UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

In the Matter of:
PUBLIC MEETING ON PROPOSED ELECTION RULE CHANGES

The above-entitled matter came on for public meeting pursuant to notice at the **National Labor Relations Board, 1099 14th Street, N.W., Margaret A. Browning Hearing Room #11000, Washington DC 20570,** on **Monday, July 18, 2011,** at **9:00 a.m.**

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A P P E A R A N C E S

National Labor Relations Board:

WILMA B. LIEBMAN, Chairman
CRAIG BECKER, Board Member
BRIAN E. HAYES, Board Member
MARK GASTON PEARCE, Board Member

LES HELTZER, Executive Secretary
GARY SHINNERS, Deputy Executive Secretary

Morning Session Speakers:

ARNOLD E. PERL, Glankler Brown PLLC o/b/o Tennessee Chamber of Commerce and Industry
AMY BACHELDER, Sachs Waldman P.C.
BRIAN A. CAUFIELD, Fox Rothschild LLP
MARSHALL B. BABSON, Seyfarth Shaw LLP
DR. ANNE MARIE LOFASO, West Virginia University College of Law
ERIC C. SCHWEITZER, Ogletree Deakins Law Firm o/b/o Council on Labor Law Equality (COLLE)
SCOTT PEDIGO, Utility Workers Union Local 304
PETER KIRSANOW, National Association of Manufacturers
PROF. SAMUEL ESTREICHER, New York University School of Law
MICHAEL PRENDERGAST, Holland & Knight
HOPE J. SINGER, Bush Gottlieb Singer López Kohanski Adelstein & Dickinson
OLIVER J. BELL, Texas Labor & Employee Relations Consortium
CHRISTINE LOU OWENS, National Employment Law Project
WILLIAM P. BARRETT, Williams Mullen o/b/o Universal Leaf Tobacco
DAVID C. BURTON, Williams Mullen o/b/o Universal Leaf Tobacco
ROSS EISENBREY, Economic Policy Institute
RONALD J. HOLLAND, Sheppard Mullin Richter & Hampton

A P P E A R A N C E S

Afternoon Session Speakers:

ANDREW M. KRAMER, Jones Day o/b/o HR Policy Association
THOMAS W. MEIKLEJOHN, Livingston, Adler, Pulda, Meiklejohn & Kelly
MICHAEL J. HUNTER, Hunter, Carnahan, Shoub, Byard & Harshman
RON MIKELL, United Federation of Special Police and Security Officer and Federal Contract Guards of America
RONALD MEISBURG, United States Chamber of Commerce
PROF. ETHAN DANIEL KAPLAN, Columbia University (Visiting) and University of Maryland at College Park
ROBERT GARBINI, National Ready Mixed Concrete Association
MARGARET A. McCANN, American Federation of State, County and Municipal Employees (AFSCME)
DOUGLAS A. DARCH, Baker & McKenzie o/b/o Illinois Chamber of Commerce and the Wisconsin Manufacturers and Commerce
JOSEPH A. McCARTIN, Kalmanovitz Initiative for Labor and the Working Poor
F. CURT KIRSCHNER, JR., Jones Day o/b/o American Hospital Association and American Society of Healthcare Human Resources Association
DORA CHEN, Service Employees International Union
VERONICA TENCH, Service Employees International Union
CHARLES I. COHEN, Morgan Lewis o/b/o Coalition for a Democratic Workplace
JOHN BRADY, American Federation of Teachers
DAVID LINTON, American Federation of Teachers
BRETT McMAHON, Miller & Long Construction
MICHAEL D. PEARSON, Retired NLRB Field Examiner

I N D E X

P R O C E E D I N G S

(Time Noted: 9:00 a.m.)

CHAIRMAN LIEBMAN: Good morning and welcome everybody to this open meeting of the National Labor Relations Board. We are delighted to have you with us here today.

My name is Wilma Liebman, and I am the Chairman of the National Labor Relations Board. To my right are Board Member Craig Becker and Board Member Brian Hayes, and to my left is Board Member Mark Pearce.

On June 22, 2011, the NLRB published a Notice of Proposed Rulemaking, which proposes to amend the Board's Rules and Regulations governing the filing and processing of petitions relating to the representation of employees for the purpose of collective bargaining with their employer.

The Notice of Proposed Rulemaking sets out a procedure for filing written comments on the procedure, on the proposal. Those written comments are due by August 22, 2011.

Today and tomorrow at this open meeting, the Board is providing another opportunity for interested persons to provide their views on this important matter.

At this meeting, we are going to hear from a remarkable group of speakers, diverse in experience and viewpoint, and including a balance of practitioners, workers, academics and public policy advocates. We are truly grateful for this showing of interest and for the efforts of all of the

speakers to study the proposal, to reflect on it, and to share their thoughts and suggestions with us.

We know that the proposals have generated some controversy, and we welcome this chance to have an airing of views on this important subject.

We take the meeting very seriously. We want to hear your thoughts about the proposals, how they would work, and what might work better. I assure you, we all have open minds.

All persons who will be making a presentation here today made an advance written request to speak at this meeting, and all of the time slots for the oral presentations have been filled. Accordingly, everyone here who did not request an opportunity to speak today may observe the proceedings, and we are pleased to have you with us, but you will not have the opportunity to speak. You may, of course, submit written comments using the procedure described in the June 22 Notice of Proposed Rulemaking.

Now, let me cover some housekeeping matters which I've been asked to cover.

As you can see, the room is nearly full. There has been considerable public interest in this proceeding, and we have had more requests to attend than there are seats in this hearing room. Seats in this room have been made available on a first come, first serve basis, and we've also established

three overflow rooms where interested members of the public can watch the proceedings through a videoconference.

In addition, we are streaming these proceedings live over the internet.

Those of you who are watching from the overflow rooms will be seated in this room as space becomes available according to the priority established by the time of your arrival this morning. When you checked in, you should have been given a badge and a number. Please keep those with you at all times. If you leave the room, you must take your badge and number with you. You will not be allowed to reenter this room without both the badge and the number.

Speakers do not need a number to attend the session during which they will speak, but if they wish to attend any other session, we ask you to have both a badge and a number.

If you are a speaker this morning, for some reason you didn't receive a number when you checked in, let one of our ushers know, and we'll get a number for you.

When you leave the building for the day, this is important, make sure to return your badge and your number so you can retrieve your ID.

Please note also, there are two exits from the room. The main door is to my left through which you entered and the door to my right. You may use either door to exit the room, but you may only enter through the main doors to my left.

Restrooms are located outside the hearing room to the left and to the right. We have staff in the hallway who can escort you or direct you where you need to go. We ask you not to go into other parts of the building. If you want to leave the building, we'll escort you down to the elevator.

Today's meeting will be divided into two sessions, a morning and afternoon session. In addition to a lunch break that will begin at about noon, we'll take a midmorning and a midafternoon break.

If you must leave the meeting during the proceedings, please move quietly to the nearest exit, and an usher will assist you.

Speakers are, of course, welcome to stay with us through the session, but if you wish to leave, you are welcome to do that.

Now, let me just review some final guidelines for the speakers. We are going to follow the order of speakers that is set out on the list that was given to you this morning. Each person making an oral presentation will be given five minutes to present his or her remarks. The Board Members will then have an opportunity to ask questions after which the speaker will be excused.

Each speaker should be ready to proceed in turn and should move promptly to the podium when called. We ask that you introduce yourself and indicate who you are representing,

if anyone. If you have someone else with you, you may also introduce that person. Your five minutes will start after you making the introductions.

Now, Deputy Executive Secretary Gary Shinners, who was sitting below me on the right, will be our timekeeper today. There are lights on the podium that will start after your introductions, and the green light will turn on. The yellow light will indicate that you have one minute remaining, and the red light indicates that your time has expired. We ask that you please observe the lights, particularly the red one, so that we can remain on schedule as the day proceeds.

If you have a written statement that you wish to put in the record, please give it to our Executive Secretary Les Heltzer, who was in the anteroom to my left, before you leave for the day.

My colleagues may wish, upon review of any written testimony you submit, to pose questions to you about the testimony. I have asked them to have all questions to me within seven days. You will have until the end of the comment period, August 22, to submit answers to any questions that may be posed.

Finally, please note that this meeting is limited to issues related to the proposed amendments to the Board's Rules governing our representation case procedures and other proposals for improving representation case procedures. No

other issues will be considered at this meeting.

I want to particularly alert our speakers that they should not discuss matters that are now pending before the Board as there are important rules governing ex parte contact that we don't want you to violate.

So at this point, I would ask you to all please make sure your cell phones are turned off or any other devices, and unless anyone of my colleagues has something to say at this point, I think we can now hear from our first speaker, Mr. Arnold Perl.

Mr. Perl, if you would come forward, and Ms. Amy Bachelder will be the next speaker.

Good morning, Mr. Perl.

MR. PERL: Good morning, Madam Chairman, and Members of the Board. I'm Arnold Perl of the law firm Glankler Brown, appearing on behalf of the Tennessee Chamber of Commerce and Industry. The President and CEO of the Tennessee Chamber, Ms. Deborah Woolley, is here with me today.

The Tennessee Chamber has a natural interest in the proposed election rules, given that Tennessee's union membership in the private sector is 2.2 percent, the second lowest in the United States.

I've submitted to the Board my presentation in advance for the purpose of allowing you to ask whatever questions that you have.

Now, maybe my time can start, Madam Chairman.

As the Board observed in Excelsior Underwear, which you've cited frequently in your report, the rules governing representation election are not fixed and immutable. They've been changed and refined but generally always in the direction of higher standards.

In our view, that regrettably is not the case here, and I'd like to explain why we feel that way.

The current rules for the conduct of representation elections, in our view, do not build in unnecessary delays. Almost all elections, as your report had, take place within 56 days of the filing of the representation petitions, and the median time for the holding of elections is only 38 days. In our view, this hardly resembles unnecessary delay, since the Board itself, over the years, has stressed that the opportunity for both sides, both the employer as well as the union, to reach all the employees is basic to a fair and informed election.

Now, a notable exception to that is the Board's current blocking charge policy which you asked for views on. That policy has been abused over the years by unions in our view for their own gain to manipulate the timing of representation elections. Some of you may remember when I served on the Board's last Advisory Panel in the 1990s, 1994 to 1998, with the union bar as well as the management bar.

The management bar to a person strongly urged the Board to abandon its blocking charge policy, and yet that blocking charge policy is still around today and represents the pinnacle of unfairness and unnecessary delays.

Now, the proposed rules for quickie elections will prevent or impede a free and reasoned choice by the electorate which goes against what the Board has sought to do with its high standards.

Now, a primary goal of the Board's proposed rule amendment is to conduct elections more speedily, and this quickie election model for representation elections seriously compromises, however, the Board's self-professed duty, and it is a duty, not a goal, to conduct secret ballot elections under circumstances which ensure an informed electorate.

Now, Congress entrusted to the Board the determination of rules but did so to conduct elections fairly.

Just consider the context under which these elections take place. Legally, unions can conduct currently an organizing effort in secrecy without any notice requirement to the employer. Once a union has gained maximum support, it files its petition, and the Board under the new rules would schedule an election in far less than half the time provided under the current rules, and under such circumstances, there would be an entirely inadequate time for employees to hear the other side from the employer on the disadvantages of

union representation.

The Board's quickie election model also constitutes an impermissible limitation on the time given for an employer to communicate with its employees, and as stated in our presentation, we explain why and how that violates the Congressional mandate and intent of Section 8(c).

Now, I'm going to spend just a few moments on something that the Board said it had a preliminary view on, and that's the rule, the policy, that would be in the rules, not to allow any pre-election litigation unless it amounts to affecting 20 percent of the unit.

When you look at the case that I cited and provided you an anatomy with, of all the things that happened, of ITT Lighting Fixtures, that provides a lesson learned of how protracted litigation results when critical unit issues are not resolved by the Board prior to the election. In that case, it involved the company's group leaders that amounted to at most 10 percent, not 20, but 10 percent of the unit, and the employer sought to get a determination in the pre-election hearing that the group leaders were supervisors and therefore should be excluded from the unit. The Regional Director, while he held a hearing, did not make a resolution of that issue and left it to the challenged ballot procedure.

