence of various avenues for employer-employee communication has never been interpreted by Congress or the Board to require equal access by union organizers to the identical vehicles for communication. This aspect of the Proposed Rule would constitute a significant intrusion into privacy rights of employees and their families. Email addresses and phone numbers are not essential to "an informed employee choice for or against representation"[32] given that the existing Excelsior requirements provide for disclosure of every eligible employee-voter's most reliable and near-universal point of contact, the home address.

Statutory Hearing Obligations Ignored. The Proposed Rule would grant Regional Directors and Hearing Officers the authority to deny employers the right to a pre-hearing election where a dispute over the appropriate scope of the petitioned-for unit concerns less than 20 percent of the bargaining unit (if the disputed individuals were found eligible to vote). This portion of the Proposed Rule violates Section 9(c) of the Act and is misguided as a matter of policy.

The Board and the courts have long held that Section 9(c) "makes mandatory a preelection hearing."[33] During my tenure on the NLRB, the Board responded to a call for more "rapid" elections and changes to the existing procedures. However, after considering this request, the Board concluded that the statutory requirement of a pre-election hearing prevented the Board from having an unfettered right to accelerate the election process. In Angelica Healthcare Services, the Regional Director directed an election without addressing the request for a hearing. Citing the

plain language of Section 9(c), the Democrat-controlled Board held that the Regional Director must provide the "appropriate hearing" referenced in Section 9(c) of the Act "prior to finding that a question concerning representation existed and directing an election."[34] Based on Taft-Hartley's enactment, parties have the right under Section 9(c) to present evidence in a pre-election hearing. The Proposed Rule's limitation on pre-election hearings violates Section 9(c) of the Act, and this limitation should not be adopted by the Board. It constitutes misguided policy for the Proposed Rule to eliminate or dramatically reduce the role played by the pre-election hearing.

B. Smaller Bargaining Units That Unions Can Organize More Easily: Specialty Healthcare

The Board's June 22, 2011 Proposed Rule is by no means the only example of the Board's recent activity to stack the deck in favor of unions during the election process. As Representatives who stand for election, you instinctively know that if you control who comprises the electorate—including reducing the size of the electorate to artificially low numbers—you will have a key to winning an election. That is what the NLRB has done for unions. On August 26, 2011, in Specialty Healthcare & Rehabilitation Center of Mobile, the Board announced a new standard for determining whether a petitioned-for unit of employees is appropriate for collective bargaining.[35] The case nominally involved the issue of appropriate bargaining units in non-acute care healthcare facilities, which in this case was a unit of Certified Nursing Assistants.[36] However, the Board's decision went far beyond this rather narrow issue and articulated a new standard for determining whether unions in other industries may petition for an election among a small group of employees over an employer's objection that the union has inappropriately excluded other related groups of employees from the prospective unit.[37]

For decades, when determining if such an exclusion is appropriate, the Board has examined whether the excluded group of employees is "sufficiently distinct" to warrant their exclusion.[38] The Board's new standard in Specialty Healthcare, however, reverses that inquiry, so that employers will have the burden of proving that the excluded employees share an "overwhelming community of interest" with the employees included in the union's petition.[39] The Board's new standard predictably will facilitate union organizing by rendering "appropriate" extremely small bargaining units even though the employees perform work functions and are managed in a manner that logically connects them to a larger group. As noted by dissenting Board Member Brian Hayes, the "overwhelming community of interest" test has "vast practical ramifications * * * [because it] obviously encourages unions to engage in incremental organizing in the smallest units possible."[40] The recent decision therefore allows unions the right to petition for inappropriately small units, for example, a unit of employees with the same job title or description, and then places a stringent burden on an employer to prove an "overwhelming" community of interest with other employees during an abbreviated and summary pre-election process under the Proposed Rule.[41]

Changing the unit determination standard in this manner not only will predictably lead to increased union organizing in the short term, it is likely to cause greater problems in new bargaining relationships. Bargaining with a small unit of employees, which excludes many other employees who share a substantial community of interest (and who may be unrepresented or organized by a different union), will impose significant costs on employers, and undermine employment stability by causing increased workforce fragmentation (at a time when it is all the more important for employers to manage employees in ways that are more efficient, with employees identifying to a more significant degree with the business as a whole). Ultimately, the Board has a statutory responsibility to approve bargaining units that are not only appropriate for union organizing, but which also are calculated to foster stable bargaining relationships and be consistent with effective business operations. These considerations are undermined, not furthered, by the new Specialty Healthcare standards.

C. Proposed Legislation Is Reasonable and Balanced Approach for Effective NLRB Secret-Ballot Elections and Collective Bargaining

The measured legislation proposed, H.R. 3094, is needed to restore the proper functioning of the NLRB's election procedures, and to reaffirm that Congress is responsible, in the first instance, for establishing and making any fundamental changes in our national employment and labor law policy. Based on my review, the Workforce Democracy and Fairness Act seeks a return to the status quo of the longstanding and effective election procedures that have been in place at the NLRB, and the legislation would codify those rules and procedures into law and restrict this

NLRB—or any future NLRB—from attempting to violate the mandates of the NLRA and circumvent Congress with regard to election procedures.

The major provisions of this legislation that would restore the status quo to the NLRB's election process include a specific mandate that "in each case" the Board would, "prior to an election," hold a meaningful hearing to determine the unit appropriate for the purposes of collective bargaining. These hearings would expressly incorporate the Board's standard "community of interest" factors to ensure that the unit is of appropriate scope and composition to balance employee choice with effective collective bargaining. The list of eight enumerated factors that comprise the community of interest test are drawn from the Board's existing case law precedent. Review of action of Regional Directors by the Board would be assured.

In response to the Board's Specialty Healthcare decision, the legislation dispenses with the Board's recent embrace of so-called "micro-units" by returning the law to its pre-Specialty Healthcare state, whereby a union's petition that seeks to exclude certain employees would only be processed if the petitioned-for group had interests "sufficiently distinct" from other employees.[42] Specialty Healthcare's use of the "overwhelming community of interest" test to promote the expansion of small bargaining units, would, under the proposed legislation, be a test appropriately limited to the Board's "accretion" cases whereby an employee group is added to an existing unionized employee group without a secret-ballot election.[43]

The legislation introduced also would codify a reasonable time framework for conducting NLRB elections—reasonable for employers, employees, and unions. Under this language, the required pre-election hearings may not be held until at least 14 days after the filing of a petition, which ensures that all parties have at least some time to analyze the legal issues involved and prepare for the potential hearing, including the preparation of necessary witness and evidentiary support. The actual secret-ballot election may not be held until at least 35 days after the filing of the petition, which ensures an opportunity for communication by the employer, the employees, and the union on the relevant issues associated with employees selecting or rejecting union representation.

Finally, employee privacy rights are adequately protected in the legislation by granting employees the choice of how union representatives may personally contact them—through either a telephone number, email, or home address—rather than have the Board mandate through regulation that all of the above, or more, of these methods to contact employees must be provided to union representatives. The proposed language reflects the spirit of Excelsior and more than adequately provides unions the ability to unilaterally contact all eligible voters to provide election-related communications.

This concludes my prepared testimony. Thank you again for the invitation to appear today. I would be happy to answer any questions that Members of the Committee may have.

ENDNOTES

[1] I am not speaking on behalf of Morgan, Lewis & Bockius, the National Labor Relations Board, or any other specific organization, and my testimony should not be attributed to any of these or other organizations. My testimony reflects my own personal views, although I wish to thank David R. Broderdorf for his efforts in helping me to prepare this testimony.

[2] 76 Fed. Reg. 36,812-36,847 (June 22, 2011).

[3] 76 Fed. Reg. at 36,825.

[4] Id. at 36,820; 36,838; 36,843.

[5] Id. at 36,821-23.

[6] Id. at 36,824-25.

[7] Id. at 36,827.

[8] Id. at 36,846.

[9] Id. at 36,831 (Member Hayes, dissenting).

[10] Id.

[11] See U.S. Dep't of Labor Bureau of Labor Statistics, Economic News Release, Union Members Summary (2011) (*http://www.bls.gov/news.release/union2.nr0.htm*).

[12] See NLRB Election Report (Oct. 19, 2010) at 10. Member Hayes indicates unions prevailed in 68.7 and 67.6 percent of all elections held in calendar years 2009 and 2010, respectively. See 76 Fed. Reg. at 36,832 (Member Hayes, dissenting).

[13] See Gen. Counsel Mem. 11-09, at 18 (March 16, 2011), cited in 76 Fed. Reg. at 36,831 n.75 (Member Hayes, dissenting).

[14] See Gen. Counsel Mem. 11-03, at 5 (Jan. 10, 2011).

[15] Id.

[16] Id.; Gen. Counsel Mem. 09-03, at 6 (Oct. 29, 2008).

[17] The Proposed Rule refers to the "expeditious resolution of questions concerning representation" (76 Fed. Reg. at 36,812); allowing 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" (id.); "Expeditious resolution of questions concerning representation is central to the statutory design" (id. at 36,813); "expeditious processing of representation petitions" (id.); "delays in the

regional offices' transmission of the eligibility list to the parties" (id. at 36,816); "expeditious resolution of questions concerning representation" (id. at 36,817); "The proposed amendments would also shorten the time for production of the eligibility list" (id. at 36,821); "progression of reforms to reduce the amount of time required to ultimately resolve questions concerning representation" (id. at 36,829).

[18] NLRA §§ 1, 7, 29 U.S.C. §§ 151, 157 (emphasis added).

[19] Id. § 159(b) (emphasis added).

[20] NLRA § 8(c), 29 U.S.C. § 158(c) (emphasis added). Obviously, important free speech guarantees also are afforded by the First Amendment to the U.S. Constitution. As the Supreme Court has recognized, Section 8(c) "merely implements the First Amendment" and "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

[21] 76 Fed. Reg. at 36,829.

[22] Id. at 36,832 (Member Hayes, dissenting), citing Chamber of Commerce v. Brown, 554 U.S. 60, 67-68 (2008) (other citations omitted). In Brown, the Supreme Court stated that Section 8(c)'s enactment "manifested a 'congressional intent to encourage free debate on issues dividing labor and management'" and reflects a "policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes" because "freewheeling use of the written and spoken word * * * has been expressly fostered by Congress and approved by the NLRB. Id., quoting Linn v. Plant Guard Workers, 383 U.S. 53, 62 (1966) and Letter Carriers v. Austin, 418 U.S. 264, 272-73 (1974).

[23] Id. at 36,814; Gen. Counsel Mem. 11-09, at 18-19 (March 16, 2011).

[24] NLRA § 9(b), 29 U.S.C. § 159(b) (emphasis added).

[25] NLRA § 9(a), 29 U.S.C. § 159(a).

[26] An employer's obligation to bargain under Section 8(a)(5) makes it unlawful for the employer to engage in individual bargaining or direct dealing with employees regarding wages, hours, and other terms and conditions of employment and to implement unilateral changes in mandatory bargaining subjects. See, e.g., Gen. Elec. Co., 150 NLRB 192, 194 (1964), enforced, 418 F.2d 736 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970); NLRB v. Katz, 369 U.S. 736, 743 (1962).

[27] See, e.g., Midwestern Instruments, Inc., 133 NLRB 1132 (1961).

[28] See, e.g., NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938); The Laidlaw Corp., 171 NLRB 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

[29] See, e.g., Scofield v. NLRB, 394 U.S. 423 (1969) (union could lawfully maintain and enforce rule providing for fines, suspensions or expulsion of union members who exceed work production ceilings established by the union).

[30] Id. The Proposed Rule would impose a similar "available email addresses" and "available telephone numbers" disclosure requirement on the "lists filed with the regional director" (but "not served on any other party") as part of the new Statement of Position that the Board would require from employers. 76 Fed. Reg. at 36,838, Proposed § 102.63(b)(1)(iv).

[31] Id.

[32] Excelsior Underwear, Inc., 156 NLRB at 1236, 1241-42 (1966).

[33] NLRB v. S.W. Evans & Son, 181 F.2d 427, 429 (3d Cir. 1950).

[34] 315 NLRB 1320, 1321 (1995). See also Barre National, Inc., 316 NLRB 877 (1995).

[35] Specialty Healthcare, 357 N.L.R.B No. 83, at *1.

[36] Id.

[37] Id. at 8.

[38] See, e.g., NLRB v. Action Automotive, Inc., 469 U.S. 490 (1985).

[39] Specialty Healthcare, 357 N.L.R.B No. 83, at *16.

[40] Id. at *27 (Hayes, B., dissenting).

[41] A related problem with the Specialty Healthcare decision is the lack of clarity regarding how the decision interacts with preexisting "industry-specific" rules and standards which the Board majority stated it did not intend to change. Id. at *20.

[42] Prior to Specialty Healthcare, the Board looked with disfavor upon fractured units, i.e., a group that is "too narrow in scope." Colorado Nat'l Bank of Denver, 204 NLRB 243, 243 (1973). Where "the petitioned-for employees do not share a sufficiently distinct community of interest from other employees to warrant a separate unit," the unit petitioned-for is inappropriate for collective bargaining purposes." Seaboard Marine, Ltd., 327 NLRB 556, 556 (1999). The legislation essentially codifies this standard into the statute.

[43] The Board in accretion cases can add unrepresented employees to an existing bargaining unit, without any election, based on the overwhelming extent of employee interchange, working conditions, common management, functional integration, bargaining history, and other factors. See, e.g., Safeway Stores, Inc., 256 NLRB 918 (1981); United Parcel Service, 325 NLRB 37 (1997); NLRB v. Sweet Lumber Co., 515 F.2d 785, 794 (10th Cir. 1975), cert. denied, 423 U.S. 986 (1975). That standard has no relevance to secret ballot elections.

Chairman KLINE. Thank you, sir.

Mr. SULLIVAN, you are recognized for 5 minutes.

STATEMENT OF ROBERT SULLIVAN, PRESIDENT, RG SULLIVAN CONSULTING, TESTIFYING ON BEHALF OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

Mr. SULLIVAN. Chairman Kline, Ranking Member Miller, members of the committee, thank you for inviting he here this morning to testify. I am honored to be here.

My name is Bob Sullivan. I am here to represent the Retail Industry Leaders Association. RELA is a trade association with over 200 members, whose combined annual revenue is over $1.5 trillion. RELA's members provide millions of American jobs and operate over 100,000 stores, manufacturing facilities, and distribution centers.

I have been a management-side labor and employment lawyer for almost 20 years—the first 10 years in private practice, and the next 7 years as vice president and associate general counsel with one of the nation's largest grocery wholesalers. My company ran distribution centers all around the United States, and retail grocery stores in the northeast and in the southeast.

In my time as in-house counsel, I was responsible for the ongoing administration and negotiation of over 40 union contracts. I also handled numerous union organizing campaigns and representation elections. I handled such matters throughout my legal career.

Since the beginning of 2009, I have operated RG Sullivan consulting, where I provide consulting services in the areas of labor and employee relations, legislative matters, and regulatory matters. The committee has asked me to testify on the Workplace Democracy and Fairness Act.

I am here to testify with input from RELA's members and based on my own experiences. I would like to concentrate on the practical aspects of the board's decision in Specialty Healthcare. The greatest concern for retailers and for other employers is that under Specialty Healthcare micro unions will be organized.

And what I mean by that is that unions will organize employees in single departments within organizations, or employees on a single shift, but perhaps not on other shifts. This will represent a big problem for retailers and other employers. Retail is a fast-paced business. Volume changes, particularly over the holidays where it changes immensely, there are late loads for many different reasons.

The key to handling these issues is flexibility. A typical retailer has five, to 20 or more departments. To respond to challenges, they draw from employees in many different departments to go where they are needed to solve problems. They change schedules, if necessary. They draw on supervisors.

All of these things would be problematic with separately-organized departments. Having employees move between departments is also very beneficial for the employees. They learn more about different parts of the company, they earn more by being able to cover shifts in other departments, and they open up opportunities for advancement. Because by learning more about the business, they are able to progress in a company if they choose to do that.

RELA's membership has many executives who started their careers on the floor of a retail establishment. They have progressed because of the breadth of their knowledge. And they are disturbed that under Specialty Healthcare the opportunities available to

them would be denied by employees who would not be able to learn the full extent of the business.

Customers are also better served when employees know all departments under the roof of a store, and are able to respond to their needs in any department without fear of violating rules. All of these things would be compromised by Specialty Healthcare and separately organized departments.

The Workplace Democracy and Fairness Act can fix the problem by restoring the rules that existed before Specialty Healthcare. This will bring businesses back to focusing on growing their businesses and creating jobs. That concludes my opening statement, or I should say my testimony. Old habits die hard.

I would be glad to take questions at the appropriate time. Thank you.

[The statement of Mr. Sullivan follows:]

Prepared Statement of Robert G. Sullivan, on Behalf of the Retail Industry Leaders Association (RILA)

Chairman Kline, Ranking Member Miller, and Members of the Committee, thank you for your invitation to testify at this hearing. I am honored to be here today.

My name is Bob Sullivan. I am here representing the Retail Industry Leaders Association (RILA). RILA is the trade association of the world's largest and most innovative retail companies. RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Its members include more than 200 retailers, product manufacturers and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

By way of background, I have been a management-side labor and employment lawyer for nearly twenty years. For the first ten years of my career, I practiced at two separate law firms in Providence, Rhode Island, where I represented a wide range of public and private sector employers in matters that included collective bargaining, union organizing and National Labor Relations Board (NLRB or Board) elections, and a wide range of labor matters before the NLRB, state labor boards and the courts.

From 2002 through 2009, I served as Vice President and Associate General Counsel for Labor and Employment with one of the country's largest grocery wholesalers with warehouses throughout the country, as well as affiliated companies that operated retail grocery chains in the Northeast and Southeast United States. As an in-house lawyer, I was responsible for all aspects of labor and employee relations, including the negotiation and administration of over forty union contracts and the handling of numerous organizing campaigns and union elections.

Since 2009 I have operated RG Sullivan Consulting, LLC, a firm that provides consulting and training services in the areas of labor and employee relations, litigation, legislative and regulatory matters.[1]

The Committee has asked me to testify on the Workforce Democracy and Fairness Act, which would amend the National Labor Relations Act (NLRA) to effectively overrule the NLRB's recent decision in Specialty Healthcare,[2] and to address issues raised in the Board's June 22 proposed rulemaking, in which the Board proposes to radically overhaul union election procedures and force elections in as little as ten days after the filing of a representation petition.[3]

I have the benefit of input from RILA's membership as well as my own experience. With the Committee's indulgence, I would like to focus on practical concerns associated with the Board's recent actions and the need for legislative action to protect the secret ballot election and the election process itself. The changes in bargaining unit determinations under Specialty Healthcare, if allowed to stand, and the proposed election rule change, if implemented, would impose severe administrative burdens on employers; lead to operational problems caused by fractured bargaining units; be detrimental to employee interests; and, for retailers, ultimately result in poor customer service.

- *Micro Unions*

Specialty Healthcare dealt with a nursing home and a union's petition to represent certified nursing assistants as a discrete group, versus a larger unit proposed

by the employer that would have included other non-professional employees. The Board ruled in favor of the union's proposed unit, and cast its ruling broadly. Under the rule announced in the case, a party seeking to expand a proposed unit in any industry must now show that the employees it wants included in the unit have an "overwhelming" community of interest with the employees in the proposed unit.[4]

The most striking negative effect of Specialty Healthcare is the extent to which it allows for what many have termed "micro unions," or bargaining units composed of small groups of employees who formerly would have been found to have a sufficient community of interest with other employees to require that a proposed unit include the larger group (these micro-unions also have been referred to over the years as fractured units). This represents a drastic change to existing law, as recently discussed in the Board's August 27, 2010 decision in Wheeling Island Gaming, where the majority applied the community of interest standard—without the "overwhelming" component—and then stated that "[o]ur inquiry—though perhaps not articulated in every case—necessarily proceeds to a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit."

While Specialty Healthcare involved a nursing home, the impact of the case is much broader, including a significant negative impact on the retail industry. I'd like to discuss some of these concerns.

Under Specialty Healthcare, organizers can isolate small groups of employees where they have support. As the courts have acknowledged, unions will propose the group they have organized.[6] If organizers have support from employees working in just one department, for example, accessories, they can seek to represent only clerks in that department. As Member Hayes noted in his dissent in Specialty Healthcare, the ruling "will in most instances encourage union organizing in units as small as possible. * * *"[7]

When retail settings are unionized, they most often have what is referred to as "wall-to-wall" bargaining units, where one unit includes essentially all union-eligible employees (that is, excluding supervisors and management). In many cases, a wall-to-wall unit is the only appropriate one given the commonality of interests within a single retail location and the frequency of staffing across departments.

When all workers in a retail establishment are in the same unit, covered by the same contract, there are mechanisms for cross-training, for covering absences between departments or in nearby stores—in other words, for employees to expand their horizons, earn extra money by picking up additional shifts—and for continuity of operations and enhanced customer service. The employer and union need to administer and negotiate just one contract, minimizing confusion, administrative burden and usually limiting negotiations to once every few years.

These issues are particularly important in retail. Retailers encourage employees to learn about their business by working in different departments. They recognize the value to employees and customers alike when a customer can ask almost any store employee for help, and get effective assistance throughout the store. Employees also appreciate the variety and in the present economy many are looking for additional shifts, which are more available with free movement between departments.

Among the executive ranks of RILA's members are many who started their careers working on the floor of a store. They are gravely concerned that micro-unions would prevent employees from developing their knowledge base and advancing their careers, allowing for better employee retention and a better connection between senior management and the employees in their stores.

Retailers typically have from five to over twenty departments. With the potential for each department, or each shift, to become a separate bargaining unit, managing the store would become a nightmare. Employees themselves would lose the opportunity to cover for absent workers and to learn about other departments, making advancement into management much less likely. Employees in smaller stores tend to move around a great deal, and drawing lines between departments would impact both customers and employees even more acutely there than in larger operations.

Worse yet, while my experience includes many responsible, customer-oriented union officials and employees, separately represented departments would inevitably lead to at least some degree of "not my job" responses to customer requests. Obviously, such customer relations would be detrimental to business, which in turn would be detrimental to all employees of the business.

Many RILA members run their own distribution centers and are quite concerned that having small groups of warehouse workers organized would prevent them from moving product in and out efficiently. They use the term "just in time product" to describe the fast pace and tight delivery windows common across retail operations. The issue is especially crucial around the holidays when retail business surges.

In a distribution center, if receiving is disrupted, product can build up on the dock before being stored in the racks. This is known as being "in default," and the effect is to back up inbound trucks, which miss their scheduled drop-offs times, triggering a succession of back-ups in the supply chain.

In stores, shelves are generally replenished overnight. When deliveries to the store are late, or when store personnel are unable to get product on the shelves in time, the impact goes straight to the customer, who may be greeted by pallets on the floor or products missing from the shelves. And I'm sure that although we have all seen Halloween decorations going up in stores, most of us probably haven't thought about what has to be done Halloween night so that customers walk into a transformed store the next day.

On both the distribution and retail sides, the answer to seamlessly keeping product on the shelves is meeting schedules and, in times of heavy volume or late deliveries, the ability to have employees pitch in on whatever needs to be done, including drawing across departments and shifting schedules. Micro unions would be an impediment to responding to changing needs, an impediment that would be felt most during the holidays.

With multiple bargaining units and multiple unions, contract negotiations themselves carry a significantly higher risk of a strike disrupting operations and hurting customers. With multiple unions and bargaining units in the same facility, it is possible to reach agreement with all but one bargaining unit, only to have the last group go on strike and shut down the entire operation.

Representation by different unions in the same setting can also have adverse effects on employee morale and job satisfaction. Two similar groups represented by different unions might not only end up with different pay scales, they would quite likely have different health and retirement plans. A union representing back room workers might have a high-end health plan and put less emphasis on retirement. A union representing greeters or cashiers might have an opposite approach. Further, contracts negotiated in different economic climates may be more or less generous than contracts negotiated at different times. The result can be employees unhappy with some aspect of their benefits who feel slighted and resentful. The team atmosphere that most employers foster and most employees appreciate would suffer, and customers notice unhappy employees.

Finally, at a time of universal discussion about the need to grow our economy, we look for expansion by our successful businesses, and opportunities to help ones that are struggling. Specialty Healthcare is a clear disincentive to both. At a minimum, healthy companies will wait to see what effects develop in their existing operations before investing in expansion—given the limited avenues of appeal for the Specialty Healthcare ruling this could take years.[8] Struggling companies will not fare well with small groups of employees being organized, making them less likely to succeed and less attractive prospects for takeover. The end result will be fewer jobs.

• *Proposed Election Rule Changes*

In addition to addressing the problems created by Specialty Healthcare, the Workforce Democracy and Fairness Act would prevent the NLRB from drastically changing union election rules by regulation in ways that would shift the Board away from its historic position of neutrality. The June 22 Notice of Proposed Rulemaking would bring a vast number of changes to an election system that not only has worked well for decades, but already results in union wins in nearly seventy percent of elections.[9]

In the interest of brevity and my intention to focus on practical matters, as well as the fact that others are here to discuss the proposed rulemaking in more detail, I will limit my comments to the effects on employees, and to the considerable burdens placed on employers by the proposed changes to what they would be required to accomplish in just the first week after the filing of a representation petition and the unnecessary increase in litigation this change will bring.

Under current practice, when a union files a petition, the Board serves it on an employer, along with a questionnaire about the employer's commerce information (relevant to the Board's jurisdiction), a request for a list of names and classifications for the employees sought to be represented, a reference to a hearing which may not have an actual scheduled date, and a request for the employer to comment on the appropriateness of the proposed unit.

As even the Board's majority as acknowledged in the Notice of Proposed Rulemaking,[10] the vast majority of representation cases proceed to election under some form of agreement rather than after a hearing. This process is helped by the function of Board Agents, who are charged with the task of determining whether there is a question concerning representation, and if there is a hearing, developing a com-

plete record using a fact-finding, non-adversarial process.[11] In my experience, Board Agents are not only expert in this process, but efficient, thorough, and of great value in helping the parties to a representation case understand the issues and reach agreement if possible rather than proceeding to hearing. While Board Agents are not advocates for employers and therefore no substitute for counsel, the Board's proposed rule changes would remove them from the process and result in far fewer elections by agreement.

Despite the fact that this stage of the process lacks hard-and-fast time limits and is left in large part to the discretion of the Board's Regional Directors, on average elections take place in barely over thirty days from the filing of a petition.[12] This time frame affords employers not only the time to comply with the Board's election procedures, it allows a reasonable period of time for communication with employees. As an election approaches, employees often have questions for the employer about everything from current benefits to what happens on election day.

The law specifically protects an employer's right to engage in non-threatening, non-coercive discussion with employees about bargaining issues.[13] The Supreme Court has acknowledged the desirable Congressional policy of "favoring uninhibited, robust, and wide-open debate" on matters relating to unionization, so long as that does not include unlawful speech or conduct.[14]

The Board's proposed rule changes would require elections in as little as ten days,[15] during which, as explained below, the employer would face a monumental task in trying to provide a greatly increased volume of information to the Board, at the risk of permanent forfeiture of its right to challenge the proposed bargaining unit. With such a short time table, employers will have difficulty getting adequate legal advice, especially about how to discuss the issues with employees.