That case went on for five years, all the way to the United States Supreme Court with the employer urging that the

group leaders open and pervasive union activity affected the fair and free choice of voters who were voting, not by challenge, but voted in the election.

Finally, the Board, at the end, found that all the group leaders were supervisors but by then, it was too late. The United States Court of Appeals for the Second Circuit had heard that case twice and vacated finally the Board's election results. So there was no winner, not the employer, not the union, not the employees.

In conclusion, Your Honor, we're gratified that you've held these hearings, stated you had an open mind, wanted to learn from the experiences of others, but in our view, there is a test. The litmus test for this proceeding must be will the quickie election model ensure an informed electorate? And we don't believe that this model passes that critical test.

This Board, and I was part of it at one time, has a distinguished history, and I hope that the proud legacy is retained, and that there's a reconsideration after you hear the views of this distinguished group, that the Chairman has spoken of, from all sectors, that you reconsider what is really best in the interest of employees, employers and unions, and especially for the distinguished history and legacy of this Agency.

CHAIRMAN LIEBMAN: Do my colleagues have any questions?

MEMBER BECKER: Mr. Perl, you spoke about the blocking charge policy, and in the Notice of Proposed Rulemaking, we invited comments on that question and posed a range of options as to how allegations of unlawful conduct prior to elections could be handled. Do you have any views on which of those options would make sense?

MR. PERL: Yes, I saw that you had nine different options, Member Becker, and when we made our recommendation on behalf of the management bar and the Advisory Panel, I think it was 1995, you have a record of that, we urged the Board to reconsider that and to basically eliminate, and that's one of the options you have in there. I think it's number 8, just eliminate the blocking charge policy. Hold the election. If there was such serious conduct that either set aside the election under the current blocking charge, the union can file objections. You can handle this in your post-election proceedings, but to go ahead and within a week -- I had a case in the State of Florida. One week before the election was held, the union filed charges, sought to block the election. The Board blocked the election with less than a week to go. All the employees had been expecting to vote in this election.

The Notice of Election had already been posted, and now it has to be explained, no, we won't hold an election. That just doesn't seem, not only does it not seem fair, it really

jeopardized I think the process in the end because people who were going to vote, that vote was taken away from them, and there's been a lot of comment. You cited in your majority report along with the dissent the very astute article written by Bert Subrin, who worked out there and was held in such high regard. His article was in The Labor Law Journal, "Blocking Charge Policy: Wisdom or Folly." It was a great article, and I read it several times when we did our work in the Advisory Panel on blocking charges.

I think this is one area where if you want to do away with unnecessary delay, the blocking charge to me is the poster child for unnecessary delay.

CHAIRMAN LIEBMAN: Thank you for being with us today. Thank you for coming here from Tennessee. We appreciate your thoughts and will take them into consideration.

MR. PERL: Chairman Liebman, thank you for having us.

CHAIRMAN LIEBMAN: Thank you. Our next witness will be Amy Bachelder, and after her will be Brian Caufield.

Good morning.

MS. BACHELDER: Good morning. I am Amy Bachelder. I'm an attorney from the law firm of Sachs Waldman in Detroit, a law firm that has represented unions in the public and private sector for many years. I'm pleased to be able to comment today about the Board's proposed rulemaking changes.

I am relatively new to the private practice of law

having spent the majority of my career working for the NLRB in the Detroit Regional Office, the biggest and busiest Regional Office in the nation. I worked there for 25 years as an attorney, a supervisor, and a Deputy Regional Attorney and was involved in every aspect of representation cases from conducting elections, to holding hearings and writing pre- and post-election decisions. I trained and supervised employees in every one of those activities also.

Arnold Perl wants me to mention that we find ourselves reunited today after about 30 years after trying a case in the Detroit Region, but I think he just wants me to stop talking.

I view the proposed changes as largely modest in incremental variations on standard good regional practice in pursuit of the Agency goal to expeditiously and efficiently process R cases. Many aspects of these cases are already in practice.

I'm going to comment on two of the proposed changes, the 20 percent rule and the statement of position at the pre-election hearing.

From my experience and observation, delay is often used as a tactic in election cases. Merely by refusing to agree to an election, a party can effectively dictate that the Region hold a pre-election hearing. Under current practice, the mere opening of the hearing guarantees that an election

will be delayed for more than a month from the time the hearing closes, whenever that is. This is due to the mandatory 7-day briefing and the 25 days required for the request for review.

Many of these pre-election hearings involve eligibility issues that can and would be deferred absent of deliberate desire for a delay. Parties have admitted as much.

The Regions have always had a practice of deferring resolution of eligibility questions to after the election if the parties agree to do so. Thus, in Detroit, as I'm assuming in other Regions, it has been the practice to approve election agreements even where 10 percent or more of the voting group eligibility is in dispute. This deferral by agreement of the parties avoids the lengthy litigation of complex factual issues and also avoids expenditure of time and effort which, more often than not, is mooted by the results of the election.

The proposed 20 percent rule that permits deferral of eligibility issues is a measure that would remove unnecessary obstacles to the efficient processing of these cases and minimize and focus the use of scarce Agency resources to those cases in which the issue makes a difference at a time it makes a difference.

The deferral of eligibility issues has existed and does exist in regional practice today beyond situations which the

parties agree, even in cases in which the parties have had a pre-election hearing and litigated eligibility issues.

For example, when there has been a pre-election hearing, in situations where the hearing record is not sufficiently developed to permit an eligibility decision to be made, even one that was expressly litigated, Regional Directors have directed that such voters be permitted to vote subject to challenge. Likewise, where an issue is raised in the hearing but the parties didn't take a position as to eligibility, Regional Directors have directed that these voters could vote subject to challenge.

In these situations, eligibility remained unresolved at the time of the election, and the issues were resolved post-election, if at all, if not mooted by the election results or other circumstances. This is the existing NLRB policy.

Finally, the issues related to the required statement of position in the pre-election hearing reflect little more than what is current standard pre-election hearing practice. At the onset of a hearing, it is the Hearing Officer's job, through consultation and questioning of the parties, to define the outstanding issues and obtain the respective positions.

The requirement the parties present evidence via an offer of proof is also a common practice to preserve the rights of parties with respect to those issues while avoiding

needless expenditure of resources.

I commend the Board for the continuation of the focus on the important work that the Agency does. The proposed rules in many respects merely standardize good regional practices as I have known them and modestly update such practices in conformity with modern day communication methods.

Thank you for consideration of my position.

CHAIRMAN LIEBMAN: Thank you. Do my colleagues have questions? Member Hayes.

MEMBER HAYES: Yes. In terms of the 20 percent rule, could you share with us what your views are? What is required by 9(c)'s statutory requirement of an appropriate hearing?

MS. BACHELDER: Well, I'm not sure I can reflect on what 9(c) requires. I can only tell you what has been practiced in the Region, and what I think is workable in going forward. I'm not expert on 9(c). I understand 9(c) to be what the Regions have always done, and I don't see this as much different.

MEMBER HAYES: Thank you.

CHAIRMAN LIEBMAN: Anything else? I wondered if you wanted to comment at all on the blocking charge issue?

MS. BACHELDER: My experience with the blocking charge is that what the Regions are doing is going to great extent to avoid having elections blocked. I have filed charges that

I thought should block elections, and when that happens, the Region expedites the investigation and gets a decision, and very rarely in my experience in the Regions do blocking charges result in actual blocking.

CHAIRMAN LIEBMAN: Thank you for being with us here today and for your thoughts.

Our next witness will be Brian Caufield, and after him will be Marshall Babson.

MR. CAUFIELD: Good morning, Chairman Liebman, Members Becker, Hayes, and Pearce. My name is Brian Caufield. I'm a management side labor relations attorney with the firm of Fox Rothschild, a firm with 16 offices and over 500 attorneys nationwide.

Prior to Fox Rothschild, I served the public as a Field Attorney with this Agency in Region 22, the Newark, New Jersey Regional Office. During my tenure with the Agency, I participated in the Washington Exchange Program, a fine program by the way, and was detailed to the Office of Solicitor and worked for then Acting Solicitor Hank Breiteneicher.

My remarks come from the perspective of having worked on both the GC and Board side and in private practice.

In my opinion, the proposed rules will do three things, increase litigation, not achieve uniformity, and limit the educational process.

With respect to the increased litigation, the proposed revisions allow for a hearing to occur 7 days after the Notice of Hearing, only if a genuine issue exists in a statement of position over the eligibility or inclusion of 20 percent or more of the unit. The initial determination of whether a genuine issue exists is to be made by a Hearing Officer, not a Regional Director, and can be made without presentation of witnesses, for example, by way of the statement of position or through an offer of proof.

What is wrong with this? First, the parties who fail to identify an issue in the statement of position, except for jurisdiction, will be forever barred from raising it. Second, a Hearing Officer, which is the hearing's gatekeeper really, is oftentimes not a long-term Agency employee, especially considering that Regions for the most part develop R case teams which consists of newer agents, and these R case teams basically are designed to teach new agents the R case process and to assist in processing the R cases more expeditiously. Thus, the determination to open the record and move forward with the hearing will often be made by individuals who are less experienced than the practitioners who are representing their party's interest before them.

How will this foster less agreement and more litigation? The extremely short amount of time from filing of the petition to hearing, seven days, issue preclusion and the

potential to be denied a hearing will, in my view, lead to employer counsel, erring on the side of caution, and raising issues in the statement of position that may not, after proper investigation by employer counsel, be genuine issues subject to litigation. In other words, if after even a cursory review, mechanics even remotely share a community of interest with drivers, I'm going to raise it in the statement of position. If, again after a cursory review, line leaders remotely appear to have a supervisory status indicia, I'm going to raise it in the statement of position. And, I'm going to do this to protect my client's interest even though there may be in the end, not a finding of the community of interest for supervisory status. However, because I likely would not have had the time to fully investigate these issues, I would not sign a stipulated election agreement. Instead, I would err on the side of caution, raise the issues in the statement of position, and argue to the Hearing Officer that there is a genuine issue involving inclusion or eligibility of 20 percent or more of the proposed unit.

Now, with respect to uniformity, the rules, the proposed rules rather, shift a review of the Regional Director's pre-election decision to after the election so that the review can be taken with post-election challenges. The proposed rules further provide that the Board has the discretion to deny pre- and post-election review, leaving the decision to

the careered Regional Directors. This process cuts against uniformity. Why? Because it potentially takes away the final decision making from a five-member Board that issues precedential decisions and places it in the hands of over 30 plus Regional Directors and Resident Officers that issue non-binding decisions.

Furthermore, splitting the traditional decision and direction of election to two, the direction of election and then the decision which must issue by the time of the tally of ballots, may create an undue pressure for Regional Directors to rush their decisionmaking process.

With respect to limiting the educational process, the issue of whether employees want to be represented by a union is joined with the filing of a petition.

Before the filing, union representation is a non-issue for many employers. For weeks, possibly months, before the filing of the petition, the union has promised employees, among other things, higher wages, better benefits, complete job protection from discipline and layoffs. Thus, the time between the filing of the petition and the election is the time for the employer to fulfill its obligation in educating its employees on what the process is all about and what it is that the employees obtain from union representation, which is the right to sit down with the employer and negotiate, not an automatic right to higher wages and benefits and job

protection.

The educational process these days is not limited to traditional campaign methods, of meetings and cute cartoon handouts. The current electorate is much more sophisticated than it was in the past. The advent of internet search tools has increased employee awareness of the unionization process. Thus, today's secret ballot voter is much more educated about the process than ever before.

The proposed rush to the voting booth will reduce the time the employees have to learn about the process and possibly result in a less educated voter.

In sum, the Board's proposed rules have the potential to increase litigation, create disparity across the Regions, and limit the educational process.

I respectfully urge the Board to adequately balance the interest of the stakeholders, to ensure that the current process suffers no detriment, and I thank you for your time today.

CHAIRMAN LIEBMAN: Thank you very much for being here with us. Do my colleagues have any questions?

MEMBER BECKER: I just want to clarify one thing and see if it changes your view. The proposal does not provide for preclusion of eligibility issues in any way. That is, the proposal provides that eligibility issues, even if they're not raised in the statement of position or at the hearing,

can be raised by a challenge. Does that change your view as to your concern about erring on the side of caution?