The result for employees would be two-fold: Far less ability to learn about the issues and hear the employer's perspective; and a higher likelihood that a well-meaning but unprepared employer would inadvertently violate employee rights by making improper statements.

As to the process itself, the Board's proposed rule changes would do two things that are momentous, one more obvious than the other. First and most obviously, a hearing would be scheduled for seven days after the filing of a petition, and employers would be required to provide far more comprehensive, detailed, and crucially important information within that time frame than ever before.

In seven days, an employer would need to file a Statement of Position, in which it must state whether it agrees with the proposed unit. If it does not, the employer would have to provide in extreme detail information about its position on all employees it contends should not be included, and on any it contends should be included, including not only name and classification, but also work location and shift, phone numbers, e-mail addresses and home addresses, for all employees in the unit that it believed appropriate.[16] The Statement of Position must include the employer's position in detail on "type, dates, times, and location of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing."[17] An employer that fails to provide the required information in a timely fashion (i.e., within seven days) would be precluded from contesting unit appropriateness, presenting evidence, or even cross-examining witnesses.[18]

Requiring such comprehensive and detailed information, including essentially all legal and factual challenges to the proposed unit and in favor of an alternate unit, under threat of complete forfeiture of the right to challenge the proposed unit, stands in stark contrast to the current burden an employer faces, which is to provide relatively easily obtainable basic information, without the need to formulate a complete factual and legal strategy within seven days (during which most, especially small, employers will have to find and retain experienced labor counsel).

The less obvious of the proposed changes—but perhaps far more significant for small employers—is the fact that the Board wants to remove its Board Agents from the role of developing a record on the representation issue.

The proposed rules will wreak similar havoc with small and large employers, for reasons that differ in direct proportion to their size.

Small employers in many cases may be able to access factual information about a proposed bargaining unit better than larger firms, but they will have no in-house experts to help them evaluate the facts in light of legal issues, and almost certainly no relationship with an outside labor specialist who might have some hope of figuring out the legal and factual issues and helping to prepare the required Statement of Position within seven days. With Board Agents no longer developing a record, up against professional union organizers, and virtually on their own, small employers will not stand a chance of complying with the Board's requirements, let alone communicating effectively and lawfully with a group of employees about to make perhaps the most important decision of their working lives, with little or no

input from their employers, and most likely only a vague understanding of who would be in their own bargaining unit.

Large employers will face a different array of intractable challenges. They will have the advantage of either in-house labor staff, or relationships with outside labor experts, or both. But while their size and resources will help in guidance, they will hinder fact-finding. Labor experts in a large corporate environment will generally be found in a central headquarters. Often they will oversee matters in many subsidiaries and affiliates. Faced with a petition seeking to organize a group of employees, their first task will be to examine the correct employing entity, then determine the organizational structure and find the right management officials with first-hand knowledge about the proposed unit, and then consider whether there are other employees who should be included in the unit. With more capability but vastly more complicated facts, large employers would be hard pressed to meet the proposed filing deadline without missing factual and legal issues. With greater resources than small employers, and given the significant burdens imposed by the Board's changes, they would also be quite likely to litigate more representation cases.

Perhaps the most striking aspect of the Board's draconian proposal to preclude employers from raising any issue not included in the Statement of Position would be its effect on the employees themselves. It is easy to lose sight of the fact that the crucial phrase "community of interest" relates to the interests of the employees. It is their livelihoods that are at stake. With today's non-adversarial fact determination, the process moves forward toward either an agreement or a hearing based on the facts bearing on unit appropriateness. The Board's proposal shows a lack of concern for accurate facts, and intent to let arbitrary procedural issues drive outcomes. This would do a disservice to the employees whose rights the Board is charged with guarding.

• *Overall Effects*

In order for our economy to function, recover, and provide more jobs, retailers need to sell, builders need to build, and manufacturers need to manufacture. The NLRB's recent actions and proposed rulemaking will have them dealing with multiple small-group organizing campaigns, litigation, and fragmented workplaces with greatly reduced flexibility. At a time when President Obama has stated that his administration is "reviewing government regulations so that we can fix any rules in place that are an unnecessary burden on businesses,"[19] the Board is doing the exact opposite. The Workforce Democracy and Fairness Act will bring reason back to the representation process, put the NLRB back on the course that the President has laid out, and let employers get back to business. More importantly, it will remove the most glaring of the Board's recent decisional and regulatory threats to economic progress, and bring back a climate where business leaders can focus on growing the economy and creating jobs.

• *Conclusion*

I have only scratched the surface of the issues raised by the Board's recent decisions and proposed rulemaking. Hopefully, though, I have explained some of the more significant practical concerns with the Board's recent actions, particularly as they relate to retailers. Thank you again for inviting me to testify. I would be happy to answer any questions from Members of the Committee related to my testimony.

ENDNOTES

[1] My testimony here today is on behalf of RILA and reflects my own personal experience. My views should not be attributed to my pervious employers or current or prior clients.

[2] Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (August 26, 2011).

[3] Representation—Case Procedures, 76 FR 36,812 (June 22, 2011); see dissent of Member Hayes, 76 FR at 36,831.

[4] Specialty Healthcare, 357 NLRB at 12.

[5] Wheeling Island Gaming, 355 NLRB No. 127, n.2. (August 27, 2010).

[6] Laidlaw Waste Systems, Inc. v. NLRB934 F.2d 898, 900 (7th Cir. 1991). Despite the majority's views in Specialty Healthcare, the ruling improperly imposes such a high standard on a party—usually the employer—opposing a proposed unit (requiring an "overwhelming" community of interest between the proposed unit and other employees sought to be added to it) that it is virtually impossible to alter the proposed unit, thus violating section 9(c)(5) of the act, which provides that in determining unit appropriateness "the extent to which the employees have organized shall not be controlling." Specialty Healthcare, 357 NLRB at 9; 29 U.S.C. §159(c)(5).

[7] Specialty Healthcare, 357 NLRB at 19.

[8] As a representation case rather than an unfair labor practice case, Specialty Healthcare is not subject to direct judicial review. Only "final orders" of the Board may be appealed directly, and the courts long ago determined that decisions in representation cases are not considered

final orders. 29 U.S.C. § 159(f); see American Fed'n of Labor v. NLRB, 308 U.S. 401 (1940). To appeal, the employer must refuse to bargain, go through unfair labor practice proceedings in which the employer can challenge the findings in the representation process. If the employer loses before the Board, the resulting decision is a final order and may be appealed in court. 29 U.S.C. § 159(f).

[9] Unions won 67.6% of elections in calendar year 2010. "Number of NLRB Elections Held in 2010 Increased Substantially from Previous Year," Daily Lab. Rep. (BNA), No. 85, at B-1 May 3, 2011.

[10] Representation—Case Procedures, 76 FR 36,812 (June 22, 2011).

[11] See Mariah, Inc. 322 NLRB 586 n.1 (1996).

[12] 76 FR at 36,831.

[13] Section 8(c) of the National Labor Relations Act provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit." 29 USC §158 (c).

[14] Chamber of Commerce v. Brown, 554 U.S. 60, 67-68 (2008).

[15] 76 FR at 36,831.

[16] 76 FR at 36,838.

[17] 76 FR at 36,838.

[18] 76 FR at 36,839.

[19] June 29, 2011 press conference.

Chairman KLINE. Thank you, sir.

Mr. HUNTER, you are recognized.

STATEMENT OF MICHAEL J. HUNTER, PARTNER, HUNTER, CARNAHAN, SHOUB, BYARD & HARSHMAN

Mr. HUNTER. Thank you. Chairman Kline, Ranking Member Miller, and members of the committee, I thank you, as well, for the opportunity to appear here. I am honored to be here.

My perspective I bring to this is that I am a union-side lawyer based in Columbus, Ohio, and I have been in the labor movement for over 40 years. This bill that is before you is entitled the Workplace Democracy and Fairness Act.

In my judgment, the proposed legislation promotes neither fairness nor democracy, and is not aimed at helping the workforce, but those who, without the intervention of labor unions and legislation that supports workers' rights, would be subject to the unfettered control of corporations.

The bill proposes to amend the National Labor Relations Act by adding four broad mandates. One, the total uprooting of the current methodology for determining permissible bargaining units. Two, the timing, and a vastly increased scope, of a representation hearing. Three, the timing of an election, and a requirement that every conceivable issue be resolved on board review before an election can even be scheduled.

And four, the timing content and provision to a petitioning union of lists of eligible employees so there can be some fairness in the ability to contact people. As the Supreme Court had noted in regard to bargaining unit determination—and I believe that Mr. Cohen indicated this, as well, in his opening testimony—that for years it has been the case that a union is not required to seek the "most" appropriate bargaining unit, if such a thing even exists, but rather "an" appropriate unit.

As the Supreme Court noted in regard to section 9-A of the act, this section read in light of the policy of the act implies that the initiative in selecting an appropriate unit resides with the employees. Moreover, the language suggests that employees may seek to

organize a unit that is appropriate, not necessarily the single most appropriate unit.

The legislation that is being proposed here would result in the wholesale disruption of 75 years of board experience in configuring bargaining units. And the purported reason for that is a single case changing an arcane bargaining unit standard in a discrete industry that would have no practical effect whatsoever in greater industry.

It would eviscerate the board's Healthcare bargaining units that currently exist, and that the parties, both employers and employees, have relied on for over 20 years. The timing and scope of a representation hearing, I would just hit on the scope of the hearing. The scope of the hearing would now include any issue which may reasonably be expected to impact on the election's outcome.

Any issue that could affect the election's outcome could be litigated. And beyond that, parties could raise, independently, any issue whatsoever that they wished. And yet the prefatory language of that section states that it should be a non-adversarial hearing, subjecting that hearing in which anything could be litigated to serious constitutional infirmities.

The bill also requires that review be granted as a matter of right, and that no election could be mandated until review was granted. And takes away what has already been provided to unions, in regard to employee contact information, for 50 years.

In conclusion, the Workplace Democracy and Fairness Act is anti-democratic and grossly unfair. It is an attack on workers' rights and should be rejected in its entirety. Thank you.

[The statement of Mr. Hunter follows:]

Prepared Statement of Michael J. Hunter, Partner, Hunter, Carnahan, Shoub, Byard & Harshman

Chairman Kline, Ranking Member Miller and Members of the Committee, thank you for your invitation to participate in this hearing. I am honored to appear before you today. My name is Michael Hunter. I am a partner in the Columbus, Ohio based law firm of Hunter, Carnahan, Shoub, Byard & Harshman. My law practice consists almost exclusively in representing unions and workers. A significant part of that representation involves representing unions assisting workers to gain collective bargaining rights through proceedings before the National Labor Relations Board and a number of its regions.

I began practicing union side labor law after graduating from Capital University Law School in 1985. Prior to that time, I worked as a union organizer from 1977-1982. I first became a member of a union in 1970. I participated in my first representation case hearing before the NLRB in 1978.

H.R. 3094, the matter subject to today's hearing, is entitled the "Workforce Democracy and Fairness Act." In my judgment, the proposed legislation promotes neither fairness nor democracy, and is aimed at aiding not the workforce but those who, without the presence of union representation, exercise largely unfettered control over it.

The Bill proposes to amend the National Labor Relations Act by adding four broad mandates: 1) the total uprooting of the current methodology of determining the permissible composition of bargaining units; 2) the timing and scope of a representation hearing; 3) the timing of an election and the requirement that every conceivable issue be resolved before an election is held; and 4) the timing, content and provision to the petitioning union of lists of eligible voters through which workers have access to information about collective bargaining and union representation.

The first proposal is apparently in reaction to a single Board decision that constitutes one of those periodic incremental adjustments to the methodology for determining bargaining units under the Act. The other three are in apparent reaction to proposed amendments to the Board's rules for which thousands of comments have been received, which have not been implemented, and for which there is no current

information available as to when, in what form, or even whether such rules will be implemented.

1. Bargaining Unit Determination

As noted by the Supreme Court, when Congress enacted Section 9(a) of the Act, it granted workers the right to take the initiative in organizing themselves into a unit. It hardly promotes workforce "democracy and fairness" to take that right away from workers.

In American Hospital Association v. NLRB, 499 US 606, 610 (1991), the Supreme Court, noted:

Section 9(a) of the Act provides that the representative "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes" shall be the exclusive bargaining representative for all the employees in that unit. § 159(a). This section, read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees. Moreover, the language suggests that employees may seek to organize "a unit" that is "appropriate"—not necessarily the single most appropriate unit. (Emphasis in original).

In addition to taking away this important worker right, the proposed Bill will result in the the wholesale disruption of 75 years of Board experience in configuring appropriate bargaining units. This all comes about in apparent response to the August 26, 2011 decision of the Board in Specialty Healthcare, 357 NLRB No. 83 (2011). The Specialty Healthcare decision involved whether non-acute healthcare facilities such as nursing homes, which are not subject to the bargaining unit rules adopted by the Board for acute-care facilities, should be subject to the same standards for evaluating appropriate bargaining units that apply to all other industries, or whether they should continue to be governed by an arcane and confusing "empirical community of interest" test that had been established by the Board for non-acute healthcare facilities in Park Manor Care Center, 305 NLRB 872 (1991).

In Specialty Healthcare, the Board overruled its 1991 Park Manor Care Center standard and decided to apply to non-acute healthcare facilities the same community of interest standards that it applies in determining the appropriateness of bargaining units in other industries. In the Specialty Healthcare case, the Board found that a unit of certified nursing assistants (CNA's) constituted an appropriate unit. It noted that once it is established that a petitioned-for unit consists of a readily identifiable group of employees who share a community of interest, the burden shifts to the employer to demonstrate that excluded employees that it claims should be included share an overwhelming community of interest with the employees for whom a union has petitioned. This analytical framework for ascertaining an appropriate unit is the same as that applied by the Board in a non-healthcare context and which was endorsed by the D.C. Circuit in Blue Man Vegas v. NLRB, 529 F3d 417 (D.C.Cir. 2008).

In apparent response to this adjustment eliminating an arcane test that applied to a discreet portion of the employer community, and moving it into the mainstream, the Bill proposes to turn on its ear 75 years of experience and stability in the determination of bargaining units.

In the first instance, the Bill proposes to eliminate the following language which has been included in subsection 9(b) of the Act, 29 USC § 159(b) since its inception in 1935:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: (Emphasis added).[1]

The Bill then goes on to mandate a set-in-stone, one size fits all test for determining whether employees in a proposed unit share a community of interest:

In determining whether employees share a sufficient community of interest, the Board shall consider (1) similarity of wages, benefits, and working conditions; (2) similarity of skills and training (3) centrality of management and common supervision; (4) extent of interchange and frequency of contact between employees; (5) integration of the work flow and interrelationship of the production process; (6) the consistency of the unit with the employer's organizational structure; (7) similarity of job functions and work; and (8) the bargaining history in the particular unit and the industry. (Bill, p.2. lines 10-20).

While items listed in the above formulation have certainly been among the useful tools utilized in evaluating the appropriateness of bargaining units, it is unclear whether this precise formulation has even been used in determining a community of interest.

Limiting the analytical tools that can be used in evaluating an appropriate bargaining unit makes no more sense than establishing a set number of tools that can be used in approaching any job. One does not change a tire with a screwdriver or adjust a carburetor with a shovel. As noted in the Developing Labor Law, (5th Ed. BNA), a compendium developed by the ABA's Committee on the Development of Labor Law:

Community of interest is not susceptible to precise definition or to mechanical application. As illustrated by the cases discussed throughout this chapter, the ultimate determination much more often depends on detailed factual analysis on a case-by-case basis than on the application of rules of law.

Id. at 643-644. Numerous other analytical tools have been used in analyzing the appropriateness of a bargaining unit depending on the nature of the industry. A few examples include similarities or differences in product,[2] geographical proximity,[3] desires of employees,[4] area bargaining patterns and practices,[5] and, while not by itself controlling, extent of organization.[6]

Adoption of the unit determination formula set forth in the Bill would wreak havoc on labor relations stability. For example, for twenty years, employers and unions in the acute care hospital industry have relied upon the certainty that organizing in that industry would involve the units established by the rulemaking process and set out at Section 103.30 of the Board's Rules.[7] It is clear, however, that those Rules were not adopted pursuant to the standard that would be dictated by the Bill. The standards and considerations taken into account in promulgating the Rule are set out in 53 FR No. 170, at 33900-33935.

As those Rules were not adopted pursuant to the standard required by the Bill, its enactment into law would again require a case by case adjudication from scratch as to the appropriateness of any new unit in the acute care hospital industry, depriving the parties of the stability, certainty and predictability that they have enjoyed for twenty years.

While the Bill would leave intact the proviso to Section 9(b) of the Act that indicates that a prior determination that a larger unit was appropriate is not in itself a ground for deciding that a craft unit is inappropriate, its dictates as to the factors to be taken into consideration in determining a bargaining unit will deprive the Board of the analytical tools that it has used for over 40 years in evaluating the appropriateness of craft severance.[8]

The Bill continues with provisions that result, as a practical matter, in a dictate that there can be only one appropriate unit for any category of employees. The Bill states, commencing at line 21 of page 2, that:

To avoid the proliferation of fragmentation of bargaining units, employees shall not be excluded from the unit unless the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.

Avoidance of "proliferation" of bargaining units has never been a factor in the general field of NLRB jurisprudence. In the passage of the 1974 healthcare amendments to the Act, reference was made in the House and Senate Reports regarding due consideration of preventing the proliferation of bargaining units in the health care industry.[9] Two circuits, the Ninth and the Tenth, found that the legislative history of the health care amendments required application of a "disparity of interest" analysis of units in the acute health care industry,[10] while other circuits specifically rejected this test.[11] Any application of that test was superseded by the promulgation of the Board's acute care bargaining unit rules and their subsequent approval by the Supreme Court in American Hospital Association v. NLRB, supra. The Bill would now enshrine a test required by only two federal Circuit courts 20 years ago for the acute-care hospital industry into the statute and apply it to all industries.

It then goes a step further by permitting an employer to add to a proposed bargaining unit any category of employees who share a community of interest with the unit proposed by a petitioning union. Beginning at line 2 of page 3, the Bill provides that:

Whether additional employees should be included in a proposed unit shall be based on whether such additional employees and proposed unit members share a sufficient community of interest.

This runs contrary to 75 years of NLRB jurisprudence, and essentially mandates that there can be only one appropriate bargaining unit for any category of employee.

Again, as emphasized by the Supreme Court in American Hospital Association v. NLRB, supra:

[Section 9(a) of the Act] implies that the initiative in selecting an appropriate unit resides with the employees. Moreover, the language suggests that employees may seek to organize "a unit" that is "appropriate"—not necessarily the single most appropriate unit.

Id. at 610. (Bolded emphasis added; italics in original). It has always been the case that in a petition filed with the NLRB on behalf of workers is not required to seek representation in the most comprehensive appropriate grouping unless an appropriate unit compatible with the one requested does not exist.[12]

As emphasized by the Supreme Court, when Congress enacted Section 9(a) of the Act, it granted workers the right to take the initiative in organizing themselves into a unit. It hardly promotes workforce "democracy and fairness" to take that initiative away from workers. It is respectfully submitted that the Bill's proposed changes to subsection 9(b) of the Act should be rejected.

2. Timing and Scope of Representation Hearings

The Bill's provisions in regard to the timing and scope of representation hearings are in apparent reaction to the Board's Notice of Proposed Rulemaking contained at 76 FR No. 20 at 36812 et., seq.

The proposed rule amendments would provide at Rule 102.63(a) that a regional director would ordinarily, absent special circumstances, set a representation hearing to commence seven days after the notice of hearing.[13]

The comments to the proposed rule amendments note that this is already the current practice in some regions, and one which the Board wishes to make uniform. 76 F.R. No. 20 at 36821. Back in 1998 "best practices" provided for a hearing within ten to fourteen[14] days. With modern access to relevant unit information through computers and with advances in communication technology, including electronic mail and overnight/express mail, it is not surprising that the Board, in many of its regions, has achieved hearings after seven days.

It is in apparent reaction to the potential memorialization by rule of the seven day timeframe currently in effect in many regions that the Bill proposes to enshrine in the statute a requirement that a representation hearing may in no circumstances "take place less than 14 days after the filing of a petition." Bill, page 3, lines 14-16. It is respectfully submitted that this is the sort of matter that, under Section 6 of the Act, is appropriately addressed by Rule so that evolving circumstances and changes in the workplace and workforce can be examined and adapted to.

The Board's proposed rule amendments propose a methodology for early and thorough identification of issues in representation case matters, and for devoting the resources of the Agency and the parties to those issues which are material and which are in dispute. Proposed Rules, Sections 102.63; 102.64. There are currently, as will be noted below, limitations on what can properly be presented in a representation hearing. In apparent reaction to the proposed rule amendments that would further promote issue-identification and avoid needless and costly proceedings while still promoting the development of a full record on all material issues, the Bill proposes the addition of the following language in subsection (c)(1) of the Act:

An Appropriate hearing shall be one that is nonadversarial with the hearing officer charged, in collaboration with the parties, with the responsibility of identifying any pre-election issues and thereafter making a full record thereon. Pre-election issues shall include, in addition to unit appropriateness, the Board's jurisdiction and any other issue the resolution of which may make an election unnecessary or which may reasonably be expected to impact the election's outcome. Parties may raise independently any issue or assert any position at any time prior to the close of the hearing. (Bill, page 3 line 18 through page 4 line 5).

This language would allow virtually any issue to be litigated in a representation case proceeding. Hearings could literally be marathon endeavors, with randomly changing positions, new issues inserted at various stages along the way, and no concern for the resulting extraordinary costs to the Agency.

It should be noted that under the current state of the law, there are limitations upon what may be introduced at a representation case hearing. Thus, for example, in Bennett Industries, 313 NLRB 1363 (1994) a unanimous Board found that a party that refuses to take a position regarding the supervisory status of employees or employee classifications is precluded from presenting testimony about the matter.

It has always been the case that unfair labor practice issues may not be litigated in a representation case hearing.[15] The same is the case with a petitioner's showing of interest which is considered confidential.[16] When parties are free to raise not only any issue which may affect an election's outcome, but to raise any issue or assert any position in a non-adversarial proceeding, such a proceeding is subject to precisely the type of constitutional infirmity that was found not to exist when the hearing is limited to determining whether a question of representation exists.[17] Allowing introduction in a representation case proceeding of evidence regarding any issue that could "affect the outcome" of any election would reduce the proceeding to a carnival atmosphere, and allowing parties to additionally introduce anything else whatsoever would reduce to the hearing to absurdity.

As a consequence, it is respectfully submitted that the Bill's proposed strictures regarding the time and scope of a representation case hearing should be rejected.

3. Timing of Elections

In apparent response to the Board's proposed rule that would eliminate the current discretionary pre-election review by the Board[18] the Bill proposes, at lines 7 and 8 of page 4, to make pre-election review mandatory and to require that no election be held until such a review is made.

Section 3(b) of the Act authorizes the Board to delegate to the regional directors its power under Section 9 to determine appropriate units, to hold hearings, to determine if a question of representation exists, and to direct an election. It provides that the Board may review any action of a regional director, but that such action, unless ordered by the Board, will not stay an action of the regional director. Since 1961, the Board's rules have made such review discretionary,[19] and that procedure was subsequently upheld by the Supreme Court.[20]

The language proposed in lines 7-9 of page 4 of the Bill would result in the last sentence of subsection 9(c) (1) of the Act reading in pertinent part as follows:

If the Board finds upon the record of such hearing and a review of post-hearing appeals that such a question of representation exists, it shall direct an election * * * (Emphasis added).

The language that would be added by the Bill forbids a direction of election until a review is completed of post-hearing appeals. As a consequence, the language in Section 3(b) of the Act which provides that Board review of a regional director's actions does not act as a stay would become irrelevant to the timing of an election because, under the Bill, a direction of election cannot issue at all until a review has been made of any appeal.

As a consequence, elections could be held up for years based upon the most frivolous appeal for review. Because the Board will lose its discretion and will be required to conduct a review in all cases, its processes would be even slower.

Unlike the current process in which pre-election Board review is discretionary, and unlike the proposed rules under which Board review would consolidated into one post-election review process, the Bill would mandate pre-election Board in every case, regardless of relevance, materiality, or merit. The Board's caseload would dramatically increase and its timelines would correspondingly lengthen.

The end result would be to deny to employees indefinitely the "fairness and democracy" they seek when attempting to organize. They would file a petition to have an election to choose whether to have union representation and watch their efforts evaporate in a morass of legalese and litigation.

Lines 10 through 14 of page four of the Bill would mandate that no election could take place in less than 35 calendar days following the filing of a petition.

This would apply even where the union and employer are willing to stipulate to an earlier date. Other than facilitating an employer in ramping up an anti-union campaign, it does not appear to have any meaningful purpose.

It is respectfully submitted that these provisions of the Bill should be rejected.

4. Lists of Eligible Voters

The initial requirement of a list of eligible voters was established in 1966 through Board adjudication in Excelsior Underwear Inc.,[21] where the Board established a prospective requirement that within seven days after direction of an election or approval of an election agreement, the employer must file with the Regional Director, "an election eligibility list, containing the names and addresses of all the eligible voters." The Board, in Excelsior, recognized that rules governing elections cannot remain in stasis, but should change with times:

The rules governing representation elections are not, however, "fixed and immutable. They have been changed and refined, generally in the direction of higher standards."[22]

Id. at 767. The Supreme Court upheld the authority of the Board to require such information, in NLRB v. Wyman Gordon Company, 394 US 759 (1969). Therein, the Court noted:

We have held in a number of cases that Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives. [citations omitted] The disclosure requirement furthers this objective by an informed employee electorate and by allowing unions the right of access to employees that management already possess. It is for the Board and not for this Court to weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present.

The same privacy and similar arguments as were presented over 50 years ago are still being raised in response to the Board's proposed rule amendments. The pro-

posed rules would change the procedures with respect to production of voter lists by requiring that the list contain available telephone numbers and e-mail addresses for each voter. 76 Fed. Reg. at 36820, § 102.67(j).

In apparent response to the Board's proposed rule amendments; the Bill proposes, at lines 15 to 24 of page 4, to insert the following language into the statute:

"Not earlier than 7 days after final determination by the Board of the appropriate bargaining unit, the Board shall acquire from the employer a list of all eligible voters to be made available to all parties, which shall include the employee names, and one additional form of personal employee contact information (such as telephone number, email address or mailing address) chosen by the employee in writing."

This provision requires a giant leap backward from what has been the state of Board procedure for over 50 years. It provides that "not earlier" than seven days after a final determination of a bargaining unit by the Board, an employer will provide to the Board one form of employee contact authorized in writing by the employee.

The Bill does not even require that this truncated information be in turn provided to a petitioning union. It requires that this information never be provided so long as there remains outstanding a question of the inclusion of even a single employee in a bargaining unit.

Employers have access to all of this information with which to bombard employees with anti-union propaganda on top of their full-time, in-person access to employees in the worksite.

There can be little argument that providing an effective means of communicating with workers would enable information-sharing and a more informed electorate. Yet, the Bill is aimed at less communication, and particularly at less worker-union communication. Workers are denied the ability to obtain information from the union while at work and the union has no independent means of learning workers' addresses, phone numbers or emails.

It is also remarkably telling what the Bill does not mandate. It does require the "contact information * * * chosen by the employee in writing" be made private and remain confidential from their supervisors and employers. It does not provide employees with a means to limit communications from the employer. It does not protect employees from being required, under pain of discharge, from attending and listening to all manner of employer communications at any time during their workday. Almost 90% of companies in which workers want to form a union require workers to attend such captive audience meetings.[23] Workers who presumably are being protected from union communications are still being forced to give attention to mandatory employer communications or be fired.

The language of the Bill in this regard is not comprehensible in the context of workforce fairness and democracy.

Conclusion

It is respectfully submitted that the so-called "Workplace Democracy and Fairness Act" is anti-democratic and grossly unfair. It is another attack on workers' rights. It should be rejected in its entirety.

ENDNOTES

[1] This analysis assumes that the drafters of the Bill considered the "first sentence" of 9(b) to end with the colon preceding its proviso, and does not intend to eliminate the proviso language.
[2] General Electric Co., 170 NLRB 1272 (1968); Bedford Shoe Co., 117 NLRB 259 (1957).
[3] Pacific Maritime Assn., 185 NLRB 780 (1970).
[4] NLRB v. Ideal Laundry & Dry Cleaning, 330 F2d. 712 (10th Cir. 1964).
[5] RN Market, Inc., 190 NLRB 292 (1971).
[6] NLRB v. Metropolitan Life Ins. Co., 380 US. 438 (1965).
[7] The Board's authority to promulgate those rules was challenged and ultimately upheld in American Hospital Association, supra.
[8] Mallinckrodt Chemical Works, 162 NLRB 387 (1967).
[9] S. Rep. No. 766, 93rd Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051, 93rd Cong., 2d Sess. 7 (1974).
[10] NLRB v. HMO International, 678 F2d 806 (9th Cir. 1982); Southwest Community Health Services v. NLRB, 726 F2d. 611 (10th Cir. 1984).
[11] IBEW Local 474 v. NLRB, 814 F2d 697 (D.C. Cir. 1987).
[12] P. Ballantine & Sons, 141 NLRB 1103 (1963).
[13] Almost a decade ago, in Croft Metal, Inc., 337 NLRB 688, 688 (2002), the Board held that a hearing should be conducted "not less than 5 days" after notice of the hearing "absent unusual circumstances."
[14] "Representation Cases Best Practices Report," Gen. Couns. Mem. 98-1, at 2 (Jan. 26, 1998).
[15] Guide for Hearing Offices in NLRB Representation Proceedings at 27.
[16] Id.
[17] Utica Mutual Ins. Co. v. Vincent, Regional Director, 375 F2d. 129 (2d. Cir. 1967).
[18] Proposed Rule 102.67.

[19] 29 CFR 102.67 (1961).
[20] Magnesium Casting Co. v. NLRB, 401 US 137 (1971).
[21] 156 NLRB 1236 (1966).
[22] 156 NLRB at 1239, quoting Sewall Mfg. Co., 138 NLRB 66 (1962).
[23] Bronfenbrenner, Kate, "No Holds Barred: The Intensification of Employer Opposition to Organizing," EPPI Briefing Paper #235 (2009); available at: *http://epi.3cdn.net/edc3b3dc172dd1094f—0ym6ii96d.pdf*

Chairman KLINE. Thank you, sir.
Mr. RUSSELL, you are recognized.

STATEMENT OF PHILLIP RUSSELL, ATTORNEY, OGLETREE DEAKINS

Mr. RUSSELL. Thank you. Mr. Chairman, Ranking Member Miller, Representative Ross, thank you for the introduction, and all members of the committee. It is truly an honor and professionally to participate in the legislative process. I cannot think of a better less for my daughter, Madison, who is here with me today. So thank you all very much. We both appreciate it.

I am also wearing a purple ribbon today just to show my support for the Spring of Tampa Bay. This is Domestic Violence Awareness Month, so I would like to remind the audience of that, as well. I support the Spring, which provides victims safety, hope, and renewal.

I support this bill. As a practicing labor lawyer and employment lawyer for over 16 years, and also as that kid who at 14 years old started bagging groceries and stocking shelves for grandparents' grocery store, I will tell you my Mamaw is still the toughest boss I have ever had.

But I have had the opportunity to work with a lot of clients when dealing with labor campaigns. And yes, I am a management-side lawyer. But I will tell you what that means for me. What it has meant for me is that I have focused on employees' rights. And that is why I think this bill should be supported and it should become the law of the land.

Because I believe that what the National Labor Relations Board has done is to ignore employees' rights in favor of union rights, or in favor of giving unions greater access. And so I want to focus my comments today—and my written material is also focused on—two rights, in particular, for employees. And that is the right to vote because I believe that everybody in the workplace should have a say on whether or not there is going to be a union.

Not just a handpicked few by union organizers. And that is, what Specialty Healthcare essentially allows is, it allows the union to come in and organize only one part of a grocery store. And I am going to use a grocery store as an example not only because it was my family business way back when, but it was also one of my most recent campaigns.

The union, in that case, came in and tried to organize just the natural foods employees. And under the law at the time, the board ultimately, after we had a hearing, the regional director had to make the correct decision that you could not organize just the employees in the natural foods department. That it had to be a wall-to-wall unit.

You had to represent everybody. Because why does that make sense? In a grocery store, employees that work in produce, employ-

ees that are baggers, they stock shelves, they work in natural foods they have to help each other out. And if you had multiple bargaining units, with multiple unions perhaps representing different groups of employees, you are going to have essentially a management nightmare.

How are you going to allow employees to go from department to department to cover absences, for example? How can employees advance in their careers if they want to get out of bagging groceries and get into the produce department. Typically, bagging groceries is a starting job. You want to move up in the grocery store business, and you want to move into a different department and perhaps into management someday.

How can you do that if you have got yet another barrier to advancement in the workplace? And that is why I think this dividing employers and businesses into subunits gets in the way of employees' rights. And instead of allowing one small group of employees to vote, I think it is better policy and should be the law of the land, as it was before Specialty Healthcare, that everybody needs to get a right to vote on whether there is a union in the workplace.

I also believe that there is another reason. And I am going to look at this from the perspective of my human resources colleagues, my friends at HR Florida and HR Tampa. They are going to have multiple policies, multiple hiring processes, multiple disciplinary rules, multiple benefit plans to administer.

You are going to have to hire more employees. This is going to cost businesses more money. And in today's economic climate, the more cost to small businesses means less jobs. So I think that it is also going to have a negative impact on the economic recovery we are trying to work our way through.

Another reason why I support this bill is the access to information. If you are a union organizer, you do not start your election on the day the petition is filed. You target that employer weeks or months in advance, you go get the support that you can get, you work your way towards getting as many authorization cards signed as you possibly can get, and you do not tell the employer.

You do not go knock on the door and say, "Mr. Grocery Store Manager, I would like to organize your employees. Do you mind if I get some names, addresses, and phone numbers?" You do not tell them. Smart union organizers are going to go do this in people's kitchens, they are going to knock on their doors and they are going to ask their friends to introduce them to their friends. And they are going to get their cards signed, and they are going to ask them not to tell anybody and to keep it quiet until they get enough support.

Then the petition is filed. And under the board's proposed rulemaking, the employer may have 10 days in which to respond to the union which has had weeks or months? That is not fair, and that is where the fairness part comes in to this bill. I think not only everybody should have a right to vote, but everybody should have a right to information from both sides.

So after having heard from the union organizers, full-time professionals, to go out and to get them to support the union I think it is fair. And from the employees' perspective, their right to information will be supported by this bill because they will get better infor-

mation before they make their decision. And they will not be forced to do so quickly.

Those are the reasons I support the bill. Thank you again, all, very much for having me out today.

[The statement of Mr. Russell follows:]

Prepared Statement of Phillip B. Russell, Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Nothing in this testimony should be construed as legal advice for any particular facts or situation. Moreover, this testimony is based on my own personal view and not those of Ogletree Deakins or any of its attorneys.

I. Executive summary[1]

The Workforce Democracy and Fairness Act, H.R. 3094 (WDFA), addresses the National Labor Relations Board's (NLRB or Board) overreaching decision in Specialty Healthcare, 357 NLRB No. 83 (August 26, 2011), and the Board's proposed changes to election procedures.

In both Specialty Healthcare and its proposed election procedure changes, the NLRB has greatly overstepped its statutory authority and worse, trampled on employees' rights to vote and to get sufficient information from both union organizers and the company before being forced into a quick decision.

The WDFA has two primary components. First, it will protect the right of all employees in a workplace to vote on whether or not to have a union. Under Specialty Healthcare, a union organizer could target, organize, and ultimately fragment the workplace into sub-units of employees. The WDFA codifies the "community of interest" test the Board has historically used to determine an appropriate bargaining unit:

(1) similarity of wages, benefits and working conditions;
(2) similarity of skills and training;
(3) centrality of management and common supervision;
(4) extent of interchange and frequency of contact between employees;
(5) integration of the work flow and interrelationship of the production process;
(6) the consistency of the unit with the employer's organizational structure;
(7) similarity of job functions and work; and
(8) the bargaining history in the particular unit and the industry.

In contrast, in Specialty Healthcare, rather than use these time-tested factors, the Board wants to presume that a unit composed of employees performing the same job at the same facility is presumptively appropriate. Under the WDFA, all employees in a workplace would get to participate in a campaign and have a right to vote on a union, not just a select few.

The second major component of the WDFA is that it will protect employees' right to information before they are forced to vote on whether or not to have a union. In June 2011, the Board proposed a series of changes to the election procedures governing elections. One of the most dramatic changes is throwing out the traditional 42-day election period and reducing it to as little as 10 days. This change will effectively take away employees' right to get adequate information from their employer after having been bombarded with sales pitches by professional union organizers for weeks, if not months.

For these reasons, and the detailed reasons stated below, I support the Workplace Democracy and Fairness Act.

II. Analysis

A. The WDFA Would Protect Employees' Right to Vote

The Workforce Democracy and Fairness Act (WDFA) is designed, in part, to correct the National Labor Relations Board's over-stepping in Specialty Healthcare, 357 NLRB No. 83 (2011):

• The key issue is whether a small group of employees performing the same job at a single location constitute an individual bargaining unit. The Board's decision in Specialty Healthcare will affect an estimated six million workplaces covered by the National Labor Relations Act. The Board historically has applied a clear set of standards in determining a unit appropriate for bargaining, which the Specialty Healthcare case turned upside down, without any rational basis.

[1] I would like to thank my colleagues, Harold P. Coxson, Jr. and Matthew Levine, for their assistance in drafting this written testimony.

• The impact will lead to an explosion of "micro-unions" within an entire workforce or across multiple locations; and will make it easier for unions to cherry-pick the unit of employees most likely to support the union and separate it from co-workers, effectively disenfranchising them.

• For example, a union may choose to organize poker dealers at a casino, rather than all dealers, because it knows the poker dealers support the unions, while the blackjack, craps, roulette and other dealers may not. Similarly, a union may organize a small group of employees working on one machine rather than all machinists in a manufacturing facility, because the majority of machinists do not want union representation. Another example is a grocery store. Using Specialty Healthcare, multiple labor unions could target and organize different groups of employees, such as cashiers, produce employees, baggers, stockers, and others. A single store with one entrance, one payroll, one set of policies and practices, one organizational chart, could be essentially Balkanized by sub-units of employees. Multiple contracts over multiple years covering multiple groups of employees would simply be unmanageable.

• These fractured units also will greatly limit an employer's ability to cross-train and meet customer and client demands via lean, flexible, staffing as employees could not perform work assigned to another unit. The impact on business productivity and competitiveness would be significant. Employees also would suffer from reduced job opportunities as promotions and transfers would be hindered by organization-unit barriers.

While the issue presented in Specialty Healthcare was potentially narrow—whether a unit composed solely of certified nursing assistants ("CNAs") is an appropriate unit—it now raises broad concerns for employers in all industries, including the nonacute healthcare industry in particular. The Board's decision in Specialty Healthcare portends a sweeping change in the standard for unit determinations in all industries regulated by the Act.

The standard used by the Board majority in Specialty Healthcare holds that a unit composed of employees performing the same job at the same facility is presumptively appropriate. This standard has serious economic ramifications for the non-acute health care industry, at a time when the nation is attempting to provide affordable universal healthcare. It would lead to the proliferation of smaller, fragmented units, and therefore increase the likelihood of strikes, jurisdictional disputes, and other disruptions to operations—all of which is contrary to the national labor policy in the health care industry. With this standard now being applied in the other industries regulated by the Act (based on the broad language of the Board's decision in Specialty Healthcare), it will have the same disruptive and costly impact on those industries, many of which are still struggling to recover and create new jobs after a prolonged recession.

Changing the unit determination standard in this manner might lead to increased union organizing in the short-term, but it will not result in meaningful collective bargaining in the long-term. Bargaining with a small unit of employees, which excludes many other employees who share a substantial community of interest whose work is integrated and interdependent, will be more costly and less likely to succeed. Ultimately, the Board has a statutory responsibility to approve bargaining units that are not only appropriate for organizing, but also for collective bargaining.

The WDFA forces the Board to adhere to its longstanding precedent in unit determination cases, which strikes an appropriate balance between the statutory goals of allowing employees to exercise their right to organize and bargain collectively, while at the same time promoting industrial peace and minimizing interruptions to commerce through effective collective bargaining. With an economy showing no immediate signs of recovery and a Board that has lost its way, adoption of the WDFA is needed now more than ever before.

1. THE BOARD SHOULD ADHERE TO ITS LONGSTANDING PRECEDENT CONCERNING THE SCOPE OF APPROPRIATE BARGAINING UNITS

In Specialty Healthcare, the Board concluded that a bargaining unit should be presumptively appropriate, in all industries, if it includes only those employees who perform the same job at a single facility. The argument for such a standard is set forth in the dissenting opinion of Member Becker in Wheeling Island Gaming, Inc., 355 NLRB No. 127 (2010). In that case, dissenting Member Becker argued that a petitioned-for unit consisting only of poker dealers at a casino is an appropriate unit, even though it excludes blackjack dealers and croupiers at the same casino. As the majority opinion noted, however, such a unit would be inconsistent with the Board's longstanding precedent, which holds that the interests of the employees in the unit sought must be "sufficiently distinct from those of other employees to war-

rant the establishment of a separate unit." Id., slip op. at 1 n.2 (quoting Newton-Wellesley Hospital, 250 NLRB 409, 411-12 (1980)). Now, it appears that the Board is abandoning that longstanding precedent, in favor of a standard that would find a unit appropriate regardless of whether there are other employees who share a substantial community of interest with the employees in that unit.

Reversing longstanding precedent in this manner is contrary to the fundamental purposes and polices of the Act. Member Becker has argued that the Board's precedent in unit determination cases "have accumulated into complex and uncertain jurisprudence that threatens to thwart employees' efforts to exercise their right to choose a representative." Wheeling Island Gaming, 355 NLRB No. 127, slip op. at 3. This argument ignores that the Act does not exist simply to facilitate and protect organizing in whatever unit a group of employees, or the petitioning labor organization, views to be the most desirable and advantageous, but the intent of the Act is also to foster and protect collective bargaining as a means of promoting industrial peace. See Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 211 (1964) ("One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."); Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 295 (1959) ("The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining * * * and thereby to minimize industrial strife."); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937) ("A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce.").

Section 9(c)(5) of the Act was added to reinforce that the Board should not make unit determinations with a singular focus on the desires of the petitioning employees or labor organization. Thus, Section 9(c)(5) provides that "the extent to which the employees have organized shall not be controlling" in the Board's unit determinations. 29 U.S.C. § 159(c)(5) (emphasis added). The Board cannot, as suggested by Member Becker in Wheeling Island Gaming, and as implied by Specialty Healthcare, comply with Section 9(c)(5) merely by pointing to some community of interest factors that are consistent with the extent of the union's organizing effort. Wheeling Island Gaming, 355 NLRB No. 127, slip op. at 3 n.2. The Board has a statutory responsibility to ensure that its unit determinations will ultimately promote stable and effective collective bargaining relationships. In the rulemaking for acute care hospitals, the Board recognized that its goal "is to find a middle-ground position, to allocate power between labor and management by 'striking the balance' in the appropriate place, with units that are neither too large or too small." 53 Fed. Reg. 33,904 (1988).[2]

The purposes of the Act are not served by making unit determinations that exclude groups of employees who share "a substantial community of interest with employees in the unit sought." Colorado Nat'l Bank of Denver, 204 NLRB 243, 243 (1973). For this reason, the Board historically has not approved of "fractured units"—units that "are too narrow in scope or that have no rational basis." Seaboard Marine, Ltd., 327 NLRB 556, 556 (1999). Fragmented bargaining units may also effectively disenfranchise certain groups of employees, a result that is also contrary to the policy of the Act.

Member Becker argues that American Cyanamid Co., 131 NLRB 909 (1961), supports a sweeping presumption—one that would apply in all industries—that a unit of "all employees doing the same job and working in the same facility" should be approved absent "compelling evidence that such a unit is inappropriate." Wheeling Island Gaming, 355 NLRB No. 127, slip op. at 2. No such presumption can be drawn from American Cyanamid. To the contrary, in finding a unit of maintenance employees to be appropriate in that case, the Board specifically disavowed any presumption in favor of a maintenance-only unit in other cases: "collective-bargaining units must be based upon all the relevant evidence in each individual case." American Cyanamid, 131 NLRB at 911 (emphasis added). Consistent with the statutory mandate to foster industrial peace through effective collective bargaining, "each unit determination must have a direct relevancy to the circumstances within which collective bargaining is to take place." Id.

Thus, the Board's unit determinations have long considered, and should continue to consider, whether the scope of a proposed unit makes sense from the standpoint of the collective bargaining that will take place if the union prevails in the election. The Board should not, as Member Becker suggests, simply approve the narrowest unit sought by the petitioning labor organization and then leave it to the parties

[2] Academic literature describes the economic reasons for striking an appropriate balance between units that are neither too large nor too small. See Douglas L. Leslie, Labor Bargaining Units, 70 VA. LAW REV. 353, 408-09 (1984).

to reshape the unit if their "experience with collective bargaining suggests to them that bargaining would be more productive in a larger or differently contoured unit. * * *" Wheeling Island Gaming, 355 NLRB No. 127, slip op. at 2. To do so would undermine the stability of the work environment and the various relationships between employees, employers and unions. The Board has a statutory responsibility to make that determination in advance, and to withhold approval of bargaining units that are not suitable to effective collective bargaining.

2. THE BOARD SHOULD NOT HAVE, IN THE CONTEXT OF A CASE ARISING IN THE NONACUTE HEALTHCARE INDUSTRY, REEXAMINED THE STANDARDS APPLIED IN ALL OTHER INDUSTRIES

Although Specialty Healthcare arose in the nonacute health care industry, the Board extended its misinformed ruling to most industries within the Board's jurisdiction. Specialty Healthcare, 356 NLRB No. 83, slip op. at 20. This is a dangerous proposition. It is contrary to the Board's decision in American Cyanamid, which recognized that appropriate unit determinations are individualized determinations that "will vary from industry to industry and from plant to plant." American Cyanamid, 131 NLRB at 911. The Board's determination as to the scope of a proposed CNA-only unit in the nonacute healthcare industry should not have given rise to a presumption that would apply in the many other industries regulated by the Act.

The Board asserts that "[i]ndustry-specific rules are the exception, not the norm." Specialty Healthcare, 356 NLRB No. 56, slip op. at 3. Yet, the healthcare industry clearly is one such exception, given the rulemaking and pattern of decision-making that formed the backdrop for this case. Unit determination standards developed in this industry should not be the vehicle for creating a new presumption for all other industries.

Unit determinations in other industries are based on different considerations and patterns of decision-making. In the utility industry, for instance, there is a presumption in favor of system-wide bargaining units. See Alyeska Pipeline Serv. Co., 348 NLRB 808, 809 (2006); Baltimore Gas & Elec. Co., 206 NLRB 199, 201 (1973); Colorado Interstate Gas Co., 202 NLRB 847, 848 (1973); Louisiana Gas Serv. Co., 126 NLRB 147, 149 (1960). This presumption rests not only on community of interest factors, but also on the fundamental policy objective of the Act—minimizing interruptions to commerce resulting from labor disputes. See Alyeska Pipeline, 348 NLRB at 812 ("The Board's presumption in favor of a systemwide unit is based, at least in part, on the judgment that an increase in the number of units leads to an increase in the number of potential labor disputes and work stoppages."); Baltimore Gas, 206 NLRB at 201 ("That judgment has plainly been impelled by the economic reality that the public utility industry is characterized by a high degree of interdependence of its various segments and that the public has an immediate and direct interest in the uninterrupted maintenance of the essential services that the public utility industry alone can adequately provide.").

There are also unique considerations and patterns of decision-making in other industries that play a major role in the national economy, including the trucking industry, the maritime industry, the hotel industry, the retail food industry, the television and radio industry, the newspaper industry, the construction industry, and in higher education. The Board should not have, in the context of a case arising in the nonacute healthcare industry, attempted to fashion a new unit determination standard that now applies in all of these industries. The standards to be applied in any industry should be determined only in a case arising in that particular industry, after full development of the unique facts and circumstances and patterns of collective bargaining that exist in that industry.

The Board suggests that changing the unit determination standard may help prevent litigation over the scope of a proposed bargaining unit. Specialty Healthcare, 356 NLRB No. 56, slip op. at 3. This is not a sensible reason to upset the unit determination standard in all industries. Under the current standard, litigation concerning the scope of a bargaining unit is rare; over 90% of elections are conducted pursuant to a stipulation. See Office of the General Counsel, Summary of Operations (Fiscal Year 2010), Memorandum GC 11-03 (Jan. 10, 2011) (reporting that 92.1% of representation elections in FY 2010 were conducted pursuant to agreement of the parties, compared to a 91.9% election agreement rate in FY 2009).[3] Changing

[3] In Wheeling Island Gaming, Member Becker asserted that "litigation, often protracted litigation, over the scope of the unit occurs prior to almost every contested election." 355 NLRB No. 127, slip op. at 3. This is a cleverly worded but misleading statement, given that the overwhelming majority of Board elections are not contested. And, of that small minority of cases that are contested, many do not involve issues of unit scope. They frequently involve issues of unit composition (e.g., exclusion of supervisors) and related issues.

the unit determination standard will produce more, not less, litigation because well-established precedent is now called into question and the parties will have an incentive to litigate in an effort to shape the law under the new standard. For this reason as well, the Board should not have engaged in a sweeping revision of its existing unit determination standards.

3. THE WDFA WILL FIX THE PROBLEMS CREATED BY SPECIALTY HEALTHCARE AND CODIFY THE BOARD'S LONG-STANDING PRECEDENT

The WDFA will address the issues highlighted above in the following manner:

- Bargaining Unit Determination—To limit proliferation and fragmentation of bargaining units, the legislation codifies the test used prior to Specialty Healthcare. Bargaining units are made up of employees that share a "sufficient community of interest." In determining whether employees share a "sufficient community of interest" the Board will weigh eight factors, including similarity of wages, working conditions and skills. The Board will not exclude employees from the unit unless the interests of the group sought are sufficiently distinct from those of included employees to warrant the establishment of a separate unit. (Section 2(1), starting on page 2 line 2, ending on page 3 line 1.)
- Bargaining Unit Challenges—To ensure employers can dispute union-proposed bargaining units, WDFA codifies the test used prior to Specialty Healthcare. Any party seeking to enlarge the proposed bargaining unit must demonstrate that employees in the larger unit share a "sufficient community of interest" with those in the proposed unit. (Section 2(1), starting on page 3 line 2, ending on page 3 line 11.)

B. The WDFA Would Protect Employees' Right to Make a Fully Informed Decision In an Election

In addition to the Specialty Healthcare bargaining unit issue, the WDFA also addresses the election rules issues raised by the Board's recent rulemaking attempt to use "quickie" elections and other changes to the Representation Case (or "R-case") procedures in union campaigns. The NLRB's proposed R-case rules would place excessive burdens on all businesses covered under the Act and would be unfair to employees. The WDFA is intended to protect employees and employers alike from such harsh consequences.

Initially, it is highly inappropriate and ill-advised for the NLRB to propose new regulatory burdens on the backs of business at a time when the country is struggling to recover from economic recession, stimulate business investment and job growth, and reduce unemployment. The NLRB's proposed historic overhaul of its Representation-case rules flies in the face of President Obama's Executive Order 13563 and admonition to government agencies not to promulgate new regulations unless absolutely necessary, and to review existing regulations which would unduly and unnecessarily burden business, especially smaller businesses.

In fact, the new rule would impose significant cost burdens on smaller businesses forced to invest the time and resources necessary to prepare for Representation-case hearings within as little at seven calendar days notice (in reality 5 working days), prepare a much more detailed "Excelsior list" within two days thereafter, and prepare for an election within as little as ten days from the date of the petition, and then prepare for a post-election challenge to unit questions and voter eligibility. The employer is likely to be un-counseled and susceptible to inadvertent unfair labor practices.

All of the foregoing nearly eviscerates the ability of the employer to communicate with its employees and the ability of employees to obtain all the information necessary to make an informed decision. Just as union organizers are entitled to campaign among employees, employers have an equal right under the Act to express their opinion as to how unionization may affect the business, employees and customers. Absent sufficient time for employees to hear and discuss both sides of unionization with employers and fellow employees, the employees will not be adequately informed prior to voting, and thus will not have a meaningful opportunity to exercise their right under the Act to support or refrain from supporting a union.

Americans are not very familiar with unions. Most small businesses, indeed most employees, know very little if anything about unions, union organizing, and union elections. They are working hard, struggling to survive in a down economy and to compete in a global economy which threatens their jobs and their businesses. Until recently, when certain Board actions elevated the agency in notoriety, most people had not heard of the NLRB, and gave little thought to unions, union organizing, and collective bargaining.

With "quickie" election rules in place, there will be little time to educate employees and prepare a response to a union organizing campaign so that employees will

be fully and fairly informed prior to the election. This is especially true for employees of smaller businesses—the ones whom the NLRB Chairman now certifies as experiencing no significant economic impact. In fact, the real cost for small business—the real economic impact—is taking the time and resources away from productive endeavors and job creation, and diverting them to preparing for "quickie" elections and "quick snap" organizing campaigns even if they never come.

But the Board Majority simply chooses to ignore the economic impact of the rule or offer alternatives for small business under an Initial Regulatory Flexibility Act Analysis. Indeed, given the fast-moving train running on the current proposal one may wonder whether the final rule has already been written. The more the Board rushes to ram these rules through the process, the more one senses that the final rule, in the words of dissenting Board Member Brian Hayes, is a "fait accompli." As he said: "The sense of fait accompli is inescapable."

1. THE PROPOSED RULES ARE EXCESSIVE AND UNFAIR

The proposed rules are not small changes merely adapting to "changing patterns of industrial life." 76 Fed. Reg. at 36816 (quoting NLRB v. Weingarten, 420 U.S. 251, 266 (1975)). As stated recently in the public hearings on the proposed Representation-case rule changes before the NLRB by former NLRB member Chuck Cohen, I know and to an extent expect each Board appointed by a newly-elected political Administration to push the envelope in deciding cases in one direction or another—liberal/conservative, pro-union/pro-management. But Mr. Cohen stated that the regulatory changes proposed here do not push the envelope—they blow up the envelope. Statement of Charles I. Cohen before the NLRB Public Meeting, June 18, 2011.