MR. CAUFIELD: It doesn't and here's why. Because if it is left for the challenge procedure, and a certification of representative issues, it typically issues with the unit that is proposed and that those who are challenged are not within that unit when the certification of representative issues. So then you have to leave that to the bargaining process, and if you're entrenched in your positions, you're entrenched in your positions. That is a permissive subject, the scope of the unit and so you really don't -- you may never come to a resolution on the inclusion of those challenge ballots especially when they're not determinative. So I'd rather front end it instead of back ending it.

MEMBER BECKER: On the question about the uniformity issue, I guess one could make an analogy to the Supreme Court's discretionary jurisdiction. So the Supreme Court likewise across many statutes has a role in ensuring uniformity and yet its jurisdiction is discretionary in almost all instances. Do you see a difference here in terms of whether the Board could still ensure uniformity even though it would have discretion not to review post-election issues?

MR. CAUFIELD: I know that from practice, you know, coming from a Region where you thought you knew how that

Region ran, and you assumed that it was the same across every Region, you know, again coming from Region 22 believing that, okay, all Regions act the same, and then getting into private practice and realizing that Region 29 has a little bit different spin on it. Region 2 has a little bit different spin. Now, I'm down in Region 4, a completely different spin or way to process a case.

So in terms of leaving those decisions to the Regional Directors, you may get different opinions in different cases and, you know, one Region may not and does not have to rely on a decision and direction of election, now a decision, in making their decision. It's going to be completely up to them. They do have to follow your rulings, and so that's where I see the uniformity remaining. I mean it happens now, but I don't see the uniformity ending with these proposed rules.

CHAIRMAN LIEBMAN: Just a quick question. Can you estimate what amount of time you need to do the investigation that you talked about? And I realize there are going to be differences depending on the size of the unit, but if you take into consideration the medium size unit is about 24.

MR. CAUFIELD: Well, I'll give you just a quick example. I won't name the client's name, but we had an election, a 24-hour operation, about 33 employees, 24-hour operation, took me nearly 2 days to develop the times for the election and

the days because you want to ensure that you have sufficient amount of times for all the employees to get to the polls. So in just that situation, that took me nearly two days to gather all the schedules, go through them all, make sure that vacations were covered, people were actually at work so they'd have an opportunity to vote.

You know, oftentimes if it's a small employer, you're not getting the call right away. They're wondering, what is -- who is the National Labor Relations Board? But large employers, certainly they have outside counsel on speed dial. They sometimes even have in-house labor counsel. So those employers are positioned to make a fairly quick decision.

But myself, when a petition comes into my office, and I have to investigate it, I know in my mind I have 14 days because I don't want to go beyond that. I know the Regions have this rule of 14 to 18 days, they want to have that hearing and want to get it done. So I know I have 14 to 18 days to make a determination to, do we want to litigate? Would we want to enter a stipulated election agreement? That has worked.

CHAIRMAN LIEBMAN: We thank you for being here --

MR. CAUFIELD: Thank you.

CHAIRMAN LIEBMAN: -- and sharing your thoughts with us. Our next witness will be Marshall Babson and then next up will be Professor Lofaso. Good morning.

MR. BABSON: Good morning. Thank you. The colloquy with Mr. Caufield reminded me, people often ask, what's the most important thing that you learned at the NLRB? I think I learned a lot of things at the NLRB, but one of the things that I surely learned is that the Regional Directors are very powerful people in the Agency.

CHAIRMAN LIEBMAN: Can I stop you for one moment? Something I meant to do for our Court Reporter. A lot of the speakers are using the expression R case, and just so the Court Reporter knows, R is the letter R. It stands for representation. Sorry. Please --

MR. BABSON: No problem.

CHAIRMAN LIEBMAN: -- go ahead and introduce yourself.

MR. BABSON: My name is Marshall Babson. I'm a partner at the law firm of Seyfarth Shaw and a former member of the NLRB. Seyfarth Shaw has one of the largest labor practices in the United States, about 400 labor and employment lawyers. I served on the National Labor Relations Board during the Reagan Administration from 1985 to 1988, and it is a pleasure to be here today, and I very respectfully offer these comments and observations.

I thought what could I possibly add or suggest that might be helpful and add something to what I was sure and confident from my many friends and colleagues who are present today and tomorrow, that might allow you to focus attention

on some elements or aspects of this process which I think are important. And the most significant element or aspect of this to me was process.

When I thought back about some of the more significant litigation in which the Agency has been involved in the last couple of years, I immediately thought of the two-member Board case, New Process Steel. I thought of the recent, relatively recent decision of U.S. Chamber of Commerce v. Brown, both Justice Stevens' opinions and interestingly cases I think that raise issues that are related to the comments that I wanted to make.

I think that most fair practitioners would not -- object to the Agency seeking to improve election procedures. We all understand that trying to find a more efficient or efficacious manner or method of resolving questions concerning representation is really at the heart of this statute, and change, of course, as we know, for those of us who are students of administrative law, is not something which is foreign to the Agency. In fact, there's been a lot of criticism through the years that there's been too much change, but in my view, it's because the premises for change have not always been satisfied or at least have not been sufficiently rationalized.

And so when I went through this proposal in detail, I decided that I would leave to others at the appropriate time

to make specific comments, and I'm sure you'll hear many of them today and tomorrow and through the comment period about particular elements or aspects. These are all live issues. It doesn't make a difference whether or not 10 percent or 20 percent of the unit is in question at the time an election is conducted. These are live issues which will command your attention.

Do the voters need to know who their fellow bargaining unit members will be? Does that have some real practical significance for collective bargaining when you sit down at the bargaining table? Does it make a difference for the employer and the employees to know who are the supervisors during the course of this?

But those are questions again which I think will be addressed and considered, and what I found at least lacking in some material or fundamental respect in this proposal was an accommodation of all of the legs I think that need to be satisfied for change. There's no question in my mind that change is contemplated by the statute, whether it's procedural change or substantive change to further the policies and procedures of the Act.

But the issue it seems to me at hand is the Board has done an outstanding job of suggesting how delay can be a problem in terms of effectuating rights, but we have this nagging question that I think was at the forefront of the two

cases that I mentioned earlier that went to the Court in the last few years, Brown and New Process. It's the 800-pound gorilla which is standing in the room, and that is how do we accomplish all of the objectives of the statute?

We know the Wagner Act was intended to promote collective bargaining for those of us who believe in collective bargaining. What does that mean having had a statute that it was again amended 12 years later and which causes someone like Justice Stevens, who I do not view as being an opponent of collective bargaining, to say that this is a statute which is suffused with the notions of debate, compromise, open discussion, that these choices with regard to collective bargaining, which is still the policy of the United States, nevertheless must be accommodated, that people need to be able to make an informed choice.

I found one passing reference in the rules, maybe I missed another, but one to speech, many to speed, and I think this is something that I would like to see the Board account for. You're going to hear a lot of practical input from a lot of experienced people on both sides. I think process, administrative process requires you to tackle this two-headed nature of the statute, to understand that this proposal, in fact, this is not -- these are not -- lists that people are throwing up or bringing to you. These are real live issues, but the statute itself I believe, and administrative process,

requires some accommodation of these competing interests in the statute.

CHAIRMAN LIEBMAN: Thank you very much. Do my colleagues have follow-up questions?

Well, then let me ask you if you might take a minute or so to tell us how you think we should go about an accommodation.

MR. BABSON: Well, I think that is difficult. Obviously you need to listen carefully and consider all the comments that are made on both sides. I don't think that it's something -- I don't think it's an empty gesture when people stand up and say an employer needs time to inform the electorate. I think the Agency has to account for this issue. I mean how does one accommodate the need for speed with regard to resolving questions concerning representation and this large notion, you know, we've heard it said many times about these competing purposes.

I think I made reference, perhaps I didn't, in my prepared remarks to the Duke Law Review article that was written in 2009 by Fisk and Malamud, the NLRB, an Agency in administrative exile, there's a real fulsome discussion of the dual purposes of the statute, and I don't think, both with regard to these proposals, Chairman Liebman, and other things that have come beforehand, that it's enough just simply to say that this is a policy preference or this is a

choice.

I think this has nothing to do with Democrats or Republicans. It has nothing to do with liberals or conservatives. It has to do with administrative jurisprudence it seems to me, and people who complain about policy oscillation I think can find some comfort in administrative principles that require not only a choice that's different but a choice that's grounded in better practice and a choice that's grounded in the dual purposes of the statute.

So I don't think there's a ready answer on this particular issue, but I think what it means is, is that as you're going about the process, and I say this very respectfully, that I think that the Board would help itself enormously to explain how the choices that are made are consistent with these principles. These choices are something more than my favorite flavor of ice cream.

There have been Board Members for the last 20 years or more who have thought that the first opportunity they had, whatever their political stripe, the first opportunity they had to make a policy choice, that they would make that choice. I think it's more than that. More than that is required. You have to demonstrate that there's a problem, and I think you've articulated that there has been a problem. Serious practitioners will acknowledge that there have been

delays on occasion.

As Ed Miller said many times, one has to be careful that you don't allow the outlier to pull along everything else, but I think that one reasonably can say that there have been problems, but you have to demonstrate that the choices that are made are an improvement and they're highly consistent with the statute, but as the Chairman herself has acknowledged, this is a statute with dual purposes.

Someone has described it as a statute at war with itself. I think it need not be, but it definitely is a challenge that must be accommodated.

CHAIRMAN LIEBMAN: Thank you for your remarks and for being with us today.

MR. BABSON: Thank you.

CHAIRMAN LIEBMAN: The next speaker is Professor Anne Marie Lofaso, and after her will be Eric Schweitzer.

DR. LOFASO: Good morning, Madam Chairman, and Honorable Members of this Board.

My name is Anne Marie Lofaso. I'm an Associate Dean and Professor of Law at West Virginia University, where I write and teach about labor law. I also spent 10 years here at the National Labor Relations Board in the Appellate and Supreme Court Branches, and I have a doctorate in comparative labor law from Oxford.

The Board should be commended for acting under its

statutory rulemaking authority to modernize outdated and confusing rules. The current rules are in some cases redundant. In other cases, there's no rule at all which results in regional variation which in time leads to unpredictability. It also allows unscrupulous parties to take advantage of built-in bureaucratic delay resulting in tactical delay.

These amendments, while modest, will go a long way toward fixing the well-known problems associated with the current election rules. This is good government acting at its best.

The views of affected parties are well understood. Employers want longer time periods to attempt to persuade their employees not to form a union. Unions want shorter time periods because they fear that the longer time period, the greater the chance of employer interference.

But the question for this Board is not whether longer or shorter time periods are perceived as favoring one party or another. The question for this Board is how it can most fairly and efficiently determine whether employees want representation.

These amendments give employees a final and fair resolution on the question concerning representation without unnecessary delay.

I have three points to make. These amendments modernize

outdated rules and make them more readable, make government run more efficiently by liberalizing information and by addressing the main problem of delay, while still allowing ample time for full debates, and deliver better service to the public. These amendments strengthen the secret ballot election process, a process that Chamber fought so hard to maintain.

Point 1, these amendments modernize the election rules by permitting the electronic filing and transmission of documents. These changes are consistent with the efforts of other tribunals to modernize their own rules such as the electronic case filing initiative of the Federal Courts. The Board's efforts to make the rules more readable are also consistent with the efforts of other tribunals such as the Federal Courts restyling project, an effort to rewrite all Federal Rules in plain English.

Point 2, these amendments also make government more efficient in two ways. First, they liberalize information available to all parties. The basic requirement for an efficient process is greater initial information. The amendments require parties to release information readily within their control, no later than the pre-election hearing. Information such as the names, addresses, telephone numbers and e-mail addresses of employees is information that is well within an employer's control. This, too, is consistent with

the recent developments of mandatory initial disclosure under the Federal Rules.

Similarly, the amendments require the parties to submit position statements no later than the pre-election hearing. To make it easier for the parties to comply with this requirement, the Board has offered the assistance of a Hearing Officer. This amendment provides a mechanism for quickly identifying the issues. This, too, is consistent with the trend in federal pleading requirements especially after Iqbal. The purpose of raising issues in early stages is to resolve issues as quickly as possible so that non-meritorious issues do not go any further which would result in lost resources.