The Board's proposed rule focuses almost exclusively on the timing of the representation election process, referring frequently to "the expeditious resolution of the election process." (See, e.g., 76 Fed. Reg. at 36,812, 36,813, and 36,817). However, the proposed rule appears to be concerned primarily with how rapidly it can push the election timetable from the date of the filing of a petition to the election itself. It pays less attention to what the Board claims as its priority—the timing from the date of the petition until resolution, including post-election procedures. In many cases the time saved at one end of the process by deferring pre-election hearings on unit determination and voter eligibility will more than be made up for by delays at the other end in post-election litigation. The proposal's 20 percent rule and the rendering Board Review of Regional Director's Decisions discretionary invite mischief as well.

"Quickie election" proposals under the Act are not new. They have been sought by organized labor for years to bail out its declining union density. "Quickie elections" were a major part of the 1978 Labor Law Reform Act. Originally, labor sought time frames of 45 days. The bill as introduced in the House called for 15-25 days depending on complexity. The Senate bill provided for up to 21 days and the Senate substitute was 35 days. Barbara Townley, Labor Law Reform in U.S. Industrial Relations. Gower Publishing, 1986 at 124-125.

More recently organized labor sought to enact legislation that simply would have done away with secret ballot elections—there would have been no elections, only card check certification under the Employee Free Choice Act (EFCA). See S. 560, 111th Cong., 1st Sess. (2009); H.R. 1409, 111th Cong. 1st Sess. (2009). What unions could not achieve through Congress, either under the 1978 Labor Law Reform Bill and more recently through EFCA, they now seek to achieve through rulemaking with the help of reliable compatriots in the Administration and at the Board. As dissenting Board Member Hayes ruefully predicted, "by administrative fiat in lieu of Congressional action * * * (the proposed rules) will impose organized labor's much sought-after 'quickie election' option." 76 Fed. Reg. at 36,831.

An employer's free speech rights under Section 8(c) of the Act[4] only has meaning if there is a realistic opportunity to speak. The United States Supreme Court has characterized the Congressional policy as "favoring uninhibited, robust, and wide-open debate" of matters concerning union representation, so long as that does not include unlawful speech or conduct. Chamber of Commerce v. Brown, 554 U.S. 60, 67-68 (2008). Limiting the reasonable opportunity for such uninhibited, robust and wide-open speech is the equivalent of denying it altogether.

[4] 29 U.S.C. § 158 (c). Section 8(c) provides:

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

Allowing unions to control the timing of an election by campaigning for as long as it takes to get sufficient signatures on authorization cards from often harassed, brow-beaten employees, then springing an election petition on the employer giving the employer only 10—21 days (using dissenting Board Member Hayes's estimate) to respond is hardly labor law equality. Unions will argue that the employer has the ability to campaign against unionization from the employees' first days at work.[5] That ignores, however, the fact that what for many employees is only white noise when discussed in the abstract, suddenly becomes important when there is a particular union involved. Employees have many questions after that. They want to know the union's record of delivering on promises made during a campaign, its contracts negotiated with other employers, its record of fair treatment of members and its exercise of the duty of fair representation in arbitration, its record of corruption, embezzlement, money laundering, and the like, and its political contributions and other campaign support for political candidates, and so on.

2. "QUICKIE" ELECTION RULES ARE UNNECESSARY

The irony is that if the goal of the rule change is to give unions more opportunity to organize, which apparently it is, there is little empirical evidence the "quickie" election rules are even necessary given current record-setting election statistics both in terms of timing and results. The only studies linking election deadlines with union success are fundamentally flawed and self-serving drawing exclusively on statements from union organizers or ignoring other more credible sources.[6]

In fact, if speed were the only basis for determining fair elections, the Board is doing quite well, as demonstrated below and as noted in Board Member Hayes' dissent at 76 Fed. Reg. at 36,831 n.5. As stated in the proposed rule, over the past decade, Board supervised secret ballot union representation elections have taken place within the median time of 38 days from the date of the petition; in 2010 that statistic was 31 days, far fewer than the Board's target of 42 days. Contrast that with the record in 1960 when the median time was 82 days! See 76 Fed. Reg. at 36,813-36,814.

Unions won a majority of elections throughout that same period, with a 68.7 percent win rate in 2009 and 67.6 percent in 2010. See NLRB Election Report (Oct. 19, 2010) and Board Member Hayes's dissent at 76 Fed. Reg. at 36,832. It is not the function of the NLRB to assure union wins. The proposed rule states that it is "unwarranted" to assume that the rules changes are designed to "increase the election success rate of unions." 76 Fed. Reg. at 36,829. While the Board describes that goal as "unpredictable and immaterial" (76 Fed. Reg. at 36,829), clearly that is not what unions believe. They openly tout these rule changes, just as they touted EFCA, as a "game changer" whereby they will increase union density.

3. THE WDFA GIVES EMPLOYEES AND EMPLOYERS THEIR RIGHTFUL VOICE IN THE PROCESS

In recent years under both Democratic and Republican Majorities, the Board lost credibility simply by going too far. The Board's proposed Representation-case rules do much more than push the envelope slightly in one direction or the other; they "blow up the envelope" entirely. The WDFA curbs this severe blow and addresses the issues highlighted above as follows:

• Voter Eligibility—To ensure employees know who will be in their bargaining unit, know whether the issue of representation affects them personally and avoid

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[5] The fact is, however, that most businesses, especially small businesses prefer to focus energy and resources on creating a strong working relationship with their employees and developing business opportunities. Moreover, these same employers are not sufficiently sophisticated in labor matters to be so forward thinking. In fact, it is more likely that small to mid-sized businesses will not know who the NLRB is and what union organizing means to their company until a petition for election is received.

[6] See, e.g., two studies whose release in June 2011 appeared to be coordinated with the NLRB's proposed Representation-Case Rules which were published in the Federal Register as a NPRM on June 21. Kate Bronfenbrenner and Dorian Warren, The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence, ISERP Working Paper Series 2011.01 (2011); John Logan, Erin Johansson, and Ryan Lamare, New Data: NLRB Process Fails to Ensure a Fair Vote, Univ. of Cal. Berkely Res. Brief (June 2011). See also, an earlier Bronfenbrenner study entitled No Holds Barred—The Intensification of Employer Opposition to Organizing, May 20, 2009, Economic policy Institute Briefing Paper #235, in which her questionable collection methodology relied as the primary source of anecdotal evidence interviews with the lead organizers involved in the organizing campaigns and elections studied. See, Responding to Union Rhetoric: The Reality of the American Workplace—Union Studies on Employer Coercion Lack Credibility and Integrity, U.S. Chamber of Commerce White Paper (2009).

complications on eligibility, e.g., whether an employee is a supervisor, the Board shall determine the appropriate bargaining unit prior to an election. (Section 2(1), page 2 line 3.)

• Scheduling of Pre-Election Hearing—Employers would have at least 14 days to hire an attorney, identify issues, and prepare their case for pre-election hearing. Employers and unions would have the same 14 days to compromise and agree on election issues. (Section 2(2)(A), starting on page 3 line 14, ending on page 3 line 16.)

• Identifying Issues in Dispute—Employers and unions could independently raise any issue or assert any position at any time prior to the close of the hearing. Employers and unions would be free to raise issues as the hearing record develops, ensuring a fair and effective pre-election hearing. (Section 2(2)(B), starting on page 4 line 3, ending on page 4 line 5.)

• Pre-election Board Review—Employers and unions could file post-hearing appeals with the Board, ensuring uniformity in Board decisions and clarity prior to the election. (Section 2(2)(C)(i), starting on page 4 line 7, ending on page 4 line 9.)

• Timing of Election—The Board will conduct an election as soon as practicable, but no less than 35 calendar days following the filing of an election petition. Employers will have time to share their opinions with employees, and employees will have time to become educated so they may effectively judge whether or not they wish to be represented by a union. (Section 2(2)(C)(ii), starting on page 4 line 10, ending on page 4 line 14)

• Excelsior List—Rather than providing names and home addresses, employers will be required to provide the union with names and one additional piece of personal information of all employees on the final vote list seven days after the pre-election hearing. The additional piece of information, such as a personal phone number, email address, or home address, will be chosen in writing by employees. This will ensure employees can choose how to be contacted and protect employee privacy. (Section 2(2)(D), starting on page 4 line 15, ending on page 4 line 24.)

III. Conclusion and recommendation

Based on the foregoing, I support the Workforce Democracy and Fairness Act as a means by which Congress can protect the rights of all employees in a workplace to vote on unionization and their right to information from all sides before being forced to vote. The WDFA is also good for businesses, especially smaller businesses, because it would prevent fragmented workforces in which management would be forced to negotiate multiple contracts with multiple groups of employees or have fundamentally different sets of policies, pay, and practices for employees who are working side-by-side in their jobs. From a macroeconomic perspective, the WDFA will also protect jobs because it will avoid the unnecessary costs arising from fragmented workforces.

Chairman KLINE. Thank you very much. I thank all the witnesses for your testimony. It is clear that we have a panel of experts. All of you heeded my request on timing. This is the most precise in abiding by the green-yellow-red lighting system I think that we have seen here. Thank you very much for that.

We are going to move to questions now. And I will ask my colleagues to please try to limit themselves to 5 minutes. I will drop the gavel relatively quickly if we start extending. Okay, I recognize myself.

There is apparently some disagreement here over what "Specialty" means and who it applies to. Clearly, we were addressing this in this legislation. So let me start, Mr. Cohen, with your experience with the board. Prior to this Specialty ruling, what standard has the board applied to determine corporate union bargaining units?

Mr. COHEN. Thank you very much, Chairman Kline. I think perhaps the best way to describe the community of interest and the distinction of interest and the various language pieces that come about is with a very practical example, if I could please give it.

Chairman KLINE. Please.

Mr. COHEN. There is a case called Wheeling Island Gaming, which was the predecessor to our situation here. In Wheeling Island Gaming—that was a casino, obviously—the union sought to organize a unit limited to blackjack dealers. The employer said, "Hold it. The smallest appropriate unit would have to include poker dealers and some related individuals, as well."

The case went to the board. The board decided that the blackjack dealers was too small of a unit. There was a dissent in that case by Member Becker, sole dissent. That was then teed up in Specialty Healthcare, which is being palmed off as a health care institution case. In Specialty, the board said, "We want to consider, for all industries, how to change these standards."

So what did the board do? They issued Specialty Healthcare on its facts, but then expanded it to virtually all industries.

Chairman KLINE. So if I could interrupt. So going back to the casino, following Specialty it is your belief that those blackjack dealers could be formed into a union, and the poker dealers formed into a union and the cashiers at the window. I assume you go to a window to cash in your chips or something. I never have any cash-in, but something like that.

So you could have multiple bargaining units inside that casino, and that has nothing to do with health care, acute care, or any other kind of care.

Mr. COHEN. That is correct. There is one thing that the employer can do is, it can go to a hearing, under Specialty, and say, "Look, there is something called an overwhelming community of interest between the poker dealers and the blackjack dealers." And if the employer can prove that overwhelming community of interest standard, then the smallest unit would have to include both of them.

But we do not know what an overwhelming community of interest is in these circumstances. It is not a concept which has been prevalent in representation election questions. It is a different concept. So we have an artificial wall created here, with an opportunity of the employer to try to prove something which would be exceptionally hard to prove.

And in my judgment, a career NLRB regional director would be compelled in almost every case to find that a collective bargaining unit composed exclusively of the blackjack dealers that would, be the order of the day.

Chairman KLINE. Thank you. And so in Mr. Russell's example, this could apply everywhere. He talked about a grocery store—I think it is a terrific example—where you have people in the meat department, the grocery department, the baggers, the stockers, the cashiers. And all of those could be, and would almost necessarily have to be, recognized as a bargaining unit.

Back to you, Mr. Cohen. This bill that is before us, would that—this legislation, the four-page, this four-page bill, I know it is less than 1,000 pages so sometimes it is hard for us to face that—would that address the concerns that you have just told us about?

Mr. COHEN. I believe it would. It would, in my judgment, restore us to the law before August 26, which is all that that aspect of the bill would deal with. And then if we also go back to the proposed quickie election rules it would also eliminate those. We have had,

for decades, very well-oiled machinery in place for determining employer positions, going to hearings if necessary.

But in over 90 percent of the cases, employers do not even go to hearings and elections are held very quickly and unions win substantial numbers of elections, virtually two out of three, but that is not enough in the environment we are in now. What this attempt is to do is to gerrymander the unit into something micro, and then have an election before there is an opportunity to respond to it.

Chairman KLINE. Thank you.

Mr. COHEN. So this bill would help very much in restoring the situation to where we were.

Chairman KLINE. Thank you. My time has expired.

Mr. MILLER, you are recognized.

Mr. MILLER. Thank you very much, Mr. Chairman. Thank you to all of the panel for your testimony.

Mr. HUNTER, as I dig through this legislation, I do not see how you get to an election against a determined—mildly determined perhaps, under this legislation—employer? How do you get there?

Mr. HUNTER. I do not think you get there for years, as a practical matter. Because the way this legislation reads, no direction of election can be made until review has been had of any issue in that case. And as a——

Mr. MILLER. That is not a discretionary decision.

Mr. HUNTER. It is not a discretionary decision because it is now mandatory. Which means instead of the small number of cases for which review is actually granted, every single case will have to go for review. As a consequence, it is going to cost the board a tremendous amount of money to do that instead of effectuate the other purposes of the act.

And it is going to plug up the procedure, and it is going to take years.

Mr. MILLER. Under current law, those issues are raised at the regional level. Is that correct?

Mr. HUNTER. Well, under current law those issues, those preelection issues, are raised before a regional director and an employer can seek review. But only if review is granted.

Mr. MILLER. How many of those, what percentage of those, issues raised at the regional level are——

Mr. HUNTER. A very small, extremely small, percentage of those——

Mr. MILLER [continuing]. Forwarded for review?

Mr. HUNTER [continuing]. Are granted. And in some cases, even where review is granted—for example, in some cases review—review will be granted over a discrete question as to whether——

Mr. MILLER. Five percent of the cases, 1 percent of the cases?

Mr. HUNTER. Yes, a certain set of people, or supervisors, or something. Then even when review is granted, those individuals area simply allowed to vote under challenge.

Mr. MILLER. And then the process goes forward.

Mr. HUNTER. Yes.

Mr. MILLER. Under the proposed legislation, the process stops until there is a review of every one of those——

Mr. HUNTER. That is absolutely correct.

Mr. MILLER [continuing]. Appeals is brought to the board.

Mr. HUNTER. That is absolutely correct.

Mr. MILLER. So the incentive is in filing an appeal.

Mr. HUNTER. That is right. I mean, if an employer does not want to have a union they need to simply keep that process going until people lose interest, or——

Mr. MILLER. You know, we just went through a couple of years of investigation and study under mine safety, where clearly a conscious decision was made by the companies to flood the appeal system on enforcement penalties and fines so that effectively all the processes of the review board were completely stifled.

So if you do not want to pay a fine, you do not want to improve the workplace, you do not want to make is safer, you just keep flooding it with appeals, and your judgment day is put off years into the future, if ever.

Mr. HUNTER. I think that is exactly right, and that is exactly what will happen.

Mr. MILLER. So every issue that you can conceivably raise at the regional level, you would then take to an appeal. And I think currently those that are accepted, which is a 1 percent or 2 percent of the cases, I think, that are accepted by the board. Those take about a year-and-a-half?

Mr. HUNTER. Yes, they can take a year-and-a-half, 2 years.

Mr. MILLER. So we have all of this concern of the timelines that are set in the proposed regs, and yet there is no concern here with the fact that the election can be postponed for years. And we all know what that means in an organizing drive is that people leave professions, people lose heart.

The employer never lets up on the drumbeat, never lets up on the campaign against the union. We know that an incredible amount of illegal intimidation goes on in the workplace against the union. So that drumbeat goes on for a year, 2 years, what have you, while a group of employees has decided they want to join the union lives under that assault.

And if it is now with 1 percent of the appeals being accepted or 2 percent of the appeals being accepted, that time frame is over 500 days. It is effectively——

Mr. HUNTER. It denies employees the right to organize.

Mr. MILLER. There is no reason——

Mr. HUNTER. It simply denies it.

Mr. MILLER. Perfect. Thank you.

Chairman KLINE. Thank the gentleman.

Mrs. BIGGERT, you are recognized for 5 minutes.

Mrs. BIGGERT. Thank you, Mr. Chairman.

My question would first be for Mr. Russell. And this may be a question of the number of days. If we are talking 17 days or we are talking 14 days, is that calendar days or is that business days?

Mr. RUSSELL. Calendar days.

Mrs. BIGGERT. Calendar days. So if an employer had the 7 days to find an attorney and prepare for the pre-election hearing, that means that, let us say, they got a petition filed on Thursday or Friday. Then that means that that would include the weekend for them do all this.

Let us add Friday. So really cannot get ahold of an attorney until Monday if somebody is not available because the offices are closed.

Mr. RUSSELL. That is correct. So you will get petitions filed Friday at 5 o'clock.

Mrs. BIGGERT. So that would count the Friday.

Mr. RUSSELL. Correct. Well, it would not count the day of the filing. You count from there. We would start with Saturday, Sunday, and so forth.

Mrs. BIGGERT. So then the next Friday they would have to have filed, have an attorney, and prepared the case for the pre-election hearing.

Mr. RUSSELL. Correct. I think what troubles me about that is, from a small business perspective—and, again, I am going to go back to the grocery store and the example that I use—the one that I represented in that campaign—they had never dealt with these kind of issues before ever.

Nor had any of the employees that were working for the grocery store. And there were about 100 employees. None of them had ever had any experiences with unions at all. They did not know what they mean, did not know what the realities were of union membership, the good and the bad.

They simply had no knowledge whatsoever. And today, the private workforce is only organized at about 7 percent. So there is an awful lot of employees out there who had never been in a union—Generation X, the Millennials, not even their parents.

Mrs. BIGGERT. So in your experience, how much time do you think an employer needs to prepare his staff, to educate his employees about the effects of the unionization?

Mr. RUSSELL. Well, there is really two parts to that. And think, first of all, how much time does the company need at first to hire an attorney and figure out the legal issues. I think this bill provides for at least 2 weeks. That, again, really is only 10 business days.

But at least I think that time period is workable, and it is a reasonable compromise. It is definitely not overreaching. And I do not believe, as Mr. Hunter says, delays the process inordinately. But it does give the employer an opportunity to get the legal team together and to get some advice.

And as Chairman Kline pointed out, these rules are complicated. There is another resource we go to all the time called the Developing Labor Law, which really is the Bible for labor lawyers, union- and management-side. And it is two volumes.

So in order to get your arms around it, not all campaigns are alike. It takes time. Now, the second part you asked about how long it takes to educate employees. You know, I think, again, let us point to the current data which Mr. Cohen indicated. Thirty-eight days is the median time frame, the average is 31 days.

I think the bill provides for at least 35 days. That is a reasonable time, and a good compromise, in which employees can exercise their right to get information before being forced to vote.

Mrs. BIGGERT. Do you know how many days the NLRB looking to have these elections take place?

Mr. RUSSELL. Yes, they wanted the elections in as few as 10 days after the petition was filed. That is simply unworkable. It is unfair

to the employees. They will not get the information they need, employers will not get the advice and support they need.

Mrs. BIGGERT. Okay.

Then thank you very much. Mr. Cohen, in testimony, and I think Mr. Russell also talked about this, you highlight the fact that employers would likely be unaware of pre-petition union activities, and yet would be forced to prepare themselves for the process, an abbreviated time frame.

Can you give me some of the other pre-petition union activities that would place an unfair burden on the employer?

Mr. COHEN. Well, sure. As Mr. Russell testified, unions, in their organizing drives, very rarely go to the employer and say, "Mr. Employer, I want to organize your employees." They get together a group of individuals who they think they have like cause with, and they work with them.

Then they decide, in their own judgment, what the appropriate unit is going to be. And then they will proceed to do the organizing around that collect course.

Mrs. BIGGERT. Because I do not have too much time, I just wanted to ask you one other question.

Mr. COHEN. Sure.

Mrs. BIGGERT. And that is, what about the right to privacy under the proposed rules that would be concerned?

Mr. COHEN. Right now, there is an obligation to provide what is called an "excelsior list," which is the name and home address of employees. A lot of employees resent that. But employers say this is what the law requires, and that is it.

Under the proposed rules, there would have to be given over electronic communication information. It is unclear, under the rules, whether it is going to be business e-mails, work e-mails, or personal e-mails, or both. Both of those, I think, severely intrude on employee privacy rights.

And it is not a warranted reason, in my judgment, to have that kind of imposition required.

Chairman KLINE. The gentlelady's time has expired.

Mr. Andrews?

Mr. ANDREWS. Thank you, Mr. Chairman.

Mr. COHEN, you make the case that speed alone should not be the predominant value for NLRB decision-making process. Do you think that one of the other values should be careful reasoning and accuracy of their decisions?

Mr. COHEN. Obviously one would tend to think that accuracy is a value and, of course, it is. But if I can——

Mr. ANDREWS. I only have 5 minutes unless, of course, the chairman gives me another minute and a half.

Mr. COHEN. But, Mr. Andrews, the law does not require that. Unions can misrepresent, and employers can, as well.

Mr. ANDREWS. Mr. Cohen, let me ask the questions. Would you agree that the regional directors are, by and large, quite competent in rendering decisions in the present decision-making process?

Mr. COHEN. I think, by and large, the regional directors do a good, conscientious job of applying the law that is before them.

Mr. ANDREWS. Right, I agree with you. Do you know what percentage of representation cases the National Labor Relations Board

presently takes? Because it has the discretion to hear them or not now. What percentage of cases do they take up in representation cases at the full board?

Mr. COHEN. Very small. Because the review process, which occurs before the election is held——

Mr. ANDREWS. Right.

Mr. COHEN [continuing]. Either determines to grant review, which only happens in a very small number of cases——

Mr. ANDREWS. The answer——

Mr. COHEN [continuing]. Or to decline review.

Mr. ANDREWS. The answer is 1.3 percent. Now, is it not correct, under the bill that is in front of us, they would have to take 100 percent of the representation cases?

Mr. COHEN. I believe that that is rather a technical issue with the proposed legislation.

Mr. ANDREWS. No, it is——

Mr. COHEN. As I understand it——

Mr. ANDREWS. Well, as I read the legislation, it says that every representation case must be decided by the full board. Now, what do you think that would do in terms of delaying elections?

Mr. COHEN. I would expect that the numbers would not change under the proposed legislation. What would happen——

Mr. ANDREWS. Really?

Mr. COHEN [continuing]. The regional director would issue——

Mr. ANDREWS. Please let me ask the questions. If they had to take 100 percent of the cases and review them, instead of 1.3 percent, you do not think that would result in more delay.

Mr. COHEN. They have 100 percent now.

Mr. ANDREWS. They take 1.3 percent of the cases now on their discretionary review. What reason do you think might exist to require them to take 100 percent of the cases for review?

Mr. COHEN. Again, please, Mr. Andrews. They have 100 percent now. The issue, 90-some percent are waived at the initial stage. Then there are only a few where reviews are granted. And all that takes place before the election, which is occurring in a quick period of time.

Mr. ANDREWS. And as I read this bill, it eliminates the possibility of that waiver. It says they have to take up all the bills, and I think that would create a major problem.

Mr. SULLIVAN, you represent the major retailers of the country?

Mr. SULLIVAN. I represent the Retail Industry Leaders Association. So it is the trade association and not the retailers themselves.

Mr. ANDREWS. Has your association taken a provision on the president's proposal that would stave off a $1,500 a year tax increase for middle class families if we do not act by December 31st?

Mr. SULLIVAN. I do not know anything about that, sir.

Mr. ANDREWS. You have not taken a position on that?

Mr. SULLIVAN. I do not know. I do not know how to answer your question.

Mr. ANDREWS. You do not know the positions your association takes on legislative issues?

Mr. SULLIVAN. I do know their position on what they have asked me to come and testify about, but I do not know what you are asking about.

Mr. ANDREWS. Okay. I would expect they would support the proposal. I am reading a headline that says "RILA Congratulates Senate on Swift Passage of Stimulus Proposal." Now, of course, that was the stimulus proposal under the Bush administration of February 5, 2008, which put more money in the pockets of consumers.

Do you think putting more money in the pockets of consumers is good for the retail industry?

Mr. SULLIVAN. I would have to agree that more money in consumers' pockets is good. Other policy issues you are asking me about I am really not prepared to address.

Mr. ANDREWS. I understand.

Mr. COHEN, when you talked about the blackjack dealers and the poker dealers, and where the board decided that the bargaining unit, as I understand it, with just blackjack dealers is not big enough. Right? Who had the burden of proving in that case that the blackjack-only dealers was not the appropriate bargaining?

Was it the employer, or was it the people trying to organize the union?

Mr. COHEN. The hearing officer of the board was charged with developing a full record. If a position was——

Mr. ANDREWS. That is not what I asked you. Who had the burden of proving whether the blackjack-only unit was the right unit? Who had the burden of proving that?

Mr. COHEN. Mr. Andrews, if you do not want to answer the question, then I cannot give you the answer.

Mr. ANDREWS. Well, I would like you to answer the question I asked. Who had the burden of proof in that instance?

Mr. COHEN. It is not a yes-or-no answer. It is not a one or the other answer.

Mr. ANDREWS. Was it the employer, or the union? Who had the burden of proof?

Mr. COHEN. The NLRB hearing officer.

Mr. ANDREWS. The judge had the burden of proof?

Mr. COHEN. But there is a qualifier, if you will give me a chance to explain that I would like to explain.

Mr. ANDREWS. Up to the chairman. He gave the last questioner an extra minute and a half. I am sure he will give that to me, as well. Is he here?

No. Please answer the question.

Mr. COHEN. The answer is, the hearing officer is charged with developing a record. If an employer takes a position in a hearing, then the burden is then on the employer to make that case. That is the Bennett Industries case.

Mr. ANDREWS. Does the statute change that rule, and put the burden on the union? The bill that is before the committee?

Mr. COHEN. Are we talking about the quickie election rules, or are we talking about Specialty Healthcare?

Mr. ANDREWS. The chairman's bill. Does it shift the burden to the person trying to organize the union?

Mr. COHEN. I am not certain in a given case.

Mr. ANDREWS. The answer is yes, it does. Which is, that is truly a radical change in labor law.

Thank you, I——

Chairman KLINE. The gentleman's time has now expired. Thank the gentleman. Let us see.

Dr. Heck?

Mr. HECK. Thank you, Mr. Chairman.

Mr. RUSSELL, I appreciate your grocery store analogy. But I worked in a hospital emergency department as a physician, and look at how many different folks work in a hospital emergency department. You have doctors, nurses, CNAs, clerks, custodial staff.

And realizing it may be an apples-to-apples comparison because of the health care exemptions, but theoretically then each one of those particular job classifications could be a separate unit. And then if that is the case, what about those same classifications that work in other departments?

So if you work in the emergency department you would have one unit, if you work in med surg you could have another, if have a CNA in the OR you could have another. Is that possible?

Mr. RUSSELL. That is entirely possible. In fact, another one of my recent campaigns involved a nursing home. So the example of the CNAs in the Specialty Healthcare case is something that I paid very close attention to. In that case, the union relented.

We reached agreement on the election. There were not endless delays, we did not tie it up forever, and we got to a vote in a reasonable amount of time. I forget the exact days, it may have been 41, but we got to a vote. And everybody in the nursing home had an opportunity to cast a vote and, once they got full and fair opportunity to information.

Had Specialty Healthcare been in place, we would have an election only involving CNAs, though those jobs are fully integrated with everybody else. They all work side-by-side. And they may even work different floors on the hospital and the nursing home, but they still have to interact with the dietary department, they have to interact with the administrative employees, they have to interact with housekeeping, many departments.

So you are correct.

Mr. HECK. Thank you. And Mr. Sullivan——

Mr. HUNTER. Mr. Chairman, if you would indulge me I would like to——

Chairman KLINE. No, it is Dr. Heck's time. I am sorry.

Mr. HECK. Mr. Sullivan, usually in unions the idea is that there is strength in numbers. So unionizing these very small groups of people, how does that actually benefit the employee?

Mr. SULLIVAN. How does it benefit the employees?

Mr. HECK. Right.

Mr. SULLIVAN. I think it does not benefit the employees. I think in—in the example that I gave in my opening testimony of the grocery store, it is very common to move from department to department in—in many retail settings. And that gives the employees the benefit of variety in their day, the ability to cover shifts in other departments, earn extra money when employees are absent which is obviously an important thing these days.

And it lets them learn the business. And if single departments or multiple departments are organized as separate bargaining units, the transfer between departments is going to be hindered. And that is not going to be good for anyone.

Mr. HECK. Thank you.

And Mr. Cohen, lastly—you know, I was brought up with the adage "if it is not broke, do not fix it." What has happened with the decades of precedent in labor law recently that is now required, this fix to be propagated by the NLRB?

Mr. COHEN. My own view of it, Congressman, is that with declining union density that—and an inability to change through legislation the NLRA, there has been attempt to go to the NLRB—where a majority of the members are of the party of the White House occupant—and change, through rules and regulations without the mandate of Congress, whatever can be done to facilitate union organizing.

Mr. HECK. Thank you. Thank you, Mr. Chair. I yield back.

Chairman KLINE. I thank the gentleman.

Ms. HIRONO, you are recognized.

Ms. HIRONO. Thank you, Mr. Chairman.

I have questions for Mr. Hunter. Hawaii unions have told me that in their organizing efforts they are often prevented from accessing the workers in the workplace. Is it not true that employers have unfettered access to their employees at any time of the work day to press their views about the union? Of course, not in any legal way.

But they have access. And does anything in this bill change any of those kinds of situations?

Mr. HUNTER. Well, the employer does have unfettered access and they have unfettered access at work, where they control the employee's work life. And importantly, they have that access not from the day a union organizing drive starts, but from the day that an employee goes to work for that employer.

And some 90 percent of employers make their views known to workers as far as how they feel about labor unions. The employer tends to have e-mail addresses for employees. They generally have telephone numbers, they have they have that means of communication.

So, you know, there may be—you know, and I have heard some reference to this of while the employer finds out when a petition's filed that there is a union drive going on, there may be somewhere a union drive that the employer did not know about until the petition was filed, but I have never seen one. They always know.

Ms. HIRONO. Yes, we have heard testimony to that effect. I also find that hard to believe in a real-life situation. And if we really cared about fair elections and fair efforts at organizing, then I think that there should be something in this bill that allows for the organizers to have access to the employee.

Another question. It is pretty clear to me, in reading this bill, that the question of the filing of the various appeals that the board will now have to take up, there will not be discretionary waivers and it is going to clog things up. And I am wondering whether—since only about 1 percent to 2 percent of the appeals are actually dealt with by the board now, are there any sanctions under the current NLRA against parties who file frivolous appeals?

Because I would anticipate that there will be many of those that the board will no longer have the discretion to dispense with under this bill.

Mr. HUNTER. No, there are no sanctions for filing frivolous appeals. To my knowledge, the only thing in the nature of sanction that the board's ever had is people engaging in outrageous behavior like if I jumped on this table or something during this hearing as opposed to the positions I take, and what have you.

So there are no sanctions.

Ms. HIRONO. So generally speaking, in other parts of—well, in litigation, there are usually sanctions against people who file frivolous kinds of appeals. And I should think that we would want to put that kind of provision—it is still, if we really want to be fair about things.

There were some questions relating to the burden shifting to the employer or to the organizers with regard to identifying the community of interest. And I just wanted to ask you, Mr. Hunter, in this bill once a community of interest group of employees is identified—and, of course, it is the employers who do not want to have the organizing effort going on, or succeed.

They would want to expand that group. They have an incentive to do that. So in this bill, an employer who seeks to expand the bargaining unit—so that is a—organizers would have to get more and more signatures in order to proceed with an election.

Does the burden shift, in this bill, to the organizers when the employer wants to expand the community of interest group?

Mr. HUNTER. Well, I think as a practical matter it does. In the general nature of things, a union would establish that the unit that it seeks is a readily—has a readily identifiable community of interest. And then if an employer disputes that, they would have to show that that was not the case.

The difficulty with the standard in this bill is, it essentially provides that, unless the employer does not take the position, in just about all cases there is only going to be one appropriate unit. Community of interest is a sliding scale. Everybody who works for an employer in a particular plant has one common denominator of community of interest.

Everybody who works for the whole employer has a more common denominator of community of interest. That has never been the test. And if this is adopted, so long as an employer can show that there is a basic community of interest—in other words, that a plant unit, the act, as it reads now, indicates that the union can seek an employer unit, a plant unit, or some division thereof.

If this—that has been taken out of the act in this bill. So that essentially, as long as there is some community of interest, if the employer can say it would be a viable sufficient community of interest to have all the employees in a particular state organized, then essentially that petition's going to get dismissed.

Chairman KLINE. The gentlelady's time has expired.

Mr. ROSS, you are recognized.

Mr. ROSS. Thank you, Mr. Chairman. For the last couple of months, I have had an opportunity to work on a subcommittee issue that I chair. That has to do with the post office, which is a public sector union, totally different from what we are talking about here.

But there is an analogy to be made that I think—that is interesting with regard to bargaining units. You see, some of you all

have been to the post office, and you see there is a bunch of people in the back just working away and there is a few people at the counter, and there is a long line, and nobody from the back comes to the front.

Because their bargaining agreements prohibit one from cross-training to the other. And my concern here is—especially with you, Mr. Sullivan, when you represent the retail industry, are we not seeing what has happened in the postal industry? Where by bus-boys, or busladies, who have now unionized, will not clear my table, and the waitress or waiter cannot clear it because they are not cross-training because they are independent bargaining units?

It seems to me that what we are doing is allowing for an unfair competitive advantage to those who do not participate. And I guess I would just like your take on this as to whether you think that ultimately, if the NLRB rules go through, and Specialty Healthcare goes through as it is now, the standing law, are we not looking at a situation where we are not going to have a competitive advantage in our retail market?

Mr. SULLIVAN. Well, I think that there is a threat of substantial harm to the entire functioning of the retail market. We—before this ever became an issue—and historically retailers have placed great emphasis on cross-training. And the nature of customer service is such that when we all walk into a store to buy something, and we see an employee of that store and ask a question, we do not want to be told, "I am sorry. I do not work in that department."

We want employees who are familiar with all departments and able to work in all departments. And we want them all to support each other.

Mr. ROSS. So, Mr. Sullivan, you hit it on—I think in your opening statement, when you talked about if a bagger at a grocery store wanted to move on somewhere they really could not if they were part of this—one of these mini unions. And I am—and I go back to the founder of Wendy's, Dave Thomas, who has since passed away.

But his secret to success was, if he had to be there at 8:30 he showed up at 8. If he got off at 5, he worked 'til 5:30. But in light of many unions, in light of impediments that we are going to prohibit not only the cross-training but the advancement of employees, what career service, what career opportunities are there out there under circumstances where members of these mini unions now must be beholden to their mini unions?

Mr. SULLIVAN. I do not know.

Mr. ROSS. Mr. Russell, as a lawyer, what would you say—are there instances where you can say—that from a procedural standpoint it is better to shorten the time than to lengthen the time?

Mr. RUSSELL. Which time period?

Mr. ROSS. Any time period. I mean, as a lawyer, for procedural purposes are there any situations where you feel it is better to shorten the time as opposed to lengthen the time?

Mr. RUSSELL. No. And what troubles me about the shortening of the time that the board has proposed here is that you are taking away the rights of the employees to get the full information they need. And as I said earlier, the union has already been talking to them for weeks or months.

What is wrong with the employer having a reasonable opportunity to get that information to the employees.

Mr. ROSS. And, Mr. Hunter, why would you object to that? I mean, it seems to me that shortening the time really is more—doing more of a disservice to the union organizers or the employees for not adequately understanding the situation. I mean, why do we need to have the shortened period in the first place?

Mr. HUNTER. As I indicated, first of all I do want to stress here that I am talking in terms of a bill, and here we are talking in terms of proposed rules that—for which thousands of comments have been submitted which we do not know what form, or whether they will be adopted in their precise form. Or whether——

Mr. ROSS. But we have a pretty good indication, based on the history of this NLRB over the last couple of years.

Mr. HUNTER. The employer has had the opportunity from day one to talk to people and let them know their feelings on unions. An increase of time to essentially beat on people with——

Mr. ROSS. And you are okay with employers disclosing all the personal information under the excelsior list? Under—allowing for them to have all the—and maybe even opening up that employer to privacy suits, violation of privacy suits.

Mr. HUNTER. I do not think that if an employer—if something becomes the law, and the employer follows the law, I do not believe they are going to subject themselves to any——

Mr. ROSS. That is your experience?

Mr. Cohen?

Mr. COHEN. My experience is that employees very frequently resent having their personal information turned over, and would resent to a greater extent having to turn over a greater amount of personal information.

And in response, if I might, to something that Mr. Hunter said, I know of no employer that communicates with its employees at home on e-mail dealing with anything like the kinds of topics we are dealing with here.

Chairman KLINE. The gentleman's time has expired.

Ms. WOOLSEY, you are recognized.

Ms. WOOLSEY. Thank you, Mr. Chairman. Just on a little bit different note for just a minute, I want to thank Mr. Russell for wearing his purple ribbon. This is domestic violence month, and I have reintroduced legislation that would bring domestic violence victims and their families under the FMLA-Family and Medical Leave Act.

And I introduced it today, so thanks for reminding me to say that. Because it falls under the jurisdiction of this committee.

Mr. HUNTER. Thank you.

Ms. WOOLSEY. Thank you.

Okay, I cannot let go of this conversation about smart unions certainly do not let employers know that they are organizing. Well, first of all they cannot. They do not have access. I mean, they could if they are—but they are not going to. But even if they wanted to, they have such restrictions on and lack of accessibility to the workforce.

So okay, we know that. They can find their way around it. But from day one—I was a human resources director. For 20 years, this is my field. Employers have access to their workers from the

minute that worker is hired. I mean, if the employer is any good, and smart, smart, smart, you know, is how you would say it, that employer has new employee meetings.

And certainly they let their new workers know where they stand on unions, what they believe in as an organization. But more than that, day in and day out that employer has the opportunity to prove their workforce that they do not need third-party representation.

That is up to the employer. They can either do it or not. And if they wait until the last minute, when they have been taking advantage of their employees or not treating them, you know, the way they ought to, then surprise, surprise. They are going to want somebody else to come in and represent them instead of the leadership of their company.

So Mr. Hunter, you have said what you need to say about that and, you know, the accessibility. But we have been just making so much about how the board's proposed new rules will hurt employers if we do not change it with this bill by getting in the way of their ability to compete.

Well, I would like to ask you how many jobs do you think the so-called Workplace Democracy and Fairness Act is going to create?

Mr. HUNTER. The only jobs it would create would be for people taking care of the warehouse full of paper for all the appeals that are going to wind up being filed in order to prevent workers from having the opportunity to organize.

Ms. WOOLSEY. So what do you think? Walk us through just exactly do you think the employers would do if they have more time between filing a petition to organize and election? What do these employers need to do that they cannot do from day one when they hire their employees?

Mr. HUNTER. Well, I think what they have, if they have additional time after a petition has been filed, it is just like for all of you when you are in a—you know, you are in an election race, and what have you. Things ramp up. And if things ramp up for an excessive amount of time, where one party has all the power over the work life of the persons who are going to vote it tilts the playing field.

Just as it does, each of you, when you conduct political campaigns. You reach out to people by phone, you reach out to them at home, you reach out to them through e-mail, and staff.

Ms. WOOLSEY. So you said something I am getting the gist of what you are saying. So employers do reach out to their workers during an organizing campaign.

Mr. HUNTER. Oh, they do more than work. They do more than reach out.

Ms. WOOLSEY. I know, I know. But they can use the e-mail, their e-mail list. They can use the personnel files. And they do.

Mr. HUNTER. Absolutely.

Ms. WOOLSEY. Well, all right. So this excelsior list that, oh my, we might level the playing field by having the—allowing the union to have that same list.

Mr. HUNTER. Well, and keep in mind the union does not even have access to that Excelsior list in—until, with its hands bound and no access whatsoever, it manages to gather up signatures of

30 percent of the people, even without that. So it levels the playing field at that point, when the campaign begins, that they can at least reach out to people for whom the employer has been able to reach out from the day they started working.

Chairman KLINE. The gentlelady's time has expired.

Dr. Roe?

Mr. ROE. Thank you, Mr. Chairman.

Last night, fairly late, Dr. DesJarlais and I got back from Afghanistan. And our last visit there was a forward operating infantry base not too far from the Pakistan border west of Kandahar. Those young people there were protecting our rights to have a free and fair election.

I put on a uniform almost 40 years ago and left this country and left a family so that you would have a right to vote. As I have said in this committee hearing many times, I was elected by a secret election, the president was, the president of the unions are. And employees ought to have that same right to a free and fair election.

And I think the NLRB, it looks to me like, is—should be an impartial referee so that no employer has an advantage nor an employee has an advantage during an election. And I think that is one of the things. In 31 years as an employer I never one time mentioned a union to my employees. Never came up.

We—we talked about how to make our work better and more efficient. And Mr. Sullivan or Mr. Russell, either one of you can answer this. I am a physician, and we had—assisting the doctors, we had CNAs, registered nurses, LPNs. I have got venepuncturists, receptionists, imaging people, billing people, scheduling people.

We have got M.D.s, D.O.s, nurse practitioners. So could any one of these—for instance, nursing assistants, LPNs or RNs—be a micro unit so that they could not go back and forth? We help each other and work together to do what? To provide better care for our patients, just as in a grocery store you need to provide services to the customer—me, when I come in to buy something.

So would either one of you answer that, if you could.

Mr. HUNTER. Well, for the moment I will stay away from employees that may be professional employees. And maybe Mr. Russell could follow up a little bit on that. But for the most basic parts of your question—I am sorry. My mistake.

I will stay away from professional employees for the moment, and maybe Mr. Russell could follow up on that. For the most basic parts of your question, the answer I think is clearly yes. That CNAs and related employees are vulnerable to being organized in very small blocks. And I do not know whether there are different shifts in the practice, but certainly by job classification or department absolutely.

And not just in different bargaining units, but also potentially by different unions.

Mr. RUSSELL. I agree also with the first statement you made. That you never once talked to your employees about unions. Well, my grocery store client had no idea what to say. But here is what was going on behind the scenes. The union was doing something that, under the law, it is allowed to do.

And that is to make promises. It can make any promises it wants to under the moon. It can say we are going to get you a dollar an

hour increase, we are going to increase your benefits, we are going to give you job security. Now, none of those are promises that they can necessarily fulfill, but employees do not know that.

Whenever the petition gets filed, the employer cannot make promises. There is a fundamental restriction on what employers can say. And that is what I train my clients on whenever this comes up, when they know about it. One of the things an employer cannot do is to make promises. It is against the law.

If they say, "Well, I promise you if you do not vote this union in, then I will give you a pay increase" they just broke the law. The union could say the converse of that, and it is okay. So there is a fundamental difference in the communications here. That is why it needs to be fair for the employer to have an opportunity to get that information to employees.

Mr. ROE. Mr. Cohen, I want to ask you a question you brought up just a minute ago. Right now, when employees have an opportunity to vote, it is occurring, on a median, within 4 to 5 weeks. Unions win two-thirds of elections when they talk to employees.

So this ought to be renamed, "If It Ain't Broke, Don't Fix It Law." Because I do not know what problem you are trying to fix. To hurry something else, where people can get the information. Am I wrong on that?

Mr. COHEN. No. Dr. Roe, I could not agree with you more. This is something which has become a well-oiled machine over decades. The general counsel who administers the regional offices has preached for years, and the regional offices have complied with, cutting back, cutting back, cutting back.

We have reached a point where all we are left with is reasonable time frames. And it works, and it is the dual functions that the board has confronted us with in the last 4 months that have created the havoc and the threat of litigation and appeals coming forth. It is unnecessary.

Mr. ROE. Why do you think the board did that?

Mr. COHEN. I think the board did it because they are trying to affect a union density issue. They see that unionization numbers are low, and they see the failed attempts that they have had before Congress in terms of changing the law. So they are changing the procedures instead.

Chairman KLINE. The gentleman's time has expired.

Mr. Payne?

Mr. PAYNE. Thank you very much. Let me just say that one of the last witness has said that companies cannot make promises. I guess you are right. However, every time there is a move on the part of organized labor to organize, companies may not be making promises, as you say. And I am not so sure that they do not whisper out some things.

One thing, though, that do make clear is that you cannot make promises. However, let me make it clear, as they would say, that if we are unionized we are probably going to have to reduce our workforce. It is going to create problems, we think, in the future because there will be demands made for pension considerations, wages, et cetera.

And so conversely, even though they may not have the opportunity to make promises. They certainly have the threat, and that

is why so many union-organized efforts fail. There is no question that at one point they were 38 percent, 29 percent, 30 percent of workers in this country we are organized. It is now down to 18 percent, 16 percent, 14 percent, and going down.

Now there is no way in the world that you would have that reverse if it were not for the power of the companies to have unions that are already in—expired, but to win many of the cases where organization of labor strength.

I mean, one large employer in my district, the company had anti-union material that was put into the bulletin boards which was locked and changed daily, where there were terrible things that were put out.

Of course the argument was that it was the local workers who were opposed to the union that did it and it was not reflective of the company, to the point where I had the president of the company. So this is totally unfair.

Matter of fact, a lot of derogatory stuff, caricatures I guess you can make through the computer. You can have caricatures that are very demeaning. And so we have seen the power of the company. And like I said, my point is that they may not be able to promise, but that big stick they have about what is the future once you organize is very, very powerful.

Mr. RUSSELL. Representative Payne, if I may respond to that, there are actually four things that employers cannot do. And it is summarized in the acronym TIPS. We keep it very simple for supervisors and managers, and it is very simple. And the T means threaten. You cannot Threaten, you cannot Interrogate, you cannot make Promises, and you cannot Spy or engage in surveillance.

Mr. PAYNE. Let me tell you what they do. They threaten, they do all four of those things in their own way. Because it is a fierce fight, and I have been involved in seeing these fights go on. They do intimidate, matter of fact. They are not going to win unless they do it, and they do it.

Mr. RUSSELL. And it results in an unfair labor practice charge, which is something that could make a rerun election or overturn an election. So there is an incentive not to do it. I have had campaigns where we had no ULPs.

Mr. PAYNE. Well, they find it to their advantage to do it because they have the wherewithal in most instances to have the upper hand.

Let me just ask the questions. And I, too, commend you for your ribbon, and I support that, as did Woolsey.

Mr. RUSSELL. Thank you.

Mr. PAYNE. Mr. Hunter, in your testimony you discussed how H.R. 3094 will result in the disruption of 75 years of board experience in configuring appropriate bargaining units. Can you explain how this legislation allows employers to gerrymander bargaining units for the purpose of defeating a union election?

Mr. HUNTER. Yes. At present, the act provides that the board can determine whether the appropriate unit is an employer unit, a craft unit, a plant unit, or a subdivision thereof. The way that has been taken out of the act in this bill, this bill then would have a set number of criteria, or tools, that are used to determine a community of interest and none other.

And therefore, there is no ability for craft severance, which there has always been under the act. This would eviscerate the eight hospital units that have been created by rulemaking. And I did want to point that out in regard to the response that this would create micro units in private hospitals.

That is absolutely incorrect. The only way that that can be disrupted in this bill, that the hospitals could be disrupted, would be if this bill passes and those rules that people have relied on for the last 20 years, in that case, would be out the window.

And we would be back to the races on that, so it would totally disrupt the way bargaining units have always been configured.

Mr. PAYNE. Thank you.

Mr. ROE [presiding]. Time has expired.

Dr. Bucshon?

Mr. BUCSHON. Thank you, Mr. Chairman.

First of all, I would like to tell you, you know, my dad was a United Mine Worker for 37 years so I fully recognize the rights of workers under the labor laws of the United States, and have a great deal of respect for all workers in this country.

What we are really talking about here is an overreaching and ideologically slanted NLRB. But let's look at the bigger picture. The Obama administration is again trying to put in place their ideological agenda they could not get through a Democratic-controlled Congress when they had control of everything.

They could have changed the laws when they had the chance, and they did not do it. So I guess at that time they must have been fair. My friends on the other side of the aisle now are here defending the NLRB's actions, when they themselves would not pass laws to change what was in place.

So the American people should take note again of the administration using unelected officials to change the laws of the land, bypassing your elected representatives in the Congress of the United States.

Mr. HUNTER, you use "fairness" a lot in a lot of your comments. And I am going to ask you a couple of yes or no questions. Do you think it is fair that after months of secret organizing behind the backs of employers, going to people's homes and getting everybody today on the side of a union activist, that the employer—again, after months of activity on the union activist side—has only 7 days to present their case before the NLRB?

Do you think that is fair? Yes, or no.

Mr. HUNTER. Well, Congressman, I cannot answer that yes or no because I do not accept the premise that an employer would be unaware that——

Mr. BUCSHON. Okay. The other question I have, then. Do you accept the fact that, say, maybe an employee, not the employer—after months of union organizing which may not have involved them individually because they may not go the right way according to the union organizer—after months of organizing by the union activist, that the employee may only have 10 days to get all the facts before they have to vote?

Mr. HUNTER. Again, I cannot answer that for a couple of reasons. One, I do not accept the premise that they may only have 10 days.

Even the board's rules do not provide anything about when a direction of election issue. So I have no idea when——

Mr. BUCSHON. But according to the proposals of the NLRB that may be the result, right? You may only have 10 days before you have to vote. Is that yes, or no?

Mr. HUNTER. I cannot answer that because I do not know.

Mr. BUCSHON. Okay, Mr. Cohen, maybe you can comment on it.

Or actually, Mr. Sullivan, I would like you to comment on this. Do you think it is possible for an employer to get paperwork done in 7 days, and present their case in front of the NLRB? I mean practically possible.

Mr. SULLIVAN. I do not think it is possible to do that adequately under the proposed rules. I think employers would have varying degrees and types of difficulty, depending mostly on their size and resources and sophistication. I think a small employer is going to have no idea what has hit him and is not going to stand a chance of complying with the rules, let alone identifying all legal and factual issues, all employees involved, and putting it all down on paper within 7 days, or forever being precluded from raising issues.

As employers get bigger, their sophistication and resources probably increases. But the complexity of their organizations then makes the fact-finding much more difficult. And for RELA, they have got many very, very large organizations spread all over the United States, huge departments with subsidiaries. And just identifying who the appropriate employing unit is, who the supervisors are that know what the employees in question do day-to-day only for the proposed unit, let alone figuring out all of the other employees that really needed to be included in that proposed unit.

I think it is virtually impossible.

Mr. BUCSHON. Thank you. I am running out a little. Mr. Russell, I heard Mr. Cohen's response to the question why now.

Why now? Why, after many, many years of labor laws protecting employees and employers——

Mr. RUSSELL. Well, I agree with former member Cohen.

Mr. BUCSHON. Why would we change it now?

Mr. RUSSELL. I apologize. I agree with former member Cohen. It really is a matter of union density. It is a question of unions wanting to get some change in the law they think will help them. But one thing I want to make clear. There is a difference in the law from August 25th of this year to August 26th.

On August 25th, the law of the land for bargaining units was exactly what are the eight points in this bill. This bill is not changing the law of 75 years. It is going back to what it was on August 25. What happened on August 26 was that overreaching board favoring unions with Specialty Healthcare.

Chairman KLINE [presiding]. The gentleman's time has expired.

Mrs. MCCARTHY, you are recognized.

Mrs. MCCARTHY. Thank you, Mr. Chairman. And thank you for having this hearing.

It has been interesting listening to this debate but, Mr. Hunter, I want to go back to some of the things that I personally find under the ruling of the Specialty Healthcare. They were saying that, you know, the nursing home owner—I believe Mr. Russell brought that

case up—wanted to bring all the different units under one unit for the vote.

If you are a nurse, if you are a nurses aide, if you are a specialty technician, they all have separate duties. They also work usually three shifts. All the others might be part of administration, might be part of housecleaning, might be part of food service. Their duties are totally different and their responsibilities are totally different.

They are also trained totally different. So when you talk about—and Mr. Russell argued in his testimony—the Specialty Healthcare decision, the board abandoned longstanding precedent. However—and think about this—that the Specialty decision simply upheld the long-standing and additional community of interest.

Meaning, you had those that were directly doing patient care, and then on the other side you had those that were part of the team of the hospital and nursing home, but certainly had no technical support as far as taking care of a patient. So is it not true that we have always had the community of interest test for determining an appropriate bargaining unit?

Mr. HUNTER. Well, the board always has had the community of interest test to determine appropriate unit. What happened in Specialty Healthcare is, subsequent to the National Labor Relations Board adopting rules that define bargaining units in acute care hospitals, there was some question as to how does one determine bargaining units in the nursing home sector, a discrete sector.

And there was this rather untenable test that applied essentially only to nursing homes called the community of interest test. Or excuse me, called the "empirical" community of interest test, which essentially said, look apply community of interest, but keep in mind what we talked about and some of the comments we made when we did the health care rules.

And nobody really knew what that meant. And that "empirical" community of interest test for nursing homes is essentially what was abandoned and overturned in Specialty Healthcare. It really has no effect whatsoever on any other industry because every other industry has always had a traditional community of interest test.

And all this fear about micro units and what have you I think is just that—it is not going to play that way. There may be different unit configurations made, as there always are. But it is to say, for example, that Specialty Healthcare would have made Wheeling Island Gaming—which was the case about the poker dealers and blackjack dealers treated differently—the only way that would have been the case is if Specialty Healthcare said the CNAs on 2 North and 3 South can organize without including the CNAs on the other wards, and what have you.

And one other thing I just do want to say in this whole process is, when people talk about the agenda of the board and what have you, you know, the board does go different ways when different administrations come in and what have you. And I have greatly disagreed with some of the positions that some boardmembers in other administrations have come up with.

But I have already recognized that what they bring to the table is their life experience and what they bring to it. And the one thing that I never did is challenge the integrity of what they were doing when they made those determinations.