These requirements do not favor either party. Instead, they make the first steps in the process clear and more efficient.

These amendments also make government run more efficiently by streamlining election procedures. The current system encourages death by 1,000 cuts. The amendments eliminate unnecessary bureaucratic delay, thereby diminishing opportunities for unscrupulous parties to take advantage of systemic delay.

By eliminating pre-election voter eligibility challenges that are unlikely to affect the election and pre-election requests for review, by giving the Board the discretion to

deny post-election rulings thereby allowing the Regional Director to make a prompt, final decision, and by consolidating review of the Regional Director's rulings through a single post-election request, the Board's efforts are once again consistent with the Federal Rules under which litigants get only one pre-answer motion.

Point 3, these amendments also deliver better service to the public, not only by modernizing the system and making it run more efficiently, but also by creating uniformity which leads to predictability. Predictability is always good for business. Uniform standards also leave less room for unscrupulous parties to game the system.

Opponents of the rule inaccurately contend that the rule cuts off debate. These amendments deal only with the time period between the election petition and the election itself. Employers and unions have ample time to make their views known during this time period as well as prior to the filing of the election petition. Indeed, many employers now show as part of their first day orientation short films about why unions are unnecessary.

Let me conclude with this. If some employers are truly concerned with full debate, I suggest that they give unions access to their property and debate the pros and cons of unionization.

Thank you for your time.

CHAIRMAN LIEBMAN: Thank you for your thoughts. Colleagues have questions?

Since you talked about uniformity, I wondered if you would want to reflect on the prior speaker's comments that this will actually result in less uniformity because there will be Regional Directors making different decisions rather than just the Board.

DR. LOFASO: Well, there is guidance, first of all, in terms of this is procedural guidance. If what he means by that is substantive, lack of substantive uniformity, there is actually a review process that the Board will have. There's still a post-review election -- post-election review. So the Board would be able to maintain which I think would be very important for National Labor policy.

CHAIRMAN LIEBMAN: Thanks for being with us today --

DR. LOFASO: Thank you.

CHAIRMAN LIEBMAN: -- and sharing your thoughts.

Our next speaker is Eric Schweitzer, and up after him will be Scott Pedigo.

MR. SCHWEITZER: Good morning. Madam Chairman, Members of the Board. My name is Eric Schweitzer. I'm with the law firm of Ogletree Deakins in the Charleston, South Carolina office where I've practiced labor and employment law for over 35 years now.

In Charleston, we can't say hello in five minutes. So

I'm going to -- I'm going to speak as fast as I can, but I expect I'll only get partially through the remarks.

I'm here representing the Council on Labor Law Equality with whom I'm sure you all are familiar. My partner, Hal Coxson was planning to be here today and wasn't feeling great this morning. So he sends his regards.

I'd like to first quote from President Barack Obama, in 2009. "The strongest democracies flourish from frequent and lively debate." In my opinion, the proposed amendments don't carry out President Obama's message there.

As the United States Supreme Court held recently, in fact, in 2008, congressional policy favors uninhibited, robust and wide-open debate on matters concerning union representation so long as that does not include unlawful speech or conduct, the Chamber of Commerce v. Brown decision.

The free speech provisions of Section 8(c) are dependent on the opportunity to speak. Limiting the reasonable opportunity for such uninhibited, robust and wide-open speech is the equivalent to denying it altogether.

Cutting short the representation process is an unwarranted curtailment of free speech.

In addition, the proposed amendments will severely limit the opportunity for employees who are facing a representation election to conduct their own independent research on the issues and engage in discussion and debate with their fellow

employees regarding the results of their research.

Second, unions file petitions at their peak strength, often after months or longer of quiet campaigning, many times without the employer's knowledge. If unions were required to notify the employer at the outset of their campaign, that would be one thing, but often the first the employer, and quite possibly many of the employees, learn of the campaign is upon receipt of the petition. In fact, I think in the proposed rules, the expedited Excelsior list, the comments regarding that proposal is to be sure that all employees know what's going on.

Third, the requirement that the employer file a statement of position regarding an appropriate unit within seven days, actually five working days, and waive any issues not raised is a denial of due process and fundamental fairness. It is certainly not consistent with Rule 26(a) of the Federal Rules of Civil Procedure as the proposal asserts. The Rules of Federal Procedure, as litigators, under the Rules of Federal Procedure, do not preclude a party from amending its disclosures at any time, Rule 26(c), nor does it prevent a party from raising and litigating any issue about which it learns during the course of the litigation. It is not uncommon for a party to move to amend pleadings to conform to the evidence presented, and Federal Judges are typically very liberal in so doing in the interest of

fundamental fairness and the administration of justice.

I further note that unlike the procedures set forth in Section 9 of the Act, and the Board's existing rules in civil litigation, for which the Federal Rules of Procedures were crafted, the parties are allowed to engage to broad discovery before going to trial. The purpose of that discovery is to learn the other side's position and evidence and to avoid trial by ambush.

Under the proposed amendments, a party's statement of position may not be obtained until the first day of the hearing, leaving the other party or parties unable to clearly identify or appreciate the issues to be presented until too late.

I had one example, not too terribly long ago, where the union representative demanded the hearing. I was ready to stipulate. He subpoenaed 35 or 40 employees from the plant, actually shut down a large portion of the manufacturing plant. We got to the hearing, and he had no issues whatsoever.

Next, the proposed delay of voter eligibility and unit challenges until after the election denies the employees of information to cast an informed vote. As one of the previous speakers mentioned and as experienced labor professionals know, employees many times make up their minds on unionization, based not on union propaganda or employer

campaigning, but on their own research and the views of their fellow employees who will be in the same bargaining unit. They may or may not want their putative supervisor or lead man to be in the same unit. They may or may not want to be in the same unit with other job classifications. Denying them that knowledge before the election is asking them to vote for a pig in a poke.

Also, adding e-mail addresses of potential voters to the information and Excelsior list may seem simply like keeping up with modern technology but, in fact, it raises serious legal and practical questions. The Board should know that employees will consider it an invasion of their privacy for an employer to disclose their home e-mail addresses, and it's unclear whether it's home e-mail addresses or only business e-mail addresses that would be required. Even if the latter, it raises concerns about solicitation under the Register-Guard decision.

These are among the many reasons we oppose the proposed new rules.

In closing, I'd like to quote from Justice Oliver Wendell Holmes. "To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of their right to state unpopular views also deprives others of the right to listen to their views."

Thank you, Madam Chairman.

CHAIRMAN LIEBMAN: Do my colleagues have questions?

MEMBER PEARCE: Yeah, I've got two questions.

CHAIRMAN LIEBMAN: Member Pearce.

MEMBER PEARCE: You mentioned that it's problematic for the statement of position to be presented so close to the hearing. I'm paraphrasing but --

MR. SCHWEITZER: My understanding is that that's a possibility. I know it was requested earlier, but I believe in the proposed rulemaking it says it has to be there on the first day, preferably it be there earlier.

MEMBER PEARCE: What would be your suggestion in that regard?

MR. SCHWEITZER: I think having a statement of position is a fine idea. My concern is not with that requirement, but with the requirement that if during the course of the hearing a party learns of some other issues or perhaps one side takes a position on the unit that hasn't been anticipated, they should be able to modify response and raise other issues.

My reading of the proposed rulemaking is you state your position, and then no matter what, that's it, and you cannot present any evidence or otherwise argue anything other than in your statement of position. I think that's too restrictive. I think any legitimate unit issue ought to be the subject of the hearing, whether or not it was stated in the position.

MEMBER HAYES: I'd like to follow up on that. The rules, the proposed rules more or less equate the statement of position to almost like an answer to a complaint in civil litigation. I wonder if you could comment first on -- utilizing what are essentially adversarial rules, the Rules of Civil Procedure, in what is essentially a fact-finding procedure, number one, and number two, to the extent that we are borrowing from the Federal Civil Rules and if that analogy holds any weight, that it's more or less like the answer, an answer is due 21 days after a complaint is served, but in this instance, we're asking employers to present an answer or be precluded, to join issues within five working days. Is that in your judgment a sufficient amount of time and is the utilization of the Federal Rules appropriate in that context?

MR. SCHWEITZER: First of all, that is a good question. I would say that if we're going to use some of the Civil Rules, then I think we should use more of the Civil Rules than just Rule 26. Rule 26 serves a good purpose. Disclosure of position of the party. Keep in mind, in my remarks though, under those rules, there is discovery. There is no discovery in our cases. So I think it's an adequate amount of time to state a position which will be clad in iron from which you cannot change at any point in time irrespective of what the other party or parties raise in the

hearing.

So if we're going to use the Rules of Civil Procedure, and they've worked very well for a huge amount of litigation in this country, they work, it is fair to all parties. Let's use all of them and which would allow for liberal amendment in the interest of justice.

CHAIRMAN LIEBMAN: Member Becker.

MEMBER BECKER: Mr. Babson mentioned an article by Professors Fisk and Malamud, and one of the things that they decry in the article is the Board's lack of capacity to do empirical research. In terms of the question of when campaigning begins, we do see cases which clearly indicate campaigning is going on before a petition is filed. Now, you've indicated that many times unions begin their campaigns without the employer's knowledge. Are you aware of any systematic or semi-systematic evidence about how often that occurs or when the two parties actually begin their campaigns vis-à-vis the filing of the petition?

MR. SCHWEITZER: I can speak, of course, almost only to my own experience. The underground campaign, if you will, the silent campaign, is now the standard. It is very, very rare that we see an open, above board, overt campaign even in very, very large units. A case that I'm familiar with in my hometown, there was a union election. The union prevailed, and after they counted the ballots, the lead union organizer,

a nice gentleman, went up to the plant manager and they shook hands, and he pulled out a photograph, and it was of the groundbreaking for the facility which had occurred some years earlier. And this was a totally below the radar campaign by the way up until the petition, and he showed it to him and, of course, the plant manager said, yeah, I remember that picture. And he said, well, you see the two gentlemen in the back, waving at the camera. He said yes. He said those are our organizers. They've been here for three years. Very, very effective.

I also know from my own experience that union organizers are very, very capable at isolating groups of employees that will be involved in a campaign and those that will not. A good friend of mine is an ex-union organizer and talked with me about some of the strategies that they employ. So you really have different components.

You will have the under-the-radar campaign, almost always these days, small unit, large unit, it doesn't seem to make a difference. You will have some group of employees who are not included in any campaigning at all and, of course, your proposed rules want to get the Excelsior list out much earlier in somewhat of an acknowledgment of that.

Despite what everyone says is the high level of sophistication of the employers, many, many times they are totally unaware of the campaign until the petition is

actually filed.

In the case I mentioned where the gentlemen were waving at the camera at the groundbreaking, years before, totally unaware of it until the day before the petition was filed. So it seems to be very, very common and not all the employees know about it.

CHAIRMAN LIEBMAN: Thank you, Mr. Schweitzer --

MR. SCHWEITZER: Thank you very much.

CHAIRMAN LIEBMAN: -- for your thoughtful comments.

Our next witness will be Mr. Scott Pedigo. I hope I pronounced that correctly.

MR. PEDIGO: Pedigo.

CHAIRMAN LIEBMAN: Pedigo.

MR. PEDIGO: Yes.

CHAIRMAN LIEBMAN: Pedigo, excuse me. And after him will be Mr. Peter Kirsanow.

MR. PEDIGO: Madam Chairman and Board Members, my name is Scott Pedigo, and I'm the President of Local 304 of the Utility Workers Union of America, from Shinnston, West Virginia. I'm here today with my colleague, Rich Cossell. He has diverted all his time for me to speak. He is with our national organizers.

Over the past eight years, I've been involved in three organizing campaigns at my workplace for Allegheny Energy. I have witnessed firsthand the actions an employer will take to

prevent its employees from having a voice in their workplace. I'm here to offer testimony based upon personal experience for your consideration.

The first item I would like to address is the theory that employers are ambushed by elections that are decreasing the timeline to get to election is detrimental to the employer. These are theories that have absolutely no basis in fact. During each of our three campaigns to become union, our employer was well aware that we were seeking representation long before a petition was ever filed.