And I do not think that we are going to do a very good job of having people being willing to commit to public service if we determine that if what they bring from their life experience to an administrative adjudication somehow should subject them to attack as if there were some sort of a moral issue involved in what they are doing, or that they are simply carrying water. I just——

Chairman KLINE. The gentlelady's time has expired.

Mr. ROKITA, you are recognized.

Mr. ROKITA. Thank you, Mr. Chairman. For the record, I just want to say that as a new member I am a little bit disturbed at the tone that this hearing has been taking, specifically with respect to a set of questions that was asked of Mr. Cohen.

You know, my understanding is, this is not a trial. It is not a trial court. We are having this hearing so that we can be enlightened and learn something so that we hopefully have a better piece of legislation, or no legislation, that will help the people of this country. I mean, we should not be asking questions that we already know the answer to, Mr. Chairman.

We should ask questions about subjects and topics to which we do not know the answer. To that extent, I would like to ask Mr. Cohen if he can elaborate on your earlier statement that 100 percent of pre-election issues are reviewable by the board.

Mr. COHEN. Yes. Congressman, under the system right now there is an opportunity to go to a hearing or to waive that right. In 92 percent of the cases, employers waive that right. If they do not waive that right, they have the right to go to a hearing. There can at least be a request for review filed of the regional director's decisions.

Mr. ROKITA. Okay.

Mr. COHEN. That whole appeal period occurs very quickly and before the election is held. So any employer that wants to bring the matter to the board now has an opportunity to do that. Instead, what the quickie election rules would do would be to change that system dramatically and not have that kind of review.

Mr. ROKITA. How often does the time between the petition and the election exceed the 2 months? I just want to make sure that is clear on the record.

Mr. COHEN. Sure. And there is some detailed statistics in my my testimony that I have furnished. But basically, pre-election waivers of hearing occur in 92.1 percent of the cases. In those where a hearing was held, the 7.9 percent—that was 37 days from the filing of the petition until the regional director's decision—then we would have that review process, which is 25 days to 30 days thereafter.

So in the small number of cases we get up around the 60-day period of time. And in terms of the board actually passing on this—and I served on the board, as you probably know—alerts come. And as the election is coming, in virtually all cases the board takes a position on the request for review.

Mr. ROKITA. So 35 days is reasonable, or unreasonable?

Mr. COHEN. I think it is imminently reasonable.

Mr. ROKITA. Okay. I heard some, during some questioning earlier, there is, quote—"unfettered access" from employers' access to employees. But, quote—"Of course, that has to be done in a legal

way." And then I heard, quote—"access from day one" in the questions.

I want to know if Mr. Sullivan and Mr. Russell want to elaborate on that. Do you think those are accurate statements or accurate comments, Mr. Sullivan?

Mr. SULLIVAN. Congressman, not in my experience. When employees come to work day one, of course they receive an orientation. And that consists of forms and getting them prepared to start doing their jobs. I have never, in almost 20 years, encountered an employer that brought up its own views on unionization right at the get-go. I have just never seen that.

Mr. ROKITA. Okay, thank you.

Mr. Russell?

Mr. RUSSELL. I agree. And also just one comment, if you do not mind. The questioning about the board's motivations is not a personal attack. When you look at Member Becker and Former Chair Leibman, they have stated that they believe the purpose of the National Labor Relations Act is to encourage unionization. What is troubling to me as a labor lawyer, as a labor professional, is if you read section 7 of the act it says that employees, citizens, have a right to either engage in those activities or not to engage in those activities.

So I think it is very troubling, when we have someone sitting on that unelected board, the picks a side.

Ms. WOOLSEY. Would the gentleman yield?

Mr. ROKITA. No.

Mr. ROKITA. Were you done? I have been enlightened enough.

Mr. RUSSELL. I was done.

Mr. ROKITA. Thank you. I yield back.

Chairman KLINE. The gentleman yields back.

Mr. Hinojosa?

Mr. HINOJOSA. Chairman Kline and Ranking Member Miller, as a former businessman for 34 years, it seems to me that American workers need strong labor laws that protect their collective bargaining rights and encourage unscrupulous employers to create family-sustaining jobs in our economy.

I am afraid that H.R. 3094 moves us in the wrong direction. I would like to ask my first question to Mr. Hunter. In your testimony, you discussed how H.R. 3094 will lead to elections being delayed for years, based on frivolous appeals for review. Can you explain how the prohibition on directing an election until a review is completed of post-hearing appeals creates unnecessary delay?

Mr. HUNTER. Yes. Essentially what this bill would do—as Mr. Cohen indicated the board would do—in a current situation, generally within a relatively short amount of time, it will decide whether it is going to take a review. And it does not take a review in 98 percent of the cases.

What this will do is require review of every case. And even if the case involves a question as to whether one head cook in a thousand-member hospital is a straw boss or a supervisor, if that is what is up on appeal then the entire thousand-member unit is going to have to wait 2 years until that cut gets made.

That is essentially what is going to happen. And as a practical matter, it is just going to deprive people of a meaningful right to organize.

Mr. HINOJOSA. Mr. Hunter, are workers to have full and fair elections undermined by this legislation? Explain your position on that.

Mr. HUNTER. Well, they absolutely are. Again, I think in the first instance there is the delay. But in the next instance, there is the fact that, as the Supreme Court has indicated, in the first instance it is up to the workers to take the initiative to decide what unit they want to organize themselves into. And under this bill, it will not be up to the workers.

Because if the employer can show that you have some community of interest—and again, it is a sliding scale of common denominators—with the wider unit, then that is the unit that is going to prevail.

And in many cases, quite frankly, if the union is organizing a particular traditional group, a traditional craft or a traditional technical unit, and the employer expands it, the petition will simply get dismissed because the union will not have submitted a showing of interest from that wider unit. And the proceeding will just be dead, at that point.

Mr. HINOJOSA. I would like to ask the next question of Mr. Sullivan. Is it not true that regardless of the election time frame, employers always have unrestricted access to employees during the work day and have the ability to conduct captive audience meetings.

Mr. SULLIVAN. Congressman, I do not think that is a fair characterization. Employers are concerned with employees doing their jobs. They do not go after them in the workplace. And while they may have access to them, the amount of time that they devote to trying to educate employees about promises being made by unions and about what joining the union really means is very minimal overall in relation to the amount of time they spend——

Mr. HINOJOSA. I disagree with you, Mr. Sullivan. Your testimony suggests that the Specialty decision will result in more unions and make employers less attractive for takeovers. Yet takeovers generally result in layoffs, as employers combine operations or as they cut costs to pay for that takeover.

Do the workers not have greater job security if their company is not taken over?

Mr. SULLIVAN. It depends on the circumstances that the company is in at the time a takeover is being considered. These days there are a lot of companies out there that are not making it, but might get saved if they are acquired by a company that is performing strongly.

And if the potentially acquiring, and saving, company looks at a situation where there are multiple, very small bargaining units, it is going to make that acquisition much less attractive. And the potential acquirer may well walk away, resulting in loss of the business and the jobs.

Mr. HINOJOSA. Your answer——

Chairman KLINE. The gentleman's time has expired.

Mrs. Roby?

Mrs. ROBY. Thank you, Mr. Chairman.

I want to give you, Mr. Cohen, an opportunity to go back and address some of the testimony that we just heard from Mr. Hunter. He made the statement that Wheeling Island Gaming, if that had been the law, that a can on one floor in one unit could not collectively bargain with a CNA in another unit.

Can you expand on that? I wanted to give you an opportunity to respond.

Mr. COHEN. Thank you very much, Congresswoman. I could not disagree more with the characterization of that. As I said, in Wheeling Island Gaming the minority view was that as long as the union asks for all of a particular classification of employee at a particular facility that there is no reason why that should not be appropriate.

What the board did is, they took a health care case as a vehicle, an excuse, to take that position that was in the minority position, dress it up around the community of interest standard, and apply it to virtually all of the NLRB's jurisdiction and the normal NLRB's jurisprudence.

If I could? In fact, we hear a parade of potential horribles that would occur in terms of litigious employers, et cetera if this legislation were to pass. Quite simply, from where I sit, if the board were to take two simple actions—if they were to overrule Specialty Healthcare and if they were to withdraw the proposed notice on quickie elections—there would be no need for the legislation to be changed.

We would have the law as it functions, we would continue to have a miniscule amount of cases where the board grants review, and we now have all-time lows in employer challenges to union certifications in the courts. It did not always used to be like that. I worked in that part of the NLRB, as well.

It used to be a substantial function of the NLRB enforcement lawyers. It is not any longer.

Mrs. ROBY. Well, and that goes to my next question, and thank you for your classification on that.

My next question for you, Mr. Sullivan, as it relates to the Specialty Healthcare decision. I had the opportunity just a few short weeks ago to talk to, on the record, one Mrs. Ivey, who came in and testified before this committee. And her company voluntarily chose to allow the union. And as a result, she was unafforded the opportunity to vote which, as you know, represents everything that this great country stands for.

So I just want to ask you a very specific question. How does the Specialty Healthcare decision affect whether or not an employer will just raise their hand and voluntarily decide to allow?

Mr. SULLIVAN. Congresswoman, that is a great question. And I think, yet again, it depends on the circumstances of the employer. I think for very small employers, if they look at the situation that they are in and if they talk to legal counsel and say what is this going to cost me and what are my chances, they are going to throw their hands up and say, "Okay, I will recognize the union."

And, in light of other recent NLRB precedent, an employee in the situation you are describing will find herself with no avenue to file

her own petition seeking to have a secret ballot election. Because that decision will have been made——

Mrs. ROBY. For her.

Mr. SULLIVAN [continuing]. By an employer. Essentially forced into it due to these recent changes. Larger employers will have a decision to make, and that decision is going to be do I challenge this or do I see my business chipped away and harmed. And so employers will make a strategic decision based on their own situation and their resources.

And they may very well go through the process, and then refuse to bargain and accept defense of an unfair labor practice charge in the hopes of getting, some day, court review.

Mrs. ROBY. Right. Thank you for that.

And just real quickly, Mr. Cohen, let us talk about that meaningful purpose from the Gaming decision. Expand on that, just a little bit, about how important that is for the employee to have that 35 days in order to educate him or herself as to whether or not joining a union is in their best interest as an employee.

Mr. COHEN. Sure. It is a complicated world in which all employers are operating now. We are in a global economy, whether we like it or not. It is fine if employees choose representation. That is their right guaranteed under the law. But they have to do it, in all fairness to them, in a context of knowledge and to learn the state of the business.

If I can for a moment, we have heard so much about access to employees. I would submit that of course employers have unfettered access to their employees during work time. They are the employer. There is nothing out of the norm in having that. And most employers get employees together regularly to learn about the state of the business, to deal with safety issues, to hear about the economy and means of production which can be improved through cross-training and making the operation more efficient.

Chairman KLINE. I am sorry, the gentlelady's time has expired.

Mr. Kildee?

Mr. KILDEE. Thank you, Mr. Chairman. I apologize first for being late. I had another hearing in another building.

Mr. HUNTER, in 1937 General Motors and the UAW reached a one-page agreement that recognized the UAW as the exclusive bargaining representative for GM employees who were members of the union. I have always had a copy of that hanging on my wall. One page, signed by John. L. Lewis and Mr. Knutson, the CEO of General Motors.

That was very simple in those days. They agreed on a contract, and it went in effect for the members of the union. There was only one other union in General Motors at that time, the pattern makers. But it was just the UAW who were recognized then.

How will the Workplace Democracy and Fairness Act primarily make more difficult the ability to workers to establish a contract with their employer? What is the deterrents that cause the greatest difficulty?

Mr. HUNTER. Well, Congressman, I think the primary deterrents will be the inability of the union to obtain legal recognition for such a long period of time. That by the time it is able to get an election, that organizing drive would have been torn apart by an employer.

Secondly, if the employees lose all say over what bargaining unit can be established that can be taken away, they will never reach a contract because they will never have a bargaining unit that they can meaningfully bargain in.

So I think that is the difficulty. That if workers have a prompt and efficient ability to organize into appropriate units that they petition for—and the legal process is not jammed up with delays and stuff—they then will have the legal right, and the employer will have the legal obligation to bargain with them.

But unless that happens, getting a contract just is not happening.

Mr. KILDEE. Can you give us some examples of how long this process could take, has taken, or could take under this bill?

Mr. HUNTER. Well, first of all, in the initial thing you will have a hearing in which you are literally allowed to litigate anything you want. So, for example, it has been the law forever that you cannot litigate unfair labor practice charges in a representation hearing because it is supposed to be a nonadversarial hearing.

This law would mandate that it be a nonadversarial hearing, and then also mandate that you can raise any issue you want to—whether it is, you know, people ought to vote against the union because, the plant manager has always been good to them, or they should vote this way because this is unfair or because these unfair labor practices are going on, or it might affect the outcome of the election how their wages compare to other people.

So that can all be throw into that hearing. So that hearing literally would go on forever. And then on top of that, they have an absolute appeal. So that you not only have an appeal in 100 percent of the cases, but you have a record going up on appeal that is jammed up with all kinds of issues that have absolutely nothing whatsoever to do with whether or not there is an appropriate unit.

And I disagree with Mr. Cohen with the characterization that you get review 100 percent of the time. You have a right to an initial hearing 100 percent of the time, but you do not have a right to review. And review is granted in less than 2 percent of the cases.

If this becomes law, you are going to have hearings that go on forever. You are going to have records that make the court reporters happy. And then you are going to have the process at the NLRB in Washington totally jammed up with those records.

Chairman KLINE. Then gentleman's time has expired.

Mr. Walberg?

Mr. WALBERG. Thank you, Mr. Chairman. And I appreciate the panel being here.

Mr. SULLIVAN, Michigan is the proud home to Myer retail store. It has 190 stores, 60,000 people in five states, several stores, and many of the people in my district. This Specialty Healthcare would have serious implications for our fundamental business model I just have to imagine.

At a time when Michigan's unemployment rate is at 11.2 percent, and the heart of my district hovers around 15 percent unemployment. I guess I want to go to the issue of jobs and, specifically, what kinds of costs would be associated with dealing with micro bargaining units as permitted by Specialty Healthcare.

And then secondly, what will be the impact on job creation in the stores and retailers that you represent?

Mr. SULLIVAN. Congressman, the cost of dealing with micro unions with, with multiple organizing campaigns targeted at small groups of employees, is hard to imagine. Obviously, it would depend on exactly the approach the employer takes.

But first of all, it would be an enormous distraction at many levels of management. And to tie into the job creation idea, it is pretty hard to think about expanding a business, potentially buying more stores, if you are getting picked apart by having single departments organize over and over. I think the potential is just enormous, and it is not good.

Mr. WALBERG. The impact, as I think of specific jobs, if you have micro units with restrictions on cross-training, what is it this says to the individual who begins at a certain level in a store, wants to expand, wants the opportunity to grow into a job situation and, ultimately, further themselves?

I mean, we are talking about jobs and the ability to go to a place and say, "I would like to ultimately be in management." By going through all the processes, what does this do?

Mr. SULLIVAN. Well, it hinders the process. And I think the impact is felt at many levels. If you have got an ambitious person who would like to work in all of the departments in the store and progress into management, the ability to go between departments could become nonexistent.

And then when you think about the day-to-day impact on employees, regardless of their ambitions, to have to work in the floral department and only the floral department all day long and not be able to help stock cans on shelves when needed, I think would be demoralizing. I think you would have boredom and stagnation.

So I think the ambitious employees would be held back, and everybody else's quality of job experience would suffer. And I think that would come through to the customers. And that is an enormous concern. Because I have seen grocery store chains fold after a year of customer dissatisfaction, and people start shopping somewhere else.

Mr. WALBERG. Going further along that line, it seems to me the only way this adds jobs to the economy is by forcing retailers to hire more lawyers. And no offense to the lawyers in the room, at least not intended. The human resource staff to deal with all of the management nightmare. And the case of retailers, this is at a time when you really need the economy to pick up and be strong.

Is there any sense of how destructive this will be across your business from distribution center to the store itself?

Mr. SULLIVAN. Well, distribution centers are equally vulnerable to having small units organized. There are many different functions under a warehouse roof, from shipping and receiving clerks to inventory control. There are selectors who pick the boxes off the shelves. There are forklift operators. There are people who load and unload trucks.

And under Specialty Healthcare, every one of those jobs that I just stated is potentially a separately organized bargaining unit.

Mr. WALBERG. Okay.

Mr. COHEN, turning to an attorney, I noticed that you were responding by writing some fast notes at the end of the last questioning. I would like to give you an opportunity to share those with us.

Mr. COHEN. Sure. Thank you very much. It has to do primarily with this notion of what goes on at a hearing. We have 60 years' worth of jurisprudence as to what is permissible to raise at a hearing or not. I believe it is a total red herring to say that we are going to have representation hearings deal with employees thoughts about whether a union is a good idea or not.

Hearings are limited. The people in the regional offices of the NLRB know what they are doing. They hold these hearings. They do not permit irrelevant items to be raised in it. And the precise issues at a hearing have to do with unit scope and unit composition.

Chairman KLINE. Then gentleman's time has expired.

Mr. Tierney?

Mr. TIERNEY. Thank you, Mr. Chairman. You know, I am sort of amused sometimes by my colleagues on the other side who think they first have to immunize themselves by saying how closely affiliated their families re with unions, and then they jump in to attack.

But if it matters at all, I am a former president of the Chamber of Commerce. So this will be a man-bites-dog story on the other side on that. [Laughter.]

And the other is, one of my colleagues, who unfortunately left here, was chastising us all because we are not asking questions just to get the facts, we seem to be predisposed. It would be wonderful to ask questions to which we could get the answers if we had a panel here that was not predisposed and not biased. And I do not think that that is the case.

So I think maybe it is important in asking the questions to understand where our witnesses are coming from so we can put them into some sort of perspective on our own. So Mr. Sullivan, let me start with you. I understand that you are a professional advocate on behalf of business interests.

Easily recognized and, according to your own testimony, you do a wonderful job advocating for your clients. But we are being asked here to consider legislation that makes it harder for working people who want to form a union to have an election. So I want to probe a little bit more into the rhetoric that you use in your testimony.

I want to see whether or not that is supported by the facts. In your written testimony, you have got a whole section dedicated to micro unions. I think that anybody who reads Specialty Healthcare would think it was about CNAs, CNAs who want to form a union. Maybe those who read it that way missed something.

Will you point out to me the page in the Specialty majority opinion where you see the term "micro union?"

Mr. SULLIVAN. Congressman, that term is not in the opinion.

Mr. TIERNEY. No, I did not see it there either, and that is——

Mr. SULLIVAN. It is the effect that would——

Mr. TIERNEY. Well, maybe you can help me then with understanding your rhetoric on that. How big, in your mind, is a micro unit, specifically?

Mr. SULLIVAN. Well, CNAs alone—and not including other employees, nonprofessional employees, working in a nursing home—in my opinion, is a micro union.

Mr. TIERNEY. All right. So Specialty Healthcare, that issue has 53 CNAs. So 53 is a micro union, in your mind.

Mr. SULLIVAN. It is a micro union because it consists of a single job classification.

Mr. TIERNEY. Well, it is what you determine as a micro union. Fifty-three.

Mr. SULLIVAN. The term does not depend necessarily on the number of employees in the unit. It depends on the isolation of the unit from other employees that have a similar community of interest.

Mr. TIERNEY. So it is your contention that janitors and other people had a similar community of interest with the CNAs?

Mr. SULLIVAN. That was the position I think the employer took in Specialty Healthcare.

Mr. TIERNEY. I know. And it is your position to advocate for the employer. But over the last decade, the median size of units in bargaining range from 23 to 26. So let me ask you whether or not 23 employees is a micro union.

Mr. SULLIVAN. I cannot answer the question in those terms, Congressman. I can tell you that I have been involved in negotiating contracts, first contracts, after campaigns for nursing home employees in my career. And I can also tell you think when unions have petitioned to recognize employees, including CNAs in nursing homes that I dealt with, every single one of those elections proceeded under an agreement.

We did not go to hearing on one of them. And that was because that I knew the rules and worked with the union, and we were able to hammer out an agreement.

Mr. TIERNEY. I do not want to interrupt you, but I do not know where you are going with that. But it does not deal with the issue. This rhetoric that you have had of micro unions, it just sounds to me like a lot of rhetoric and it is not even mentioned in the decision.

But let us move on. Your testimony also claims that the board's proposed rule would remove board agents from the process, and result in fewer elections by agreement. When you read that proposed rule, I think you would be hard pressed to see how the board's been removed from the process.

But you also claim in your testimony that the board wants to remove its board agents from the role of developing a record on the representation issue. Now, just to be clear, if you read the rule what it says is that it is the duty of the hearing officers to create an evidentiary record concerning only genuine disputes as to material facts. That is on page 36822 of the Federal Register.

So let's get it straight. Are you taking the position that board agents should have to create a record where there are not genuine disputes as to material fact?

Mr. SULLIVAN. Excuse me, Congressman. What I mean by removing the board agents from the process is that today——

Mr. TIERNEY. No, but my question to you is whether or not you take the position that board agents should have to create a record where there are not genuine disputes as to material fact.

Mr. SULLIVAN. That is not what I am saying.

Mr. TIERNEY. That is not your position. Is it your position that employers should be able to bog down the hearing with frivolous claims?

Mr. SULLIVAN. Not at all.

Mr. TIERNEY. Thank you.

Mr. RUSSELL, let me just look to your for a second here. In February of 2009 you presented a conversation, or a talk, entitled "Staying Union-Free in a Pro-Union World—A Special Management Briefing." And you presented that to the Florida Transportation Builders Association Contractors Construction Industry conference.

In this PowerPoint for the Costangy law firm, you are stated that you are a labor employment lawyer for business, and that you help businesses stay union-free. Is that how you see your role as a businessperson? Your job is to help businesses stay union-free?

Mr. RUSSELL. That is correct Congressman—whenever the client requests. That is correct. When the clients request that service, I do provide it. I do it by the ways I have described today. Providing information to my clients.

Mr. TIERNEY. Look, I just wanted to make it clear who we are dealing with here——

Mr. RUSSELL. Correct. By providing information to my clients that they——

Mr. TIERNEY. You also——

Chairman KLINE. The gentleman's time has expired.

We have had an opportunity for all members to ask questions. I want to thank the panel, and I will turn to Mr. Miller for his closing remarks.

Mr. MILLER. Well, thank you, Mr. Chairman. I would just sort of pick up where Mr. Hunter left off. And that is that it is hard to see how you keep out the issues that Mr. Cohen has suggested would never be raised. Because, in fact, the language in your bill suggests that all of these issues can be raised in these hearings, and any other issue resolution which may make an election unnecessary or which reasonably is expected to impact an election's outcome.

And then during that hearing, parties may independently raise any issue or assert any position any time prior to the close of the hearing. And since you must now have that hearing as a matter of law, it is not the discussion of the board. It is the law, and that review will take the review of the post hearing appeals.

It seems to me that you have done exactly what many have sought to do over the years. And that is to basically prevent the National Labor Relations Board from providing a remedy to the rights for which it was designed and brought into being to protect.

It is very clear in section 1 of the Act, when it says "to eliminate the causes of certain substantial obstructions to the free flow of commerce, and to mitigate and eliminate these obstructions, where they have occurred, by encouraging the practice and procedure of collective bargaining, and by protecting the exercise by workers of full freedom of association, and self-organization," and so forth.

I mean, that may sound as an anachronism or something that does not fit in today's globalized economy. But the fact of the mat-

ter is, that is how workers get rights at work. That is how workers get a safe workplace, that is how they get a decent wage, that is how they get decent hours, decent benefits, and decent conditions.

And now what you are setting in motion is a review process and a hearing process that when it has been invoked in a limited number of cases it is an average where the elections have been held, the ballots have been impounded. And now you have the review.

It sees, on the average, some 500 days over the many years of that review. And we all know that this is a competition between holding that potential bargaining unit together, and fracturing it. And so time is on the side of those who would want to fracture it. Because employees get promoted, employees leave, they get other opportunities elsewhere.

They move, they get divorced, whatever happens in their in their lives. And that works to whittle away the unity that those members might have had. The idea that actions are never taken against them, they are not intimidated? They are intimidated all the time. That is what all those cases are about on unfair labor practices.

People are fired all of the time, and they get back pay if they are successful some years later getting rehired by their employer after the determination of that case. These actions go on all the time. And so now what you have set up is the perfect storm between raising frivolous cases, invoking the legal resources of the board, and swamping them now with hearings.

And then reviews of those hearings so the opportunity to get the collective bargaining rights that are provided for in the establishment of the National Labor Relations Act are eviscerated by this legislation.

That is consistent with the opinion of most of the members on the other side of the aisle here. That is what they would like to do. They see no reason for this Board to continue, or the act to continue. And yet it is absolutely critical to employees having some bargaining power in the workplace, to hold on to the foothold that they might have in middle class.

And we obviously know that the benefits of that go even to those employees who are not in the unionized workplace. But that process continues to support their wages, their benefits.

So, Mr. Chairman, I would hope that this legislation would undergo extensive revision if we are going to consider it. But I really believe that it really, really strips the rights of workers under the laws that have served both employers and employees well for many, many years is—now at risk of being destroyed by this this legislation. Thank you.

Chairman KLINE. I thank the gentleman. I have been given three letters in support of H.R. 3094. I would ask you now for consent that those be inserted in the record. Hearing no objection, the letters——

[The information follows:]

October 11, 2011.

Hon. JOHN KLINE, *Chairman;* Hon. GEORGE MILLER, *Ranking Member,*
Education and the Workforce Committee, U.S. House of Representatives, Washington, DC 20515.

DEAR CHAIRMAN KLINE AND RANKING MEMBER MILLER: On behalf of Associated Builders and Contractors (ABC), a national association with 75 chapters representing 23,000 merit shop construction and construction-related firms with nearly

two million employees, I am writing in regard to the full committee hearing on the Workforce Democracy and Fairness Act (H.R. 3094).

ABC supports the Workforce Democracy and Fairness Act, which would block the National Labor Relations Board (NLRB) from moving forward with its "ambush" elections proposal and also reverse the Board's recent decision in Specialty Healthcare.

For more than a year, the NLRB has moved forward with an agenda that is creating an environment of economic uncertainty and threatening to harm the construction industry. The NLRB's decisions, proposed rules, invitations for briefs and enforcement policies demonstrate that the agency has abandoned its role as a neutral enforcer and arbiter of labor law in order to promote the special interests of politically powerful unions. These actions will have negative implications for workers, consumers, businesses and the economy, including:

- *"Ambush" elections*

In August, ABC criticized a NLRB proposed rule that could dramatically shorten the time frame for union organizing elections from the current average of 38 days to as few as 10 days between when a petition is filed and the election occurs. ABC submitted comments to the NLRB stating the proposed rule would significantly impede the ability of construction industry employers to protect their rights in the pre-election hearing process; hinder construction employers' ability to share facts and information regarding union representation with their employees; and impose numerous burdens without any reasoned justification on small merit shop businesses and their employees, which constitute the majority of the construction industry. In the largest response on record, the NLRB received more than 70,000 comments, many of which strongly opposed the proposed changes.

- *Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers*

In an August 30 decision, the Board ruled that a union could seek to organize a group of nursing assistants, despite requests by the employer to include other employees in the unit. The decision effectively creates a new standard for bargaining unit determinations for all industries. This reverses a standard that has been in place for decades without controversy. The new standard places a heavy burden of proof on the employer to show that the excluded employees should be included.

At this time of economic challenges, it is unfortunate that the NLRB continues to move forward with policies that threaten to paralyze the construction industry and stifle job growth. We commend the committee for holding a hearing on this important matter and urge immediate passage of the Workforce Democracy and Fairness Act (H.R. 3094).

Sincerely,

CORINNE M. STEVENS, *Senior Director,*
Legislative Affairs, Associated Builders and Contractors, Inc.

COALITION FOR A
DEMOCRATIC WORKPLACE

October 12, 2011

Dear Chairman Kline and Ranking Member Miller:

On behalf of millions of job creators concerned with mounting threats to the basic tenets of free enterprise, the Coalition for a Democratic Workplace thanks you for holding today's hearing on H.R. 3094, the Workforce Democracy and Fairness Act. We support H.R. 3094 and urge Congress to immediately pass this much-needed legislation. The bill directly addresses recent and economically crippling actions of the National Labor Relations Board (Board or NLRB). Specifically, the bill would block the Board from moving forward with its ambush election proposal—an effort by the Board to effectively deny employees' access to critical information about unions and strip employers of free speech and dues process rights. H.R. 3094 also would reverse the Board's recent decision in *Specialty Healthcare*, which poses an immediate and direct threat to our economy by opening the door to swarms of micro-unions.

The Coalition for a Democratic Workplace, a group of more than 600 organizations, has been united in its opposition to the so-called "Employee Free Choice Act" (EFCA) and EFCA alternatives that pose a similar threat to workers, businesses and the U.S. economy. Thanks to the elected officials who stood firm against this damaging legislation, the threat of EFCA is less immediate this Congress. Politically powerful labor unions, other EFCA supporters, and their allies in government are not backing down, however. Having failed to achieve their goals through legislation, they are now coordinating with the Board and the Department of Labor (DOL) in what appears to be an all-out attack on job-creators and an effort to enact EFCA through administrative rulings and regulations.

While the Board's actions have gained recent notoriety from the unprecedented attempt by the agency's Acting General Counsel to mandate where and how one company—Boeing—can operate and expand its business, the Boeing case is just tip of iceberg. During the last few years, the Board and DOL have issued a barrage of anti-business and anti-worker decisions and rules, which collectively amount to the greatest upheaval in U.S. labor law in over 50 years. The Workforce Democracy and Fairness Act directly remedies ambush elections and micro-unions (*Specialty Healthcare)*, which are two of the Board's most damaging and outrageous actions.

On June 21, the Board proposed a rule on "ambush elections." According to Board Member Brian Hayes, these new procedures could result in union representation elections held in as few as 10 days after the filing of a union petition. The NLRB's own statistics reveal that in 2010, the

average time to election was 31 days, with over 95 percent of elections occurring within 56 days. The current election time frames are not only reasonable, but permit employees time to hear from both the union and the employer and make an informed decision, which would not be possible under the proposed timetables. In fact, the reduced time frame would leave employers barely enough time to secure legal counsel, with little to no opportunity to talk with employees about union representation or respond to promises union organizers may have made to secure union support, even though many of those promises may be completely unrealistic. Given that union organizers typically lobby employees for months outside the workplace without an employer's knowledge, these "ambush" elections would often result in employees' receiving only half the story. They would hear promises of raises and benefits that unions have no way of guaranteeing, without an opportunity for the employer to explain its position and the possible inaccuracies put forward by the union. Ambush elections would be particularly damaging to small businesses as the proposed changes would effectively eliminate any measure of due process by forcing elections before most employers could even understand what was happening or even obtain legal advice and representation.

The proposal also tramples over employer due process rights. As Member Hayes noted, the proposed rule will "substantially limit the opportunity for full evidentiary hearing or Board review on contested issues involving, among other things, appropriate unit, voter eligibility and election misconduct." The proposal would require that all pre-election hearings occur within seven days of the petition. Businesses must file a statement within those seven days setting forth their position on all relevant legal issues. Any issues not identified in the statement would be waived forever. These unnecessary time limits put enormous pressure on all businesses, but like the NLRB's ambush election proposal, the impact will be especially damaging to small business, who will have enough problems finding counsel within these time frames, let alone obtaining any meaningful understanding of their rights and obligations under this complex law.

In *Specialty Healthcare*, the NLRB paved the way for the formation of "micro-unions," which make it easier for unions to organize by permitting them to form smaller bargaining units that often exclude those similarly situated employees who oppose unionization. This effectively disenfranchises them. Prior to the decision, bargaining units had to include employees who share a "community of interest." Smaller units were only permissible where the employees in the proposed unit had interests that were "sufficiently distinct from those of other employees to warrant the establishment of a separate unit." This prevented swarms of small, "fractured units," of similarly situated employees. As a result of the Board's decision, businesses now face the possibility of having to manage multiple, small units of similarly situated employees with increased chances of work stoppages, as well as potentially different pay scales, benefits, work rules and bargaining schedules. This will greatly limit an employer's ability to cross-train and meet customer and client demands via lean, flexible staffing because employees will no longer

be able to perform work assigned to other units. Employees also will suffer from reduced job opportunities, as promotions and transfers will be hindered by organizational unit barriers.

Again, we thank you for holding this important hearing and urge immediate passage of H.R. 3094, the Workforce Democracy and Fairness Act. If left unchecked, the actions of the NLRB will fuel economic uncertainty and have serious negative ramifications for millions of employers, U.S. workers they have hired or would like to hire, and consumers.

The Coalition for a Democratic Workplace

and

National Organizations (83)
60 Plus Association
Agricultural Retailers Association
AIADA, American International Automobile Dealers Association
American Apparel & Footwear Association (AAFA)
American Bakers Association
American Feed Industry Association
American Fire Sprinkler Association
American Foundry Society
American Frozen Food Institute
American Hospital Association
American Hotel and Lodging Association
American Meat Institute
American Organization of Nurse Executives (AONE)
American Pipeline Contractors Association
American Rental Association
American Seniors Housing Association
American Supply Association
American Trucking Associations
American Wholesale Marketers Association
AMT-The Association For Manufacturing Technology
Asian American Hotel Owners Association
Assisted Living Federation of America
Associated Builders and Contractors, Inc.
Associated General Contractors of America
Automotive Aftermarket Industry Association
Brick Industry Association
Building Owners and Managers Association (BOMA) International
Center for Individual Freedom
Center for the Defense of Free Enterprise Action Fund
Coalition of Franchisee Associations
Custom Electronic Design & Installation Association
Environmental Industry Associations
Food Marketing Institute
Forging Industry Association
Heating, Airconditioning & Refrigeration Distributors International (HARDI)

HR Policy Association
INDA, Association of the Nonwoven Fabrics Industry
Industrial Fasteners Institute
International Association of Refrigerated Warehouses
International Council of Shopping Centers
International Foodservice Distributors Association
International Franchise Association
International Warehouse Logistics Association
Metals Service Center Institute
Motor & Equipment Manufacturers Association
NAHAD - The Association for Hose and Accessories Distribution
National Apartment Association
National Association of Chemical Distributors
National Association of Electrical Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Club Association
National Council of Chain Restaurants
National Council of Investigators and Security Services (NCISS)
National Federation of Independent Business
National Franchisee Association
National Grocers Association
National Mining Association
National Multi Housing Council
National Pest Management Association
National Restaurant Association
National Retail Federation
National School Transportation Association
National Solid Wastes Management Association
National Tank Truck Carriers
National Tooling and Machining Association
NATSO, Representing America's Travel Plazas and Truckstops
North American Die Casting Association
North American Equipment Dealers Association
Precision Machined Products Association
Precision Metalforming Association
Printing Industries of America
Retail Industry Leaders Association
Snack Food Association
SPI: The Plastics Industry Trade Association
Textile Care Allied Trades Association
Textile Rental Services Association
The Real Estate Roundtable
Truck Renting and Leasing Association
U.S. Chamber of Commerce
United Motorcoach Association
Western Growers Association

State and Local Organizations (37)
American Society of Employers (Michigan)

Arkansas State Chamber of Commerce/Associated Industries of Arkansas
Associated Builders and Contractors, Inc. Central Florida Chapter
Associated Builders and Contractors, Inc. Central Pennsylvania Chapter
Associated Builders and Contractors, Inc. Chesapeake Shores Chapter
Associated Builders and Contractors, Inc. Delaware Chapter
Associated Builders and Contractors, Inc. Florida East Coast Chapter
Associated Builders and Contractors, Inc. Florida Gulf Coast Chapter
Associated Builders and Contractors, Inc. Hawaii Chapter
Associated Builders and Contractors, Inc. Heart of America Chapter
Associated Builders and Contractors, Inc. Inland Pacific Chapter
Associated Builders and Contractors, Inc. Iowa Chapter
Associated Builders and Contractors, Inc. Mississippi Chapter
Associated Builders and Contractors, Inc. Nevada Chapter
Associated Builders and Contractors, Inc. Ohio Valley Chapter
Associated Builders and Contractors, Inc. Pacific Northwest Chapter
Associated Builders and Contractors, Inc. Rhode Island Chapter
Associated Builders and Contractors, Inc. Rocky Mountain Chapter
Associated Builders and Contractors, Inc. South East Texas Chapter
Associated Builders and Contractors, Inc. Western Michigan Chapter
Associated Builders and Contractors, Inc. Western Washington Chapter
CA/NV/AZ Automotive Wholesalers Association (CAWA)
CAI-Capital Associated Industries Inc. (Raleigh, NC)
California Delivery Association
Charleston Metro Chamber of Commerce
Employers Coalition of North Carolina (Raleigh, NC)
Greater Columbia Chamber of Commerce
IEC of Oregon
Iowa-Nebraska Equipment Dealers Association
Little Rock Regional Chamber of Commerce
Minnesota Grocer Association
New Jersey Motor Truck Association
North Carolina Chamber
Rogers-Lowell Chamber of Commerce (Arkansas)
South Carolina Trucking Association
Virginia Trucking Association
Western Carolina Industries

October 12, 2011.

Hon. JOHN KLINE, *Chairman,*
Committee on Education and Workforce, U.S. House of Representatives, Washington, DC 20515.

DEAR CHAIRMAN KLINE: On behalf of the National Association of Manufacturers (NAM), I am writing to express manufacturers' strong support for H.R. 3094, the Workforce Democracy and Fairness Act.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of the manufacturing economy by advocating policies that are conducive to U.S. economic growth.

The recent actions and the decisions of the National Labor Relations Board (NLRB) demonstrate the Board's commitment to pursue an activist agenda that threatens economic growth and jobs. This agenda would burden manufacturers with harsh rules, making it harder to do business in the United States. If enacted, the Workforce Democracy and Fairness Act would restore the balance needed to ensure employees receive the information they need to make an informed decision and give job creators the certainty they require to be confident in hiring and expansion.

According to the NLRB's proposed "ambush election" rule, employers would have as few as 10 days to communicate with their employees between the time they learn that a union is trying to organize the workforce and the election. This proposed rule represents a dramatic shift in union election procedures that have stood for decades. If finalized, this new regulation would pose a considerable burden on employers and limit the ability of employees to make an informed decision on joining a union.

Additionally, the Board's decision in the Specialty Healthcare case represents the most dramatic change in labor law in 50 years. The decision sets forth a new standard for determining which group or "unit" of employees will vote in the union election. These "micro-unions" could cripple an employer's ability to manage operations in an effective way, resulting in a manufacturing facility with separate unions representing custodial staff, assemblers, and fitters. We believe this decision will unnecessarily divide employees and place an extraordinary burden on employers.

Your bill, by guaranteeing an employer's ability to participate in a fair union election process by establishing a 14 day timeframe for an employer to prepare a case to be heard by the NLRB and establishing no union election will be held in less than 35 days, ensures employees are able to make fully informed decisions about joining a union. Your bill would also correctly reestablish decades of law, reinstating the standard by which employees vote in the union elections and preventing the possibility of several "micro-unions" at one facility.

We look forward to continue working with you on our shared goals for a strong economy, job creation and promoting fair and balanced labor laws. Thank you for bringing the Workforce Democracy and Fairness Act forward in the Committee. I urge its swift enactment.

Sincerely,

JOE TRAUGER, *Vice President,*
Human Resources Policy.

October 14, 2011.

Hon. JOHN KLINE, *Chairman;* Hon. GEORGE MILLER, *Ranking Member,*
Committee on Education and the Workforce, 2181 Rayburn House Office Building, Washington, DC 20515.

RE: *Committee Hearing on H.R. 3094 "The Workforce Democracy and Fairness Act"*

DEAR SIRS: We are writing to express the strong support of HR Policy Association for H.R. 3094, "The Workforce Democracy and Fairness Act" ("Act" or "legislation"). We are very concerned with the National Labor Relations Board's recent activity including the issuance of the proposed regulation regarding representation case procedure[1] and the Specialty Healthcare decision.[2] This legislation targets and would remedy the serious problems associated with the proposed rule and the Specialty Healthcare decision and would provide greater freedom of choice and protections for employees in union elections. We respectfully request that this letter be included in the hearing record.

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, these companies employ more than 10 million people in the United States, and their chief human resource officer are generally responsible for employee and labor relations for their respective companies.

The legislation would establish minimum time frames for union representation elections that would closely approximate the current 38-day median rejecting the

[1] 76 Fed. Reg. 36812.
[2] 357 NLRB No. 83 (August 26, 2011).

NLRB's recently proposed election rules that could result in elections being held in as few as 10 days, giving employees little time to hear the employer's position as well as that of their co-employees. The bill also preserves existing procedures that enable the NLRB to sufficiently determine which employees should be included in the unit that the union would represent. Finally, the bill would overturn the recent Specialty Healthcare decision, which will result in fragmented workplaces where unions can represent extremely small groups of employees (e.g., the cashiers in a retail setting) even where their interests coincide with the broader workforce.

The Board's recent actions including most prominently the proposed regulation dramatically shortening the time for union elections, and the Specialty Healthcare decision which encourages micro-units in the workplace, all serve to disrupt the workplace and undermine and hinder job growth and economic recovery. We applaud your Committee for holding a hearing on The Workforce Democracy and Fairness Act and urge Congress to pass the Act. What follows are the Association's concerns regarding the proposed election regulations and concerns related to the recently issued Specialty Healthcare decision, which the legislation would remedy.

I. NLRB's Expedited Election Rules Would Curtail Employees' Ability to Make a Fully Informed Decision on Union Representation

Election Data Indicates Proposal is a Solution in Search of a Problem. In a statement issued in conjunction with publication of the rules, NLRB Chairman Wilma Liebman states that, despite some improvements over the years, "the current [election] rules still seem to build in unnecessary delays, to encourage wasteful litigation, to reflect old-fashioned communication technologies, and to allow haphazard case-processing." Yet, the case is not made in the proposal for this apparent breakdown. Indeed, in his dissent, NLRB Member Brian Hayes cites NLRB data to show that the vast majority of elections proceed in a very expeditious manner. Currently, the NLRB's internal objective in representation cases is to complete elections within 42 days of the filing of the petition.[3] However, 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. Citing BNA data, Member Hayes adds: "Inasmuch as unions prevailed in 67.6 percent of elections held in calendar year 2010 and in 68.7 percent of elections held in calendar year 2009, the percentage of union victories contemplated by the majority in the revised rules must be remarkably high."[4] H.R. 3094 recognizes that the longstanding existing election procedures are wholly adequate.

Failure to Seek Stakeholder Views. In addition to its failure to justify the need for the proposed changes, the credibility of the proposed rules is further undermined by the decision of the Board not to solicit any views from the stakeholder community before issuing the proposal. In our Blueprint for Jobs in the 21st Century, the Association recommends "involvement of essential stakeholders in the formulation of new employment policies" (i.e., through a process of negotiated rulemaking) as a solution to the problem of existing rules failing to reflect the realities of the workplace. Instead of being formulated through a collaborative process, employment regulations often simply implement the wish list of a powerful interest group. Moreover, President Obama's Executive Order 13563 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." While independent agencies like the NLRB are not required to comply with the Executive Order, they should operate within its spirit, particularly in a highly sensitive matter like union representation elections, where a number of interests are affected. As Member Hayes notes in his dissent, there were a number of ways of involving the affected stakeholders in this process, including negotiated rulemaking or, at the very least, receiving comment by the Board's standing Rules Revision Committee and by the Practice and Procedures Committee of the American Bar Association. Indeed, some of the proposed changes, such as allowing the electronic filing of key documents with the Board, have not generated significant opposition and, as part of an overall collaborative process, could be part of a package of welcome improvements to the Board's election procedures.

Curtailing Employee Access to Essential Information Before Voting. The Workforce Democracy and Fairness Act would reject the Board's proposed "hurry up and vote" procedures, under which employees will be denied critical information in mak-

[3] NLRB General Counsel, Summary of Operations (Fiscal Year 2010), GC. Mem. 11-03, at 5 (January 10, 2011).

[4] "Number of NLRB Elections Held in 2010 Increased Substantially from Previous Year," Daily Lab. Rep. (BNA), No. 85, at B-1 (May 3, 2011).

ing an informed decision regarding whether to be represented by a union—a decision that in the vast majority of situations is, as a practical matter, a permanent one that will bind not only the voting employees but later hires as well. Under the proposed regulations, there are two critical areas where key information will be limited or curtailed:

• Shorter Campaign Periods. While the proposed rules do not identify a specific time target, a key provision in the changes requires the NLRB regional director to set the election at "the earliest date practicable." Member Hayes estimates that the changes will result in elections between 10 and 21 days. This is far shorter than the current 38 day median (within which, as BNA data indicates, unions win 2 of every 3 elections already), which is itself a considerably shorter period already than voters have in deciding whether a candidate will represent them for 2, 4 or 6 years in Washington. In most cases, this gives employees ample opportunity to hear not only from their employer but to discuss the issues among themselves. Both the Board and the U.S. 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."[5]

• Not Knowing Who Else the Union Would Represent. In seeking to expedite the election process, the proposed rules would eliminate pre-election proceedings in certain situations where the employer disputes the union's claim of which employees will vote upon and potentially be represented by the union. Currently, the Board will make a "unit determination" in those situations before the employees vote. The dispute may be based on different job classifications or, as discussed below, whether certain employees are exempt supervisors and therefore excluded from the voting and the representation. The proposed rules provide that, where the disputed group of employees involves fewer than 20 percent of the total number, all employees are to vote anyway, with the votes to be counted after the unit determination is made. Thus, in a casino setting, the blackjack and poker dealers may have to vote without knowing whether their terms and conditions of employment will be covered by a collective bargaining agreement that also covers waiters and waitresses, bartenders and others that may or may not have a sufficient "community of interest" with them.

Uncertain Status of Supervisors. One critical group that will be affected by the "20 percent" rule just described are supervisors, whose exempt status determines not only whether they will vote and be represented by the union, but also whether their conduct is regulated by the same rules that apply to the employer. Thus, if they participate as employees in the campaign and it is later determined that they were in fact supervisors, statements they made for or against the union could be deemed coercive. This could result in the election being overturned, as occurred in Harborside Healthcare, Inc., where an employee who helped the union solicit supporters was later deemed a supervisor.[6]

Denial of Employer Due Process Rights. A number of the changes, purportedly in the interests of expediting election procedures, would curtail the ability of employers—especially small businesses—to effectively present their position to the Board on critical issues like which employees should or should not be in the unit. Many of these highly technical but significant changes would violate the requirement of "an appropriate hearing" under the National Labor Relations Act, including:

• Limiting access to the NLRB for review of both pre-election and post-election determinations made by regional bureaucrats who often are not lawyers;

• Requiring employers to articulate and substantiate their positions on key election issues prior to any hearing or risk waiving those arguments; nor could they offer evidence or cross-examine witnesses with respect to virtually any issues not raised by them at the outset, even if those issues have a critical impact on the employees;

• Requiring an employer who contests the union's description of the "appropriate unit" to identify "the most similar unit" that the employer would deem appropriate, and provide the names, work locations, shifts and job classifications of those employees, which would then become available to the union.

Expanding Union Access to Employees' Personal Information. Under current procedures, once an election is ordered, employers are required to provide the union with a list of the names and addresses of the employees who will be voting. The

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[5] See Chamber of Commerce of the United States v. Brown, 554 U.S. 60, 60-68 (2008); Franzia Bros. Winery, 290 N.L.R.B. 927, 932 (1988). Section 8(c) of the National Labor Relations Act protects an employer's right to communicate with employees regarding unions and representation issues.

[6] 343 N.L.R.B. 906 (2004).

proposed rules would expand the information required under so-called "Excelsior lists"[7] to include telephone numbers and email addresses, though it is not clear whether this information would be personal, business or both. Either is problematic. If personal email addresses and telephone numbers are required, this would be a significant incursion on employees' privacy. If the requirement involves business telephone numbers and email addresses, this would be an unprecedented expansion of union access to employers' workplaces. The Workforce Democracy and Fairness Act would protect employee privacy and limit the information made available making it similar to the longstanding procedure.

II. The NLRB's Decision in Specialty Healthcare Furthers Long-term Goal of Labor to Undermine Fundamental American Labor Law Principle of "Majority Rules"

Decided on August 26, 2011 by a vote of 3 to 1, with NLRB Member Brian Hayes dissenting, the decision in Specialty Healthcare,[8] enables unions to secure organizing victories by carving out very small "micro-units" within a workplace, such as cashiers in a retail setting or poker dealers in a casino setting. What makes the situation even more alarming is the inability of employers to obtain a prompt review in the courts, which will likely take two or three years at best. Consequently, prompt legislative action such as the Workforce Democracy and Fairness Act is necessary.

Determining Who Votes in a Union Representation Election. When a union seeks to organize employees in a workplace, the first issue to be addressed is usually which group of employees will vote and ultimately be represented by the union if it is successful—i.e., the "appropriate unit." The general touchstone in making this determination, which is very fact-sensitive, is whether there is a "community of interest" among the employees. When a union has authorization cards signed by at least 30% of the employees in the unit, it files a petition with the NLRB regional office. If the employer believes the union's target is not an appropriate unit, it can challenge the petition, prompting a hearing and determination by the Board as to what the appropriate unit is, i.e., a "unit determination." In making this determination, there is a presumption in favor of the union's petition. However, if the employer believes that other employees have been inappropriately excluded, it will argue that there is a broader community of interest and, prior to Specialty Healthcare, the employer generally could prevail if it could show that the union's unit does not have interests that are "sufficiently distinct" from the larger group.[9] The legislation would generally preserve this framework.

Union's Victory Strategy Often Premised on Smallest Possible Group. The smaller the group of employees voting in an election, the fewer the union needs to gain a majority. Thus, unless there is strong sentiment favoring the union in the larger workplace, the union will target a discrete group where pro-union sentiment is strongest and hope to hold the support of a majority of them in the election. If successful, the union can then try to secure better wages, benefits and other advantages for this small group, creating a case it can then make to the larger workforce. Thus, in Specialty Healthcare, rather than seeking to organize the entire non-acute healthcare facility—or even all nurses—the the union targeted certified nursing assistants (CNAs), and excluded registered nurses (RNs) and licensed professional nurses (LPNs), not to mention cooks, dietary aides, business clericals, residential activity assistants and others covered by the employers human resource policies.

The Goal of Organizing "Minority Unions." As organized labor's ability to organize new members has declined, it has begun supporting the concept of "minority unions," i.e., enabling any subset of a workforce's employees to form a union that the employer must bargain with, even if a majority of the employees do not support it. Although a petition has been filed with the NLRB by a broad coalition of unions to achieve this through rulemaking,[10] the National Labor Relations Act is clearly based on a "majority rule" principle. Moreover, such a policy, which mirrors the laws in several European countries, would be viewed by employers and, likely the overwhelming majority of policymakers as well, as being highly disruptive and divisive in American workplaces at a time when U.S. employers are struggling to compete globally. Nevertheless, organized labor is interested in any approach that enables it to subdivide a workforce to obtain smaller "majorities" in elections.

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[7] Named after Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966).

[8] 357 NLRB No. 83 (August 26, 2011).

[9] Cf. Wheeling Island Gaming, 355 NLRB No. 127, Slip. Op. at 1 n.2 (August 27, 2010); Newton-Wellesley Hospital, 250 NLRB 409, 411-12 (1980).

[10] Petition in the Matter of Rulemaking Regarding Members-Only Minority-Union Collective Bargaining (Aug. 14, 2007).

The Specialty Healthcare Decision. In Specialty Healthcare, the Board adopted a new standard for determining appropriate units, raising the bar substantially—impossibly, in the view of many labor lawyers—for an employer to challenge the union's unit as excluding other employees with a shared community of interest. Abandoning the "sufficiently distinct" standard, the Board will now require employers to show that there is an "overwhelming community of interest" with the larger group by pointing to "factors that overlap almost completely." Effectively, any time a union files a petition involving a group of employees with the same job title and description, it will likely prevail. Although in deciding the case the Board sought in one part of the decision to claim that the new rule would only apply in non-acute health care facilities, the otherwise broad statements made in the decision prompted dissenting Member Brian Hayes to point out what management attorneys are generally concluding as well:

[T]his test obviously encourages unions to engage in incremental organizing in the smallest units possible * * * [It will] make it virtually impossible for a party opposing this unit to prove that any excluded employees should be included * * * [T]he Board's Regional Offices * * * will have little option but to find almost any petitioned-for unit appropriate * * *[11]

The Disruptive Impact of the Decision. The successful operation of a business often depends on the ability to maintain uniform human resource policies that provide wage scales, benefits, scheduling, promotions, and so forth to a broad range of employees within the workplace. To have these policies fragmented, requiring bargaining with a union representing a small group of employees every time changes are made, can make or break the employer's ability to maintain the flexibility needed to respond to the demands of the marketplace. This becomes even more difficult if there are multiple unions, each representing one small part of the workforce. Thus, in a retail setting, in order to change major store policies, such as hours of operation, management of work flows during peak seasons, etc., the store owner may first have to bargain with the unions separately representing the cashiers, the salespersons in each department, the loading dock, the delivery truck drivers, etc. To underscore the absurdity of the ruling in Specialty, an earlier ruling in a case involving a casino rejected a union's petition to organize the poker dealers as a distinct unit from the blackjack, roulette, craps dealers and so forth.[12] Under Specialty Healthcare, the union would likely have prevailed, as signaled by Member Craig Becker's dissent in the case.

Inability of Employers to Bring a Legal Challenge Necessitates Legislative Solution. What is perhaps most disturbing about the Specialty Healthcare decision is the inability of employers to obtain a challenge in the courts, due to the complicated procedures of the NLRB. With extremely rare exceptions, the NLRB does most of its rulemaking with decisions in cases rather than regulations. There are two kinds of decisions—those such as Specialty Healthcare involving election procedures (called "R cases") and those involving unfair labor practices ("C cases"). Only decisions in C cases can be appealed directly to the federal courts, nor generally is there any realistic ability to obtain declaratory relief by a court that a Board decision is wrong. If an employer wishes to challenge an R case decision where the union "won" the election, it must refuse to bargain with the union, thus committing an unfair labor practice, which then invokes the Board's procedures in those cases. Thus, the time frame from the filing of a union petition to a review by the courts typically involves at least a year or two if not longer. Meanwhile, as employers wait for the right case to move through these procedures, every NLRB regional office in the United States will be required to rule on union petitions in accordance with Specialty Healthcare. Absent legislation overturning the decision, the disruptive effects will be felt immediately and for a very long time. Thus, it is imperative for Congress to pass the Workforce Democracy and Fairness Act.