Each campaign lasted a minimum of six months, and our last campaign took over a year to get the support needed to win an election. Our employer always knew within a matter of a few weeks that we were actively pursuing unionization. All of our campaigns were conducted in the light of day for months before filing for the election, and the company held many anti-union meetings leading up to days that were openly advertised meetings to inform the membership. There is no ambush of employees or employers. Excuse me.

We support shortening of the timeframes for the pre-election hearing and the number of days to election day.

By this point, in all of our campaigns, the company used this time to ramp up their anti-union campaign, and with even more mandatory meetings, topped off with one-on-one or two-on-one brow beating sessions, designed to intimidate

employees from continuing their support for the drive.

During our most recent campaign, the company, knowing they were losing the war for our voice, they went as far as to target some committee members with false or overreaching discipline. Some of these resulted in the national organizers filing unfair labor practice charges against the company. The company's hope was that this would delay the election even further so they could try to make up the ground they had lost.

I'm here to say that thankfully our organizers were able to avoid delaying the election, and on a positive note, we were successful in settling all these charges when our new employer took over.

The company didn't quit with their campaign after we had won the right for representation. They targeted a strong supporter for retaliation, and despite their own written policy, overreached on discipline and terminated the employee. Despite the fact that they lost every step of the way, they continued on their course of retribution until the new owner took over. I'm happy to report this employee has returned to work and was made whole by the employer.

Our employer used ratepayer money to fund a very aggressive anti-union campaign through the use of union busting firms. This practice did not end with the loss in the election. The employer continued their use between

campaigns to try to prevent the solidarity necessary to win. With the present reporting rules, they are able to cleverly hide these costs without ever informing the ratepayers as to how much this service affected their bills.

It is our experience that the present rules too heavily benefit the employer. With the amount of time it takes to build the support to win representation, the employer has more than sufficient time to try and persuade the employees that they will take care of them. The additional time provided by the present rules greatly increases the employer's chance of success simply by working the system.

I would like to close with thanking you for the time and consideration to present my observation of the rules based upon my experience.

CHAIRMAN LIEBMAN: Thank you very much. Do my colleagues have questions?

MR. PEDIGO: Thank you.

CHAIRMAN LIEBMAN: Thank you very much.

Our next speaker then will be Peter Kirsanow, and next up after him will be Professor Sam Estreicher.

Good morning, Mr. Kirsanow.

MR. KIRSANOW: Thank you and Members of the Board. I'm Peter Kirsanow of the law firm of Benesch, Friedlander, Coplan, and Aronoff in Cleveland, Ohio, with offices all across the United States.

I'm here on behalf of the National Association of Manufacturers. The National Association of Manufacturers is the preeminent manufacturing association in the United States and also the largest industrial trade association in the country, representing manufacturers, large and small, in a variety of industrial sectors, all industrial sectors, in fact, in all 50 states.

Manufacturing is the largest driver of economic growth in the country, contributing $1.6 trillion to the economy. There are tens of thousands of manufacturers that have a keen interest in the promulgation of the proposed rules, and would respectfully submit that the aggregate and separate effects of the rules would have a significant adverse effect on manufacturing, a meaningful exercise of employees' Section 7 rights, employer 8(c) rights, and the workplace in general.

There are a number of early identifiable, substantially deleterious effects of the rules, but for purposes of this hearing, NAM will reserve comment on all but two issues, the truncating of the period between filing of the representation petition and the conduct of the election, and the backloading representation issues.

To paraphrase Member Hayes, the rules would eviscerate the ability of employees to make an informed choice of their Section 7 rights and eviscerate the ability of employers to communicate their positions to their employees under Section

8(c).

The proposed rule would slow the robust free and uninhibited exercise of their rights of debate and to the free-wheeling use of the written and spoken words in the union context as contemplated by Congress when it enacted the National Labor Relations Act, also enunciated in Letter Carriers v. Austin, in the Supreme Court, and we should not have any illusions.

The cumulative effect of the proposed rules reducing the median time period from the current 38 days to anywhere from 10 to 21 days would have the profound effect on the ability of employers to communicate their message to their employees and deprive them of the right to get vital information to the employees regarding their rights and the possible effects of unionization.

Even under current median of 38 days, many employers have a difficult time saying all that they wish to their employees about the issues.

Now, this applies predominantly to smaller employers, but larger companies as well. Consider the traditional campaign scenario. The union, as you may have heard just a moment ago, spent six to eight months gathering signatures for authorization cards, and during that period, it will convey its message regarding the benefits of unionization to the employees with few legal constraints, and the employer,

in the main, although I don't know of any empirical studies, I will tell you there's a host of anecdotal stories with respect to this, completely oblivious to the fact that a representation campaign is underway, and not all employees are hearing the particular message either. The employer's completely oblivious and not all employees are subject to the message either.

The employee population, or portions thereof, thus hearing an unrebutted story, a one-sided story, not necessarily an accurate one, they may not be hearing about all the downsides of the unionization effort. They may not hear about union dues, fees, and assessments. They may not hear of the union's political posture or social agenda with which the employee may disagree. They may not hear about some of the struggles of unionized companies that may be faltering or going out of business, and the union controls the filing of the election petition which to a large degree determines the approximate date of the election, and this will be the first time in most cases that employer will have any idea that a campaign is underway. It may also be the first time that many employees are aware that a campaign is underway and there's a mere five and a half weeks to the election in the main.

It takes many, if not most, employers, even the larger ones, up to two weeks to figure out what it is that they even

want to say about the particular issue, and thereafter, they'll have three to four to weeks to communicate that message to the employees, in contrast to the 30 to 40 weeks the union may have already used to communicate its message, and logistics are even more challenging for employers that don't have a centralized workplace.

With the proposed rules implemented, the election would be conducted before many employers would have even figured out what it is they need or want to say to their employees regarding the unionization issue.

This effectively deprives the employer of its 8(c) right, the First Amendment incorporated into the labor context, and it will destroy or hinder employees' Section 7 rights, essentially reducing it to a fiction, and this is compounded by the fact many of the procedural issues you've heard about with respect to the election are either rushed or backloaded, and it imposes, the rules will impose strict determinative pleading requirements on the employer, the non-petitioning party. The employer is required to craft a position on a variety of issues within seven days or forever forfeit the right to do so.

And this would deprive many employers of the effective right to legal counsel and thus due process and arguably impede its right to petition the government for the address of grievances.

Moreover, the scope of review of, of the post-election scope of review will be limited and discretionary. For those of us who have been doing this for a while, the rules are enormously beneficial to unions. Indeed, those of us who have been through a few hundred representation elections over the years have a difficult time conceiving of how a union could not win an election in any given circumstance under the proposed rules, especially if the Board fashions a new understanding of what constitutes an appropriate bargaining unit.

But they will be profoundly harmful to employees who will be forced to make an uninformed decision with respect to one of the most important aspects of their lives, and profoundly harmful to employers who will be removed from and have little input into determination to unionize the workplace.

For the foregoing reasons and those that will be submitted in our comments, NAM respectfully requests that the Board reconsider issuance of the proposed rules.

Thank you, Madam Chairman.

CHAIRMAN LIEBMAN: Thank you, Mr. Kirsanow, for your thoughts. Any questions? Member Becker.

MEMBER BECKER: You very eloquently articulate the importance of a campaign period, but I think we would all agree that it just can't make sense to have the length of

that campaign period hinge on the accident of what issues are litigated. That is, currently we have a system where the length of the campaign period depends on how many issues are litigated, and how complicated they are. That certainly doesn't make sense, does it, where we hinge this very important period that you described, the length of it, on the accident of what litigation there is?

MR. KIRSANOW: I think former Member Babson indicated that there are competing concerns in the National Labor Relations Board, and I think you articulated one very fine one. That is, you want to make sure that you do this in an expeditious process, but by the same token, you want to protect very important procedural concerns on behalf of the employees and the employer and frankly the union. You want to make sure you get it right in the first instance or as close to right as you possibly can get.

To some extent, some cases may be delayed by virtue of following procedure. Those procedures have arisen over the course of 70 years for good reason, but by the same token, I think it's enormously important that we make sure that we have the ability to communicate both the union message, the company message, the employee message, and also given the fact that the median right now is 38 days, 95.6 percent of cases are resolved in 56 days, that doesn't strike me as being particularly long and, in fact, if we want to get it

right, because this is an important thing, for employees, for employers, for the union, adding a couple of more weeks to the process shouldn't be a problem. We should be able to get it right, and right now I believe that we're looking for a solution in search of a problem.

MEMBER BECKER: Just a follow-up question, and again we're always in search of data which is as reliable as possible. You talk about a party's ability to communicate, and the only empirical study that I'm aware of is from my old labor law professor, Jack Getman, and he conducted a study of Board representation elections now some years ago, and found that surveying employees after the election, there was a very marked difference between the number of communications they had had from the employer and the number of employer meetings they had gone to versus the number of communications and union meetings.

You describe a very different world, but again are you aware or is your client aware of any empirical data on that question post-dating the Getman study?

MR. KIRSANOW: As I indicated we do not. I can tell you about my own anecdotal information as could any other management side labor lawyer, but let me suggest with respect to the Getman study that sometimes recency is promising. In other words, if an employee has heard the union or the company message over the last five weeks, it tends to stick

in his mind in terms of the number of times he's heard it as opposed to having heard maybe the same number or possibly more messages from the union over a six to eight month period.

CHAIRMAN LIEBMAN: Let me just ask a quick question similar to one I asked earlier, and you're someone you've said has done a lot of these campaigns. What is the -- can you estimate the time it would take in your mind for the employer to have an opportunity for expressing its views, and I understand that can vary according to the size of the workplace, but again, taking our median size of 24.

MR. KIRSANOW: Thank you, Chairman Liebman. You're right. It does vary, and with this median size of 24, that presumes a relatively small employer. Typically what happens is the employer, as I think Mr. Caufield indicated, he gets a notice and doesn't know who the National Labor Relations Board is because he's concentrating on making widgets. He tries to figure it out, and then calls his lawyer who is an estates and wills attorney, and that attorney says you need a labor lawyer. A couple of days go by and then he finally finds a labor lawyer. They start discussing what needs to go on. Several days have passed. The labor lawyer comes in, tries to get a climate survey of the particular employer. What are the issues that are going on? What do you think the employees are concerned about? Several more days pass.

In the meantime, the employer's also trying to assess with his labor lawyer what are the various pre-election issues that need to be addressed, supervisory status, scope of the unit, et cetera.

Trying to assess what it is that the employees need to hear may take several days, could take several weeks, depending upon the nature of the employer, whether it's 24 or 2400. And I would say that under the current system, where we've got a median of 38 days, I would say from my own experience all employers feel extraordinarily rushed under those 38 days.

With all due respect to some of the other individuals who have testified thus far, I recognize that my competency is limited, but I always feel extraordinarily unprepared. My client feels as if they don't have enough time to get all of their messages out, and also keep in mind that some employers do not have a centralized work location. They've got to go out to outlying facilities, or they've got to communicate with their employees who don't arrive at the same workplace every single day. That presents challenges. It presents challenges for the union, too. It strikes me that possibly the more time someone has to make an informed choice, to make a communication to the employees regarding an essential issue regarding their workplace, the better off all will be.

CHAIRMAN LIEBMAN: Thank you for your thoughts.

MR. KIRSANOW: Thank you.

CHAIRMAN LIEBMAN: Thank you for being with us today.

Our next witness will be Professor Sam Estreicher. Just to alert everyone, I think we will take a short break after Professor Estreicher.

PROF. ESTREICHER: Thank you. That gives everyone a strong incentive to want me to finish quickly, and five minutes is barely enough for any academic to clear his throat, but I'm from New York and I speak quickly. Madam Chairman and Members of the Board, I thank you for this opportunity to express my personal views.

I'm in the broad support with the general lines of the proposed rulemaking. There are problems, and I want to discuss a couple of recommendations I might have, but the modernized Excelsior list is a good thing. I don't think there's a serious personal privacy issue, if you limit it to the work e-mails, and there could be some sort of a consent procedure to deal with the privacy issues.

I think also the elimination of the discretionary review period, pre-election review of the Board, is an unqualified gain because my understanding is it's been barely utilized and it triggers an automatic waiting period for no good reason, my study indicated.