We applaud the Committee for holding this hearing and appreciate your consideration of this matter.

DANIEL V. YAGER,
Chief Policy Officer & General Counsel, HR Policy Association.

Mr. MILLER [continuing]. Also under the announcements that make available documents for the hearing for the record.

Chairman KLINE. No objection to either, they will be submitted for the record.

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[11] Specialty Healthcare, 357 NLRB No. 83, Slip. Op. at 19-20.
[12] Wheeling Island Gaming, Inc., 355 NLRB No. 127, Slip. Op. at 1.

[The information follows:]

Prepared Statement of Chris Grant, Schuchat, Cook & Werner

Per your request, here is a summary of two examples of employer abuse of the election process creating delay:

1. Employer refusing to provide issues in advance of hearing and taking contradictory positions

Employers sometimes refuse to provide notice of the issues prior to the hearing, and then change their positions, resulting in delay. In ADB Utility Contractors, 353 NLRB No. 21 (2008) and 355 NLRB No. 172 (2010), the employer refused to give its position as to the issues prior to the representation hearing, forcing the union to guess as to what the employer would argue. At the representation hearing, the employer contended that its project supervisors and project managers (involving less than 20% of the unit) were employees and not supervisors. Notwithstanding, the employer subsequently argued at the unfair labor practice trial in the case that various crew leaders which the employer had fired for their union activity, that worked under the project supervisors and managers, were statutory supervisors. That is, the employer took the exact opposite position as to the status of the same individuals in two, virtually contemporaneous NLRB proceedings. The employer also knew that the workers were meeting with union representatives before the union filed the representation petition, and the employer acted on that knowledge. The General Manager informed employees that he knew that they were attending union meetings, and the employer fired several lead union supporters before the union filed the petition.

The Union spent nearly five years having to litigate the employee status of the crew leaders. In the 2008 decision, the Board noted that delay in the case was due to the Employer posture on the supervisory issue which was "a complete turnaround from its position during the near contemporaneous representation proceeding." The Board noted that, but for the Employer's contradictory positions, the Board could have issued a decision earlier.

If the law required exhaustion of Board appeals before an election, in cases like ADB where employers raise frivolous issues it would take five years before employees would have the opportunity to vote. Employees would be denied the right to select a representative for 5 years or more.

2. Employer repeatedly litigating the same position at facilities across the country despite repeatedly losing

In response to election petitions, the American Red Cross forces local unions across the country to litigate simple issues that the ARC has lost multiple times at other facilities. This creates delay.

Unions typically seek to include team leaders (also called mobile unit leaders, site supervisors, and charges) in Red Cross bargaining units. These are frontline employees who collect blood and have the same hours as other employee, work under the close supervisor of low-level managers, are subject to detailed rules, and have little discretion in making decisions. The ARC claims these employees are supervisors. It has lost this claim many times, but continues to raise it. See American Red Cross, Heart of America Blood Services Region, Case 33-RC-5033 (May 4, 2007), American Red Cross Blood Services, Southern California Division, Case 21-RC-20885 (May 11, 2006), American Red Cross, Missouri-Illinois Blood Services Region, Case 14-RC-12500 (June 10, 2004), American Red Cross Tennessee Valley Blood Services Region, Case 26-RC8399 (November 24, 2003) (site supervisors are not statutory supervisors); American Red Cross Blood Services, Northern Ohio Region, Case 8-RC-16337 (charges are not supervisors); American Red Cross Badger-Hawkeye Region, Case 13-RC-20710 (March 14, 2002) (collections specialists II are not statutory supervisors); American Red Cross Tennessee Valley Blood Services Region, Case 26-RC-8150 (March 13, 2000) (mobile unit leaders are not statutory supervisors); Tri-State Division Greater Alleghenies Region, American Red Cross, 9-RC-17310 (November 1, 1999) (charge nurses are not supervisors); American Red Cross Blood Services, Northern Ohio Region, Case 8-RC-15906 (August 24, 1999) (charges are not supervisors).

Unions also typically seek to represent collection or blood drive employees in an area (numbering up to 150 employees). The Red Cross has repeatedly argued that Unions must represent other non-supervisory employees in the area, like tele-recruiters and lab techs, that have little to no contact with the collection employees, work in different facilities, and work under different supervisor, and do not collect blood. The ARC has lost this issue repeatedly. American Red Cross, Arizona Region,

Case 28-RC-6452 (July 7, 2006); American Red Cross, Missouri-Illinois Blood Services Region, Case 14-RC-12500 (June 10, 2004), American Red Cross Tennessee Valley Blood Services Region, Case 26-RC8399 (November 24, 2003); American Red Cross, Blood Services, Southern Region Savannah East Coast District, Case 10-RC-15296 (August 9, 2002), American Red Cross Badger-Hawkeye Region, Case 13-RC-20710 (March 14, 2002), American Red Cross Blood Services Southwest Region, Case 16-RC10255 (June 23, 2000); American Red Cross Tennessee Valley Blood Services Region, Case 26-RC-8150 (March 13, 2000).

The litigation of issues that the ARC repeatedly loses at the least creates unnecessary delay in scheduling and holding an election. At worst, it is in bad faith.

If you need additional information, let me know.

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Staying Union-free in a Pro-union World:

A Special Management Briefing for FTBA Contractors

Phillip B. Russell

Labor and Employment Lawyer for Businesses

February 24, 2009
FTBA/FDOT Construction Conference

Florida Transportation Builders' Association

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What I do . . .

- **I help businesses**
  - **comply with all labor and employment laws**
  - **stay union-free**
  - **avoid and win lawsuits**
- **I do this by providing**
  - **advice and counseling services**
  - **reviewing and revising handbooks and policies**
  - **training supervisors and managers**
- **I am an advocate for businesses!**

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Today's Workshop

- The New Pro-union World
  - The Obama Team and Congress
  - Executive Orders - *Forced Unionization Through Federal Contracting*
- The State of the Unions – No Worries! (*right?)*
- How Unions Organize Now – Elections
- How Unions Want to Organize – EFCA
  - RESPECT Act - *The push for more members!*
- Staying Union-free in a Pro-union World

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Who Said This?

"I don't believe the labor movement is part of the problem. It's part of the solution."

President Barack Obama
Friday, February 6, 2009
When Signing his 4th Pro-Union Executive Order

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Obama's Pro-union Team

- **NLRB Chair, Wilma Liebman**
  - Board focus should be to *promote* union organizing!
- **Department of Labor, Hilda Solis (ON HOLD)**
- **EEOC Acting Chair, Stuart J. Ishimaru**
  - Systemic discrimination, caregiver discrimination
- **OFCCP Acting Director, Lorenzo Harrison**
- **Dep't of Homeland Security, Janet Napolitano**
  - Favors temporary guest worker program (good), but also passed first mandatory E-verify law (lose business license if you don't; bad)

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The Pro-union Congress

- Both chambers controlled by substantial majorities of pro-union politicians
- Democratic Party platform called for passage of the Employee "Forced" Choice Act
- House passed EFCA in 2007
- Senate is very near filibuster proof magic number
- Big Labor supported Democrats with hundreds of millions of dollars in contributions

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Why Did Unions Support Democrats?

"We will strengthen the ability of workers to organize unions and fight to pass the Employee Free Choice Act."

- 2008 Democratic Party Platform

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Obama's Pro-union Executive Orders

- **Notice Posting Requirement**
- **Can't Use Federal Money to Stay Union-free by:**
  - preparing and distributing materials;
  - hiring and working with legal counsel or consultants;
  - holding meetings (including paying the attendees for time spent at meetings held for this purpose); and
  - planning or conducting activities by managers, supervisors or union representatives during work hours
- **Successor Projects – Must Recognize Existing Union**
- **Project Labor Agreements (PLA's)**
- **Why Issue These Orders?**
  - Foundation for using bailout money to promote unionization

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Executive Orders Webinar

Tuesday, March 10, 2009

Register at www.constangy.com

- Analysis of all 4 Executive Orders and the upcoming regulations
- Advice for what businesses should be doing
- Political briefing from Capital Hill by Brian Worth of the IEC

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The State of the Unions

"We don't have to worry about unions in Florida or in our industry."

"Right ?"

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What Percentage Are In Unions?

- Private Workforce Nationwide
- Private Workforce in Florida

Both are about 7.6%

- Construction Industry Nationally

About 15%

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But, Unions Win More Elections!

- First Half of 2008
  - # of elections was same as in 2007 (776), but Union win rate increased substantially!
- Unions won 66.8% (up from 58.5%)
- Teamsters, SEIU, and IAM most active and most successful
- Construction industry win rate for unions?

62.3%

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Since 1996, Unions have improved their record in elections each year.

- In 2001, unions won 54% of representation elections nationwide.
- In 2002, unions won 56% of representation elections nationwide.
- In 2003, unions won 57.8% of representation elections nationwide.
- In 2004, unions won 59% of representation elections nationwide.
- In 2005, 2006, and 2007,unions won over 60% of representation elections nationwide.

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Yeah, but . . .

1. Unions are a thing of the past. Maybe there was a reason to have them before, but not now!
2. We don't have to worry about unions in Florida.
3. We don't have to worry about unions in our industry.
4. ***My people would never support a union!***

Top 4 Ways to "Stick Your Head in the Sand"

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What Do Your People Think About Unions?

- 58% have at least a favorable opinion about unions

www.rasmussenreports.com
September 2006 Survey
1,000 participants nationwide

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Why Employees Support Unions

- Lack of communication
- High-handed treatment
- Inconsistent treatment/showing favoritism
- Employee abuse
- Lack of written rules and policies
- Failure to show competent leadership
- Lack of personal recognition

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Why Employees Support Unions

- Lack of employee participation
- Inadequate or inequitable employee benefits
- Wages – *BUT NOT THE MAIN REASON!*
- Failure to show positive benefits
- Lack of grievance procedures
- Failure of employee identification with company

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Why Employees Support Unions

- Lack of job security
- Lack of job design
- Neglect of safety or environmental factors
- Management too busy to listen
- Not knowing what is expected of them
- Suggestions not given consideration
- Poor working conditions

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Impact of Job Satisfaction

- Bad Job → 8 to 1 for Union
- "So-So Job" → 3 to 1 for Union
- Fairly Good Job → 2 to 1 for Company
- Great Job → 7 to 1 for Company

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Impact of Employees' Perception

- Management does not care about me at all → 7 to 1 for Union
- They care some, I think → 2 to 1 for Union
- I know they care some → 2 to 1 for Company
- They really care! → 8 to 1 for Company

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#1 Reason

Their employer does not do anything to make sure employees have all the information they need to see that a union is not only bad for the company and supervisors, but it is bad for them as well!

What we have here is a failure to communicate!

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Reasons You Don't Want a Union

<u>3 Perspectives</u>
Company
Supervisors
Employees

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Company's Reasons For Not Wanting A Union

- Flexibility
- Individual problem-solving
- Customer commitments
- Costs
- Loyalty

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Supervisors' Reasons For Not Wanting A Union

- Adversary relationship
- Attacks on credibility
- Production squeeze
- Belligerent shop stewards
- Ability to respond to individual needs

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Employees' Reasons For Not Wanting A Union

- Union "Leadership"
- Union Control Of Benefits
- Unions Don't Protect Job Security
- MONEY (Cost Of Membership And Union Finances)
- Worthless Promises
- Union Rules, Fines, And Discipline
- Conflict
- Strikes
- Loss Of Individuality
- Blind Adherence To Seniority
- Exclusive Representation
- No Easy Way To Get Rid Of Union

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How Unions Organize Now: What is the Law?

Secret Ballot Elections

Employer Does Not Have to Agree to Terms

Employer Has Free Speech Rights

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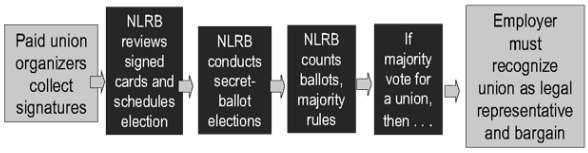
Union Organizing: Current Law



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To Organize a Workplace

1. **Unions must get enough authorization signatures on cards or petitions**
   - **The magic number is 30%, but . . .**
   - **Real magic number is about 60-70%**
     - Union organizing field manuals
2. **NLRB schedules representation hearing**
   - **Checks cards**
   - **Determine any bargaining unit issues**
     - Supervisory status of crew leaders?

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To Organize a Workplace

3. **Campaign**
   - Supervisor training
     - Leadership, communications
     - Do's and Don'ts
   - Indirect employee communications
     - flyers, paycheck letters, postings
   - Employee meetings
4. **Election Day – Secret Ballot**
   - 50% + 1
   - Don't have to vote for union even if you signed an authorization card!

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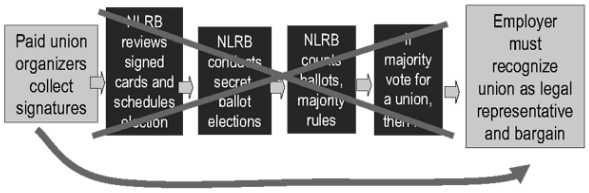
"Employee Free Choice Act"



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How Do Unions Get Signatures?

- Who are the leaders?
  - Disgruntled or former employees
  - Former employees
  - Paid outside organizers
- What do they do?
  - Promises, promises, promises
  - Peer pressure
  - Deception
  - Threats

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New Organizing Tactics

- Focus on younger workers who are tech-savvy
- Online social networking
  - MySpace and Facebook
- Cell Phones
- Text Messaging
- Instant Messaging
- E-mail Distribution Lists
- YouTube Videos

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Early Warning Signs

- **Strangers in or around parking lots or entrances**
- **Union cards or propaganda**
- **Group meetings off premises**
- **Social Butterflies**
- **Increased complaints**
- **Questioning of authority**
- **Changes in relationships**
- **Emergence of new leaders**
- **Increase in rumors and gossip**

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Early Warning Signs

- **Increased activity in and around restrooms.**
- **Increased food trailer and parking lot activity.**
- **Increased grapevine activity.**
- **Increased griping.**
- **Unexplained work slowdowns.**
- **Unexplained deterioration in amount and quality of work.**
- **Unexplained perfection in work.**

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Early Warning Signs

- **Employee reluctant to look supervisor in the eye, or talk one-on-one.**
- **Employees disperse when supervisor walks up.**
- **Requests for lists of names and addresses**
- **Changes in work habits**
- **Increased contact between shifts**
- **Questions about unions**
- **Joking comments about unions**

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The BIGGEST Early Warning Sign of Organizing Activity?

Change!

Yes, We Can! (and yes, we did!)

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How Unions Want to Organize

Change the Law!!!!

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The Employee "Forced" Choice Act

NO Secret Ballot Elections
Binding Union Contracts
Severe Employer Penalties for Resisting

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No Secret Ballot Elections

- Majority of cards = union (no election!)
- Employees' "votes" would be publicly disclosed
  - **Exposes employees to coercion and pressure from union organizers and pushers**

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Compulsory, Binding First Contract Arbitration

- **Bargaining within 10 days of union demand**
- **Refer to FMCS after 90 days of "bargaining"**
- **Arbitration after 30 days**
- **Results binding on parties for 2 years**

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Guaranteed First Contracts

- Replaces concept of "bargaining impasse" with a new concept
- IMPASSE – could simply be agree to disagree
- "Impasse" under EFCA is bargaining for 90 days without executing a contract
  - **After which the federal government steps in to impose a binding two-year contract**

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New Penalties and Remedies

- Liquidated damages equal to double back-pay (i.e., triple back pay)
- Civil penalties ($20,000/violation) for certain employer campaign conduct
- Priority NLRB investigations of employer conduct under mandatory injunction provisions (employee reinstatement during investigation and federal court litigation)

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How Will This Affect Campaigns?

- Union can promise "guaranteed" first contract during organizing campaigns
  - **Presently, less than 50% of first contract negotiations end up with a contract**
- Current national labor policy does not mandate a contract
  - **EFCA does**
- Union can coerce employer capitulation to contract demands and union's campaign promises…
  - **or face uncertainty of government-appointed arbitrator's binding contract**

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Can the EFCA Become Law?

- March 2007 – EFCA passed the U.S. House
- June 2008 – EFCA stalled in U.S. Senate
- Democratic Party platform
- Obama supports EFCA

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If Not The EFCA, Then What?

- **Quickie Elections of 10-14 days**

- **No Captive Audience Speeches**
  - **Bar captive audience speeches or require equal time for union organizers**

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RESPECT Act

with or without the EFCA

- **Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers Act**
- Eliminates supervisory duties of "to assign" and "responsibility to direct" from statutory definition
- Adds new requirement that employee spend a majority of time on performing remaining "supervisory" duties

- Would greatly reduce the number of employees that are "supervisors" and who are not eligible to join a labor union
  - Crew leaders; working foremen; charge nurses

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EFCA + RESPECT + New NLRB =

- New style of campaigns
- Unprepared business community
- Huge increase in organized businesses
- Aggressive Penalties and Remedies

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Possible Other Labor Laws

- **Ban on striker replacements**
- **Restrictions on outsourcing**
  - **or tax incentives**
- **Reclassification of independent contractors as employees**

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Staying Union-free in a Pro-Union World

A Strategic Approach to Labor Relations and Union Avoidance

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4 Steps

1. **Review and Analyze Key Polices, Procedures and Practices**
   - **Statement on Unions**
   - **Open Door Policy**
   - **No Solicitation / No Distribution**
   - **Employment at Will**
   - **Progressive Discipline**

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4 Steps

2. **Education and Training**
   a) **Supervisors and Managers**
      - Labor Relations in the Modern Workplace
      - Causes and Signs of Union Organizing Activity
      - Responding to Organizing Activity
      - Leadership and Communication Skills

   b) **Employees**
      - Unions in the Modern Workplace
      - Meaning of Union Cards
      - Reasons to Remain Union-free
      - Key Policies Review and Discussion – *Assess Weaknesses!*

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4 Steps

3. **Response Team / Material Creation**
   - Issue Assessment
   - Supervisor Guides
   - Response Preparation
4. **Union Activity Response**
   - Unit Evaluation Consultation
   - Hearing Representation (mini-trial)
   - Management Refresher Training
   - Campaign Planning and Execution

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Employer Don'ts

- T
  - Threaten
- I
  - Interrogate
- P
  - Promise
- S
  - Spy

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Employer Do's

- F
  - Facts
- O
  - Opinions
- E
  - Experiences

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Labor & Employment Law Workshop

Thursday, March 12, 2009
Marriott Waterside

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Compliance and Prevention Services

- **Supervisor and Manager Training**
  - **Employment Law 101 every Third Thursday**
  - **Customized on-site training**
- **Advice and Counseling on Tricky Situations**
  - **Hotline Service at Flat Annual Rate (HANDOUT)**
- **Audit Policies, Practices**
  - **Flat Rate Projects (Handbook, Policies, Payroll)**

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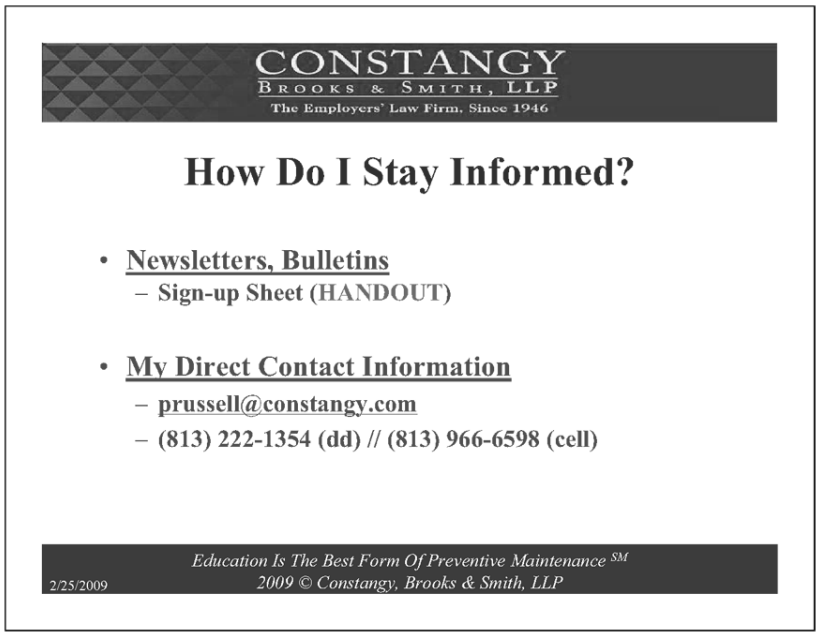

Chairman KLINE. I want to thank the panel, and just restate what I think is the obvious. This is a legislative hearing. We have some legislation before us. We are hearing from experts their views, their opinions, on the impact of that legislation and the impact of the proposed rule and rules coming from the National Labor Relations Board.

It is the intent of the legislation not to clog up the review process. We are looking to codify what has been existing practice in both reviews and appeals, and allow this to move forward smoothly. We believe that the current actions of the board are injurious to workers, denying them the opportunity to hear all sides of the debate before they make a truly huge decision in their lives and their family lives on whether or not to recognize a union.

We believe that the current ruling is manifestly unfair to employers, particularly small employers, when they have to deal with something like this, and more. I understand we have a multi-volume set, a couple of volumes. And as Mr. Russell pointed out, there are many, many employers who have no idea what is coming through the door and they have 7 days to find the lawyer, get their position in, and then not be able to change it.

So we are looking in this legislation to undo what I think are very injurious actions of the National Labor Relations Board, protect the rights of employees and employers as they go forward to make these decisions. We will be informed by the hearing today. And if we need some classification, to Mr. Miller's point, in report language or in changing the language of the bill to make sure that we are not doing the egregious harm which has been suggested by the other side, we will of course be looking at that.

Again, I thank the witnesses for their participation today. And there being no further business, the committee stands adjourned.

[The prepared statement of Mr. Kucinich follows:]

Prepared Statement of Hon. Dennis J. Kucinich, a Representative in Congress From the State of Ohio

Mister Chairman, I strongly oppose H.R. 3094, "The Workforce Democracy and Fairness Act." It would tear down seventy five years of National Labor Relations Board (NLRB) case law governing the appropriateness of a bargaining unit of employees. That case law says that unions should be able to organize sub-units of an employer, such as employees of one department, as opposed to all the employees at that workplace. But H.R. 3094 would allow employers to water down any potential bargaining unit by using its influence to stack the voting pool full of guaranteed "no" votes.

The NLRB recently proposed a change to the procedures governing the rights of workers seeking to form a union. The changes would modernize and improve the procedures currently in place and further protect workers from efforts to delay or thwart workers exercising their right to collectively bargain. These changes would bring improvements for American workers. H.R. 3094 would prevent these important changes from taking place and serves as yet another bill brought by the majority of this committee that would significantly undermine the right of American workers to collectively bargain.

The bill would allow employers to indefinitely delay union elections by requiring the National Labor Relations Board to hear and issue a formal decision on every appeal, no matter how arbitrary, made by employers. This will force workers seeking to assert their right to collectively bargain to wait months, even years, until an actual union election can take place.

The intent of H.R. 3094 is clear: to impede the right of workers to collectively bargain. Given that about 14 million Americans are out of work and another 8 million are unable to find enough work to live reasonably, it is a shame that this Committee is wasting its resources on another piece of legislation that attacks the National Labor Relations Board. One of the greatest barriers toward an American economic recovery is the steady weakening of the middle class. This bill does nothing to help that. Instead, it is another step in the other direction.

112TH CONGRESS FIRST SESSION

H.R. 3094

To amend the National Labor Relations Act with respect to representation hearings and the timing of elections of labor organizations under that Act.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 5, 2011

Mr. KLINE (for himself, Mr. MCKEON, Mr. WILSON of South Carolina, Ms. FOXX, Mr. HUNTER, Mr. ROE of Tennessee, Mr. THOMPSON of Pennsylvania, Mr. WALBERG, Mr. DESJARLAIS, Mr. ROKITA, Mr. BUCSHON, Mr. GOWDY, Mrs. ROBY, Mr. ROSS of Florida, and Mr. KELLY) introduced the following bill; which was referred to the Committee on Education and the Workforce

A BILL

To amend the National Labor Relations Act with respect to representation hearings and the timing of elections of labor organizations under that Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Workforce Democracy and Fairness Act".

SEC. 2. TIMING OF ELECTIONS.

Section 9 of the National Labor Relations Act (29 U.S.C. 159) is amended—

(1) in subsection (b) by striking the first sentence and inserting the following: "In each case, prior to an election, the Board shall determine, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining. Unless otherwise stated in this Act, the unit appropriate for purposes of collective bargaining shall consist of employees that share a sufficient community of interest. In determining whether employees share a sufficient community of interest, the Board shall consider (1) similarity of wages, benefits, and working conditions; (2) similarity of skills and training; (3) centrality of management and common supervision; (4) extent of interchange and frequency of contact between employees; (5) integration of the work flow and interrelationship of the production process; (6) the consistency of the unit with the employer's organizational structure; (7) similarity of job functions and work; and (8) the bargaining history in the particular unit and the industry. To avoid the proliferation or fragmentation of bargaining units, employees shall not be excluded from the unit unless the interests of the group sought are sufficiently distinct from those of other employees to warrant the estab-

lishment of a separate unit. Whether additional employees should be included in a proposed unit shall be based on whether such additional employees and proposed unit members share a sufficient community of interest, with the sole exception of proposed accretions to an existing unit, in which the inclusion of additional employees shall be based on whether such additional employees and existing unit members share an overwhelming community of interest and the additional employees have little or no separate identity."; and

(2) in subsection (c)(1) in the matter following subparagraph (B)—

(A) by inserting ", but in no circumstances less than 14 calendar days after the filing of the petition" after "hearing upon due notice";

(B) by inserting before the last sentence the following: "An appropriate hearing shall be one that is non-adversarial with the hearing officer charged, in collaboration with the parties, with the responsibility of identifying any pre-election issues and thereafter making a full record thereon. Pre-election issues shall include, in addition to unit appropriateness, the Board's jurisdiction and any other issue the resolution of which may make an election unnecessary or which may reasonably be expected to impact the election's outcome. Parties may raise independently any issue or assert any position at any time prior to the close of the hearing.";

(C) in the last sentence—

(i) by inserting "and a review of post-hearing appeals" after "record of such a hearing"; and

(ii) by inserting "to be conducted as soon as practicable but not less than 35 calendar days following the filing of an election petition" after "election by secret ballot"; and

(D) by adding at the end the following: "Not earlier than 7 days after final determination by the Board of the appropriate bargaining unit, the Board shall acquire from the employer a list of all eligible voters to be made available to all parties, which shall include the employee names, and one additional form of personal employee contact information (such as telephone number, email address or mailing address) chosen by the employee in writing.".

[Whereupon, at 12:25 p.m., the committee was adjourned.]

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