So those are very good things. In general, professionalizing the R case and requiring the parties to

make an offer of proof to have a basis for their position, that's all for the good, and in general, trying to reduce the time between the filing of the petition and the election is a good. It's not an absolute good. Former Member Babson made this point. There are countervailing values. One important value is I believe the need for an informed employee electorate.

The U.S. system is one of the hard in, hard out. It's hard to get a union in. It's hard to get a union out. Until we move to system where decertification is informal, we have to have some integrity to the employee choice.

I think a lot of progress has been made on the time period between the filing of the petition and the election. It used to be a 50-day median, so said the Dunlop Commission. It's now 38-day median. I think that median is going to improve with the elimination, I haven't done the math, because I'm math allergic like most lawyers, but once you eliminate that waiting period for pre-election review of the Board, it's going to improve.

I'm not sure you can improve that median much more, and so I would like the Board to think about generally an application of the proposed rule, sort of with a rule of reason with some flexibility in the Regional Director. I don't think you can improve that median, and the reason I say that, you will improve it somewhat, because of the

elimination of the discretionary review waiting period, but you're not going to improve it a great deal more than that, and it may not be desirable for a variety of reasons.

One reason is I think a problem lies elsewhere. The problem lies with the especially heavily litigated cases. The problem lies with blocked charges, and I'm going to talk about that in a moment. We need more data on this, but I think that much of the tail of this distribution, and I'm not a statistician, but is a good median, but then there's a long tail, and the long tail are the cases that take a great deal of time from the filing of the petition to the election. Many of those are blocked cases.

I think if you're going to introduce an element of union access to the employee electorate, there's going to be a need for time as well, and I think that's desirable, too, in the interest of informed employee electorate.

Also the point has been made about small employers. The median is 24. We need more data on small employers in Board elections, but my instinct is at least in Region 2, if you've got more than one employee, you're within the Board's jurisdiction. Many of those cases involve very small employers, and if you look at the first contract failure cases, many of them involved very small employers, employer with very small units. It's not clear if they're viable units for collective bargaining.

So my point is it's going to be hard to reduce this median significantly beyond what you can accomplish with the elimination of pre-election review.

Let me offer some suggestions. Again I support in the main much of what is in the proposed rulemaking.

Four suggestions. One, I think the Board should seriously consider largely eliminating the blocking charge. There may be some extreme cases where it makes sense, but the general postponement approach or backloading approach of the proposed rule, which I think is a good idea, should apply to blocking charges as well. I haven't done -- by the way, there's been very little empirical research done in labor law, and the Board can work with the academics in making that data more useful. So it would be nice to know how many unfair labor practices actually occur in organizing campaigns. How many discharges occur? I think we can get that kind of information.

So if you're going to ask me about empirical work, I think I'm the only one who has done it, and there isn't much out there. Maybe Kate Bronfenbrenner as well. The Getman study is very old, and you can talk about that if you'd like.

I think we should eliminate the blocking charge. If the charging party is not happy with the outcome of the election, a charge, if it then results in a compliance, can be adjudicated, and the one year election bar would not apply if

there's an unfair labor practice that mars the election outcome. But the general message should be this Agency provides elections on a fairly prompt basis, whoever is petitioning.

Secondly, I'm not sure about this, but I'd like to see more explanation as to why the Petitioner in a typical case, which is the labor organization, is not required to file its petition within an appropriate unit under well-established Board law. What the proposed rule contemplates is an expedited process, which I support in general, but there ought to be a burden on the organization. It's not that great a burden, but to file the petition within an established unit. If it's filing a petition in the unit that seeks an extension of existing law, or a change in existing law, that should not bring within it this expedited procedure. It should go back to the pre-existing procedure.

The third recommendation, here I'd urge the Board to take this very seriously, the preclusive effect of the statement of position. The statement of position is a good idea. The employers that have said to you that the discovery analogy doesn't work have something in it. Most of these are small employers. They don't have HR departments. They don't have legal departments. It's just not fair. It's not going to stick. Fairness is essential to acceptability of what you're trying to do and acceptability that will allow your

change to persist over a change in administration.

The statement of position in my view should only preclude -- should only be a tool to identify for the Regional Director the issues that must be adjudicated pre-election. This is basically the approach that you've taken with respect to the eligibility of individual voters. Take it with respect to the appropriate unit as well. You will then meet head on a lot of the criticism you're getting from the employer community. You will be promoting fairness to small employers. This isn't just fairness to give them a chance to run their campaign, but just fundamental sort of process fairness, and you will be promoting I believe the acceptability of this rule.

What's the rule? The rule is tell us what's at issue? If you think there's a need for a plenary pre-election hearing, tell us what's at issue. If not, it's all getting backloaded to the post-election period provided that the labor organization makes out a prima facie case of an appropriate unit as I've suggested earlier.

The fourth recommendation, in general, the idea of putting off the determination of the individuals exclusionary, sorry, the non-eligible status of certain individuals to the post-election period is a very good idea because very often they're being used as gambits, but there are cases, and it seems to me the Board ought to be open to

this, there are cases where an employer legitimately needs to know whether these folks are supervisors because the employer is using them or will use them in the campaign, and there needs to be some earlier determination in those cases.

Now, obviously this can be abused. The answer to abuse is not to have an absolutely inflexible rule but to empower your Regional Directors to only recognize the exceptional case.

So those are my recommendations. None of them take away from my endorsement of the proposed rulemaking, and I applaud the Agency.

CHAIRMAN LIEBMAN: Do my colleagues have any questions?

MEMBER PEARCE: Yes. Can you explain a little bit about the preclusive effect of the statement of position? What would you feel would be a better way to address it?

PROF. ESTREICHER: You tell the -- well, typically we're talking about a petitioning labor organization, and the respondent is the employer. It's not always the case, I understand. If the employer says, and this all has to do with implementing the statutory right to a pre-election hearing, and we're saying the union has to have a prima facie case that it's an appropriate unit.

Now, you are saying you want to have a plenary hearing. What is your case for a plenary hearing? We think the election can go forward. Well, the employer says, well,

we've got potential supervisors here. Well, we're going to allow you to challenge those ballots, put them in reserve, and we'll decide that status later on. Or I think there's an inappropriate unit. Well, what's the issue about the appropriate unit? Make your case now.

We're not going to say you're precluded from relitigating that post-election. That's my problem. There's the preclusion rule that if you don't make the case now, there is a post-election preclusion. I think that's going too far. It should set the agenda for the pre-election hearing because the employer's saying, look, there's something out of the ordinary here. The Board's presumptive appropriate rule, a unit, does not work here. I'm a very special employer. I organize it differently. I'm a decentralized operation, whatever. I'm a metropolitan operation. Well, you have to make that case if you want a hearing.

If you don't make that case, the election goes forward, but you can still challenge that post-election. Now, again, that's not going to be an easy challenge to the employer I assume based on Board law, but you challenge that post-election. It is -- strikes me as draconian, and it will unsettle a lot of communities in the court to say that even small employers on this very collapsed timeframe, which in general makes a lot of sense, but to say that people have to

fully determine their legal positions. It's not going to sustain itself.

MEMBER PEARCE: With regard to the union bearing the --

PROF. ESTREICHER: By the way, I would support -- excuse me one second. I would support a rule of estoppel, if you do make the point and there is a hearing, then you're bound by the outcome.

MEMBER PEARCE: I see.

PROF. ESTREICHER: And I think Mr. Schweitzer had some good idea about a good cause showing. That's what I heard from him. Good cause showing. So these are all rule of reason items that will help promote the acceptability of what you are doing, and --

MEMBER PEARCE: So you're not suggesting two bites of the apple.

PROF. ESTREICHER: If you raise the point, yes, that makes sense. Because that would then be the respondent's choice.

MEMBER PEARCE: Now --

PROF. ESTREICHER: You were saying something about the labor organization.

MEMBER PEARCE: Yes. The prima facie showing on the part of the petitioner is to establish an appropriate unit or what are you talking about? Are you talking about an appropriate unit based on judicatory standards or --

PROF. ESTREICHER: An appropriate unit based on the Board's existing law. I don't think it's that demanding, but I think it's necessary to the theory of what you are doing. The theory of what you are doing is that the union makes a prima facie case, that is if a question concerning representation is present. That's why you're dispensing with all this other stuff unless the employer puts something in issue. So that's the logic of it. So I think the kind of -- I understand. I've been in this area. We call it a fact-finding process. I understand. It's an adversarial process.

CHAIRMAN LIEBMAN: You want to wrap up, Professor Estreicher.

PROF. ESTREICHER: I'm done. Thank you very much.

CHAIRMAN LIEBMAN: Do you have any more questions?

Thank you. I let the time go a little longer since you've studied and written on this issue so much, Professor Estreicher.

I want to thank all of our morning witnesses. At this time, we're going to take a short break. I'll remind everyone to take your badge and number with you. We have escorts to direct you to the restrooms. If you're going to leave the building, remember you need to be escorted on the elevator, and you need to return your badge and number and don't forget to get your ID.

We are going to reconvene promptly in 12 minutes, which

is I guess about 10 minutes of, 9 minutes of. We hope you will return and join us for the rest of the morning.

(Off the record.)

CHAIRMAN LIEBMAN: We're back on the record.

Our first witness up will be Michael Prendergast, and after him will be Hope Singer. Good morning.

MR. PRENDERGAST: Good morning, Madam Chairman, Honorable Members of the Board. My name is Michael Prendergast. I'm a partner with the law firm of Holland and Knight. I'm speaking today in opposition to the proposed amendments.

One of the speakers used the phrase, and I've heard it used elsewhere, that in a lot of ways, the amendments come across the, particularly the employer community as really a solution in search of a problem that doesn't exist.

As Member Hayes summarized in his dissent to the proposed regulations, most of the elections are taking place well within the ambitious goals set by the Office of the General Counsel. There are a few aberrations, but the amendments aren't addressed to the causes of those aberrations and won't address those situations, will not expedite the commencement of bargaining, and will in many cases, where review is still allowed, will simply shift review to the time period after the election and we believe at great cost.

It will do so at the cost of we think confusing the electorate, leaving potential supervisors in the unit. Folks will not be sure exactly what unit they will be voting to join or not to join. This is particularly problematic in the case of supervisors, where someone who may be a supervisor who is left in the bargaining unit, it puts an employer in a difficult position. Do they let that potential supervisor engage in campaign activities that if they are found to be a supervisor, they would not otherwise be allowed to do, and that could be potentially disruptive, and we think it runs the risk of destroying the laboratory conditions that the Board has fought so many years to keep in the election process.

Of course, most significantly, and most speakers have addressed, is that what these amendments are really all about is shortening the pre-election period, and the effect that that will have on limiting the free speech of employers and squelching the robust debate that Congress sought to encourage through Section 8(c) of the Act.

Employees need to know the facts about the important decision of whether or not to select a collective bargaining representative. They need to know why they should even bother to vote. We still see frequently in our campaigns that employees are told by union organizers, look, if you don't want the union, just don't vote, but don't ruin it for

everybody else when, in fact, the true facts are that the majority of those voting control whether the union represents the entire bargaining unit.

Employees need to know about the unions trying to represent them. We see frequently unions will brag about their outstanding pension plans and not bother to tell people that their pension plan had to file a notice of critical status with the Department of Labor.

Employees need to know what collective bargaining is, what collective bargaining is not. They need to know that it is not a guarantee of benefits. They need to know about the risk of strikes and the effect that that could have on them and their families. They need to know about union by-laws that could subject them to trial and fines if they try to cross a picket line.

Unfortunately, experience shows that employees are not getting those facts from the union, and if they don't get those facts from the employers, they won't get them anywhere else.

The amendments as written, we feel, will go a long way to ensure that employees are voting in the dark on an issue that may be one of the most important issues that ever face them in their working careers.

Finally, I'd like to address the issue of the Excelsior list. Anyone with an e-mail address today -- pretty much

anyone with an e-mail address today knows how to operate Google, and if you don't, you can just ask your first or second grader and they'll show you. Employees know how to share their e-mail addresses with the unions if they want to do that, but what this will be is a further unwarranted intrusion on employees' privacy. Organizing drives are often very, very emotional, and a lot of times it includes supporters' personal attacks on employees who want to exercise their right to refrain from supporting the union and absent violence or specific threats of violence, this Board has usually held that that conduct is not only allowed but protected. So employees have to put up with insults, name calling, rude behavior, on the job, in the break room, on their way to and from work. The proposed amendments will ensure that they'll also have to put up with that behavior as unions spam their e-mails accounts during the organizing drive.

Thank you very much for your time and your consideration.

CHAIRMAN LIEBMAN: Thank you for your comments. Do my colleagues have any questions?

MEMBER BECKER: I have a question about your supervisor concern, which is really how do you see this as different? As I understand the current system, if there's a close question on a supervisor, a request for review is often

filed. If the Board grants the request for review, we typically aren't able to rule on that question before the election and yet the election is not stayed. So you have that open question. The election goes on. If it's a close question, even after certification, if there is certification, you may have a technical refusal to bargain on the supervisor question as you often did in the supervisor context, and so you have that uncertainty now. How do you see the proposal as different in that respect?

MR. PRENDERGAST: The proposals now would put off any dispute not involving 20 percent of the bargaining unit to have the election. We see that as resulting in those issues more frequently being left towards after the election.

MEMBER HAYES: If I can just follow that up, with respect to not so much when the decision is made, but when the record is made, if there are supervisory issues that are raised in a pre-election context, does 9(c) require that there be a hearing with respect to that if a party insists on a hearing?

MR. PRENDERGAST: Member Hayes, I'm not exactly sure.

CHAIRMAN LIEBMAN: Let me ask one question about e-mail addresses. The Excelsior list, of course, for however long it's been around, has required turning over employee home addresses, and how do you see e-mail addresses being more of a problem? It seems to me -- it's easier for me to delete an

e-mail than to turn away someone who's at my front door. So I'm curious of your thoughts.

MR. PRENDERGAST: We have frequently organized drives. Our employer clients are faced with employees who are extremely irate about getting mail sent to their homes, and why was my name given to the union. We have to tell them that that was required by the Board's procedures. That's why we all have spam filters today because those irritating, unwanted e-mails are coming into our workplace, and a lot of times when people get -- when people have someone's e-mail address, there's a lot of other things people can do with their e-mail addresses, finding their social media sites, et cetera, and it's just a further intrusion on employees' privacy. If employees want to share their e-mail addresses with the union, they know how to do it.

CHAIRMAN LIEBMAN: Thank you. Thank you for your comments and for being here today.

Our next speaker is Hope Singer, and up after that will be Oliver Bell. Good morning.

MS. SINGER: Good morning, Chairman Liebman, Members Becker, Hayes, and Pearce. Thank you for allowing me to testify before you this morning. I truly appreciate it.

My name is Hope Singer. I started working for the National Labor Relations Board in 1979 as a law student in Region 22 in Newark, New Jersey, and was hired as a Field

Attorney in Newark in the fall of 1980. I stayed here for five truly, wonderful, remarkable years, and at that time transferred to Region 31 in Los Angeles at the end of 1985. After a short period at Region 31, I went into private practice in Los Angeles, in March 1987, and I've stayed in private practice with pretty much my same firm with different names, which I won't share with you because that will take up the rest of my five minutes.

The time that I've spent practicing as a union labor lawyer has been almost exclusively as a traditional union labor lawyer, unlike many other union lawyers who go into parts of employment practice law. I do nothing but exclusive representation of labor organizations as labor organizations, and I do that in Los Angeles County. If Los Angeles County were a state, it would be larger than 42 other states. If Los Angeles County were counted as an individual geographic entity, it would probably be better known that over 10 million people live and work in Los Angeles, and of that 10 million are 12 percent of all of the unionized workers in the United States in Los Angeles County.

You would probably not be surprised to hear that in the private sector in Los Angeles, the entertainment industry is collectively the largest employer in Southern California.

When I thought about what I could add to these proceedings, anticipating that 30 or 40 or 50 speakers were

going to before you, and many of them on the union side making one set of arguments while others on the management side making their arguments, what I thought I would try to do is bring some perspective from the other side of the country.

The union density in the movie and television industry is among the highest in the United States. However, unlike the images many people have of what it means to make a movie, many of the movie crews, and I'm not talking about the casts, the directors, the writers, although some of this is true for them as well, I'm talking about the middle class people who work as camera operators, hairdressers, makeup people, who make movies. Those movie crews who work turning out films do not do it on the back lots of employer studios such as Paramount or Twentieth Century Fox with the images that we have of how movies were made from the movies of the forties. That just doesn't exist anymore.

What happens is that when most movies or television series are made, they're made by employers that are created for the distinct and specific purpose of creating that one product. So if, for example, a movie was going to be made called The Board, an employer would be created that would be called something like The Board, Inc. or The Board Movie, Inc., and everyone who worked on that movie would be employed by that one employer. It would be created for the sole purpose of making that one movie or creating that one

television series. And once the movie had been completed, the employer disappears and the itinerant workforce disperses much like their counterparts in the construction industry but without an 8(e) type of situation, and so the next time, they go to another employer. If they want to be represented by a union with that employer, they have to organize once again.

In this industry, with its high union density, there's little doubt that most, if not all, of the employees who are able to want to work in jobs where they are represented by labor organizations. They've been able to establish decent, middle class wages. They've been able to establish health and pension funds that will take care of themselves and their families, and through the earning of these middle class wages, Los Angeles has become in large part of over the last half century, a community where people can take care of themselves and their families through the work in that industry.

When a new employer is established to make a movie and a substantial portion of the crew is hired usually from the Los Angeles area, where the most skilled workers are, they're very likely to be union members and, as I said, anxious and eager to continue with their union representation for the reasons stated above.

Under the current system, any employer who wishes to ensure that there will be no union representation, if the

employees seek an election under the Board, can have that wish met and the movie will be completed, released in theaters, distributed worldwide, with advanced DVD purchases available on Amazon and ultimately in your neighborhood convenience store where you can pick it up before an election could even be held.

In light of these significant delays, workers in this industry often choose an alternate, albeit legal method of obtaining recognition for the union. They seek to represent them. They strike. They shut down the production, thereby exercising their legally protected right to obtain union representation but with the potential of economic impact on the community that could have been avoided if these folks had access to an election system that worked.

I see that the red light is flashing. I would ask for another 30 seconds to 1 minute if I may.

CHAIRMAN LIEBMAN: Surely.

MS. SINGER: My recollection of the history of the Act is that one of the reasons in passing the Act was to avoid labor strife that brought economic consequences into the community.

I'm fascinated by the stories that the media picks up to run in any particular area and in labor in particular. Of the dozens, and possibly hundreds of strikes in the entertainment community, the media recently focused on a

strike that occurred on a reality TV show called The Biggest Loser, which occurred last fall. Forty or fifty employees struck and eventually won recognition. The story was covered not only in Southern California but throughout the country, and it struck me as somewhat incongruous that within this context, the fact that the workers had to resort to a strike, causing the employer to lose money, causing the workers to lose money, causing a shutdown of a fairly significant production, that the biggest loser was the workers and the employer because they were the ones who lost because the workers could not get an election in a timely fashion. Thank you.

CHAIRMAN LIEBMAN: Thank you. Do my colleagues have questions?

Thank you for coming all the way here to share your thoughts with us.

Our next speaker will be Oliver Bell, and up after him will be Christine Owens. Good morning, Mr. Bell.

MR. BELL: Good morning, ma'am. Madam Chair, Members of the Board, it is great to be here this morning. Also I'd like to acknowledge the guests and members of the audience we have from organized labor, employers, trade associations and, most of all, the employees present or viewing this via webcast who have the most at stake in this entire process.

Thank you for allowing me the opportunity to share my

perspective with you. My name is Oliver Bell. I'm from Austin, Texas. I am the CEO of Oliver Bell, Incorporated, and the founder of the Texas Labor and Employee Relations Consortium.

As a non-attorney practitioner of human resources, labor relations, and positive employee relations strategies, I believe I have a valuable and relevant perspective on these proposed rules.

Just quickly, a background piece. Bell, Inc. is a labor relations consulting firm offering advice to employers who have the goal of improving the overall work environment for their employees, our clients, our union and non-union, employers who seek to provide attractive wages, benefits and educate employees about their business. The Consortium includes senior leaders in operations, human resources, and labor relations that want to stay abreast of workplace trends, implement best practices in the areas of conflict resolution, communications, leadership, wages, benefits, et cetera.

Why is this constituency concerned about the proposed rule change? They are interested in these changes because it affects their employees. They have indicated that regardless of whatever political pressure exists, the Board should resist indulging the special interests of employers, unions, or academia.

Most employers understand that it is the NLRB's duty to protect the rights of employees to make a free choice regarding representation, and that it is proper that the Board would encourage an election process in which employees have sufficient time to hear and process relevant information prior to voting on the issues.

Should any of the Board rules regarding the election process be changed? I think that there are some administrative rules which clearly would be an improvement if they were changed. In reviewing the Board's election rules and regulations fact sheet, at first look one might think that there's not much to it. Why be concerned? Change away. A closer look reveals the proposal, in some cases, is actually genuine change for some areas and changes that reflect the fundamental shift away from protecting employee rights in other areas. The latter begs the question whether the changes, in fact, give in to special interests.

Let's take a quick look at recent Board performance. I won't belabor you with it because so many people have quoted that today, but your case intake was up 10 percent last year for FY 2010. Ninety percent of all cases were conducted within 56 days of filing. You've heard the number 38 several times regarding the median to election, but also the average to election has been 31 days, the average time to election, and 92 percent of petitions have voluntary election

agreements.

So I think those are important things to note, and this performance evaluation would indicate that the current process is running well, so it raises the question of why change?

Let me touch on that from kind of a question and answer perspective. Do the rules protect and support employees in the election environment or do they create a questionable and potentially unstable environment? On NLRB Form 707, the Notice of Election, it is clearly stated that the Board wants all employers to be fully informed about their rights under federal law and wants unions and employers to know what is expected of them in an election.

Even the federally published guide to the Labor Relations Act states that the purpose of creating the layman's guide was to ensure that all parties fully understand their rights and obligations under law.

During representation cases, when I do consulting, we encourage employees to use all possible sources of relevant information including radio, TV, print media, the internet, especially government agency websites and union websites and to attend company meetings and union meetings to get information. An employee who has access to information can make an informed decision for or against unionization, and then that decision is truly in their best interest.

The challenge unions have today, in my opinion, is that even though they win a majority of contested elections, often when employees have access to information, they tend to back away from unions before an election can be called. That is not a NLRB problem. That is a messaging problem. It's a challenge in communicating a value proposition of unionization. So it's not an election process problem.

Does a shortened election cycle provide employees with a more democratic process or create a reckless process? I submit it would be a bit more reckless, also more harried.

In the last several weeks, the term ambush election has come into vogue from several different sources. I think what this means is an election that would be viewed as a contrived process in which one party has an unfair advantage of calling essentially the time and date of the election.

As a former Army officer, West Point Airborne Ranger, one thing we learned in the principles of war was to be able to choose the time and place of battle. If you can do that, you can win the majority of the time.

Also just in terms of performance, if you look at unfair labor practices, because employers quite often bear the brunt of being told that they're bad actors, and this is historic data which has run a trend line, but in FY 10, there were 23,500 and change ULPs filed. As the historic trend line goes, over two-thirds of those or right at two-thirds of

those were dismissed or withdrawn. About 34 to 35 percent of those were actually settled. They might have had hearings, but they were settled. Only 1 1/2 percent actually went to hearing and had to be fully adjudicated. So that would seem to indicate that things were going well.

In closing, the proposed rule changes will not result in greater rights and protections for employees. They would, in fact, result in lesser employee protections and will only favor unions, thereby creating a process that is flawed by design. May I have an additional minute, ma'am?

CHAIRMAN LIEBMAN: Surely.

MR. BELL: Thank you. The Board mission is not to advocate for or against unionization but to advocate for a process that allows employees to make a choice free from intimidation and coercion. This should also include free from a process that might encourage process manipulation. By your own internal assessment, you are delivering well on your goals.

Having a union is no guarantee of a great work life, nor is not having a union, but current private sector employees have sent a clear message. Only 1 in 14 employees is in a union currently in the private sector. They don't get the value proposition. Really employees are business people. This is about the deal. If they think the deal is good, they're going to buy into the deal.

How does an employee evaluate the deal? It could be any number of things. It could be wages and benefits. It could be schedules. It could be work life balance. It could be advancement opportunity. It could be workplace diversity. But a good deal is in the eye of the employee, and I trust them to be able to assess that whether they're union or non-union.

Finally, beyond that, I encourage expanding this inquiry. I think this is an exceptional process, and one thing I would like to do for everyone that has spoke today, my hat's off to you and to the gentleman, Mr. Pedigo -- is he still here? I mean I think that was great that he came up, and any employee that comes up to state their opinion whether they're in favor of unionization, whether they're not in favor of unionization, but when they have the gumption to come stand up here and let you know where they stand, I think that that's great, and I think that's important.

Two days of comment really is not enough. I have the privilege of serving also as the Chairman of the Board of the Texas Department of Criminal Justice. We do a number of public meetings, and if we were doing something of this scope and magnitude, you're talking about something here that will impact 100 million employees, we would probably take a little bit more than two days to hear what everybody has to say face-to-face. So if there's any way that you can expand this

process, this is outstanding.

Again, thank you for your time, Madam Chair.

CHAIRMAN LIEBMAN: Thank you for being here and sharing your thoughts with us. Do any of my colleagues have questions?

MEMBER PEARCE: I have a couple. Mr. Bell, thanks for coming and speaking.

MR. BELL: Yes.

MEMBER PEARCE: When you quoted this average that several of the other previous speakers quoted, this 38-day average --

MR. BELL: Yes.

MEMBER PEARCE: -- do you realize that that 38-day average includes stipulated elections?

MR. BELL: I looked at it as the entire process. So I think that's great.

MEMBER PEARCE: Okay. Would -- I would like to inform you, if you haven't already read it, that those elections that are -- that go to hearing, those processes that go to hearing, the average amount of time between petition and election is between 82 and 123 days.

MR. BELL: Well, in the -- and I don't question that fact. I would think that -- there was someone that made a statement earlier also about outliers. If according to your own statistics, 92 percent of the elections are by agreement,

so by stipulation. The fact that we have some that go longer, I think that that's a process, one, in some cases it's unfortunate, but sometimes there are complicated issues involved. In my own background, in terms of having worked a number of R cases, seldom have we had something get extended like that. I had the opportunity to work with a lot of different law firms, but I would say the overwhelming majority of our elections have occurred within 42 days from petition to election.

MEMBER PEARCE: Okay. And you understand that the proposed rules that are under consideration now are primarily for procedures that don't really contemplate stipulated elections.

MR. BELL: Yes, and in terms of streamlining the process itself, and maybe in the rush to get through a page and a half or however that goes, it wasn't clear. I think that some of those proposed changes actually would strengthen the process overall. I mean I see no reason to be opposed to electronic submission. I mean it is 2011. I think a lot of the question that has been brought up has just been in terms of human response time prior to being able to push that button to send the message off.

MEMBER PEARCE: Thank you.

MR. BELL: Any other questions?

CHAIRMAN LIEBMAN: Thank you very much for coming here

today and sharing your thinking with us.

MR. BELL: Thank you for allowing me to speak.

CHAIRMAN LIEBMAN: So our next witness will be Christine Owens, and after that will be William Barrett.

Good morning.

MS. OWENS: Good morning. Good morning, Madam Chair and other Members of the Board. I appreciate the opportunity to talk with you today about the NLRB's proposed rule changes regarding representation elections, and we will expand on these comments, on these remarks in the comments that we submit next month.

The National Employment Law Project is a non-partisan organization that for 40 years has engaged in research, education, litigation support, and politic advocacy to promote the workplace rights and economic interests of low wage and unemployed workers. The overwhelming majority of workers for whom we advocate are women, people of color, and immigrants, and most are not represented by unions.

While others have addressed the particulars of the proposed rule changes, my remarks will focus on the low wage workforce with the goal of highlight why two particular changes, the rules contemplate, first, streamlining the election process by eliminating most pre-election hearings and, second, providing greater access to information more quickly to enhance communication among workers and between

workers and the union that they seek to be represented by, why these changes are of such value to low wage workers.

Low wage workers make up approximately 25 percent of the workforce. Low wage jobs are among those projected to grow the most throughout this decade, and to date, in this recovery, the bulk of job growth has been in low wage occupations.

Union representation provides a powerful economic -- for low wage workers, providing a 21 percent pay differential for unionized low wage workers in the bottom 10 percent of the wage scale compared to their non-union counterparts. Among the demographic groups that comprise the low wage workforce, which again is mostly women, African-Americans, Latinos, and immigrants, the union premium in the form of higher wages and greater access to health insurance and employer provided retirement coverage is significant.

Among these groups in the lowest paid 15 occupations, the wage premium for unionized workers is as much as 19.5 percent, and unionization increases the likelihood of employer provided health coverage by up to 41 percent, and of employer provided retirement savings by up to 29.2 percentage points.

Low wage workers represented by unions are also more likely to have access to a host of additional employee benefits such as lengthy periods of paid leave, along with

the basic due process rights that a contract provides as well as representation and a collective voice for enforcing basic statutory rights such as safe workplaces, fair pay, and non-discrimination, and that's particularly critical because Agency resources, while they have increased over the last few years, are still inadequate to the task of reaching the workplaces in the American economy. It's also critical because as I'll report, in a second, low wage workers experience particularly high rates of violations of workplace protections and low wage workers have much greater job insecurity. So a union contract provides greater security.

Notwithstanding the large share of the workforce and the growing share of the workforce comprised by low wage workers, their representation by unions is inadequate. Fewer than 8 percent of workers in sales and office jobs are unionized or represented by unions, and fewer than 12 percent in service occupations are represented by unions, compared with 17 percent in construction and manufacturing and more than 20 percent of professionals.

There are multiple reasons why low wage workers are underrepresented by unions, not the least of which is their economic vulnerability and perceived disposability. It makes them less able and less willing to endure the lengthy process, the uncertainty, the risk of retaliation, and the added pressures associated with a union organizing drive.

Low wage workers are extremely economically tenuous. One-quarter are the sole source of earnings for their households. Another third provide more than half of their household incomes. Half of low wage workers live in low income families.

Compounding and associated with this economic vulnerability, the low wage labor market is characterized by considerable churning and high rates of turnover. Roughly 60 percent of low wage workers work in firms where annual turnover is 50 percent. Low wage workers are easily displaced and easily replaced, making job retention a challenge and an urgent need.

Low wage workers experience high rates of workplace violations. In a survey that NELP conducted with university researchers in New York, Chicago, and LA in 2008, we found that one-quarter of the surveyed low wage workers had not been paid legally required minimum wages in the preceding weeks, and of those who had worked overtime, three-quarters did not get overtime pay. Among the 12 percent of workers who had experienced workplace injuries, only 8 percent filed for workers' compensation, and of those, half experienced some sort of adverse employer reaction in response to their filing.

This same survey found that among workers who did complain or try to form a union, 43 percent were subjected to

retaliation, and significantly, a large share of surveyed workers, 20 percent who experienced a serious workplace violation, such as dangerous working conditions or sub-minimum wage pay, did not pursue complaints or attempt to form a union because of fear of retaliation or the perception that doing so was futile.

This economic vulnerability of low wage workers, the urgency of getting and keeping jobs, their high rates of turnover, their awareness that employers can easily replace them, the high frequency of violations and retaliation, the known violations that occurred during union organizing efforts combine to dampen the tenacity required for workers to see the process through to exercise their right to organize.

As Professor Jennifer Gordon has written in the context of low wage immigrant workers, slow processing, limited enforcement powers, and complex bureaucracies discourage the assertion of workplace rights by low wage workers.

We believe that the proposed rule changes overall will create more uniformity and certainty for all parties and provide a fairer, more efficient and more transparent process. This is crucial to the right of all workers and particularly low wage workers to exercise their right to organize and bargain collectively. Thank you.

CHAIRMAN LIEBMAN: Thank you very much for contributing

your perspective. Does anyone have a question?

Thank you for being with us today.

Our next speaker is William Barrett, and next up after him will be Ross Eisenbrey. Good morning.

MR. BARRETT: Good morning, Madam Chairman. My name is William Barrett. I'm with the law firm Williams Mullen. We are also here on behalf of our client, Universal Leaf Corporation. I'm going to split my five minutes actually with my partner, David Burton, and as a result, my time is very limited. So I'm just going to make a couple of brief points.

I've been a management side labor lawyer since 1992, after I had left 4 years as a trial attorney with Region 14 St. Louis of the National Labor Relations Board. In four years at the Board, I had the privilege of conducting myself at least 50 representation elections and served as Hearing Officer numerous times along with the normal casework of ULP investigations and trials.

It's my view that the R case processing of the NLRB is certainly one of the shining stars of the Agency's work. I don't think it's a process that's broken. I don't think it's been at all demonstrated that there are serious delays affecting the process. I don't think we ought to have a situation where aberrational handfuls of cases affect rules that then are going to be put onto the vast majority of the

rest of the work.

My main concern is with what we see as potential procedural due process violations and incumbent on the loss of the right to litigate potentially significant statutory and procedural issues if they are not identified in an initial position statement submitted within mere days of receiving the petition. Whether or not the employer was aware of an underground union organizing campaign prior to the petition being filed, it is almost certain that the legal issues that will be attendant to being filed with that position statement won't have been examined in any sort of depth.

The Chairman has talked a few times about the stereotypical size of the average employer bargaining unit of 24. That's typically a very small employer. One of the problems with that person is they get the petition. If it comes in late in the week, that owner, that manager may not be available. It takes time to get connected with the employer, and usually there's only one or two decision makers in that business.

In a larger business, on the other hand, that might be an integrated operation with multiple job sites and employees in far-flung places, you have the problem that marshaling the personnel data relevant to filling out and completing all the positions on the position statement at risk of losing the

ability to litigate those is a difficult process. It's not something that is a one phone call process.

As a result, I think what you'll see is practitioners on the management side will throw the literal kitchen sink into these position statements in an effort to preserve all possible issues to litigate later on.

It's been compared in the proposal that the Rules of Civil Procedure are similar to what we're trying to do here, but as has already been noted, an answer to a complaint is due in 21 days from the filing of the complaint in the federal system and 30 days in state systems. Seven days is simply not an analog, especially given the fact that in an answer, sometimes your answer is we don't know. We don't have the information and so therefore it's denied, and you always have the ability to amend the complaint here. And so the preclusive effect that results from denying the opportunity to litigate later is going to have some severe consequences, and I think it may well result in the fact that companies, management side labor lawyers will be perhaps less likely to agree to a stipulated election agreement which is what guides about 90 percent of the election work today, and I would hate to see us lose the opportunity to have the vast majority of cases litigated and processed in a timely fashion. Thank you.

CHAIRMAN LIEBMAN: Thank you very much. Mr. Burton.

MR. BURTON: Thank you. Again, my name is David Burton from the law firm of Williams Mullen, and I want to focus very quickly on the issue of post-election challenges and handling many of the representational issues post-election.

The standard is going to be 20 percent. Generally if a Hearing Officer can determine that less than 20 percent of the unit is at issue, that will be decided after the tally of the ballots, subject to a challenge, if it is outcome determinative of the election.

Now, anecdotally -- no empirical evidence. Anecdotally, generally most elections that I have worked on are decided by less than 20 percent of the vote. That means we're going to have a larger backdate or backlog of post-determination decisions.

Now, the concern that we represent here is an issue that you do not have an informed voter. Member Hayes addressed this issue in his dissent and pointed out the Beverly case, and I think that case raises a very important issue. A voter has to decide whether or not the union is in their best interest. That decision cannot always be made if that voter does not know who or what the unit will be that he or she is voting for.

Furthermore, under the Act, the employer has the right of free speech as many people have talked about today. An important tool or an important part of the process is the

employer communicating with its employees, whether or not it believes that unit is appropriate for the employees. By setting this issue towards the end, after the election, employers do not know what they're going to be able to argue. They don't know what that appropriate unit will be. Neither do the employees. That can create some confusion. It also possibly takes away that employee's right to exercise a free vote and understand what they are voting for.

Thank you.

CHAIRMAN LIEBMAN: Do my colleagues have questions for either one of these speakers?

MR. BURTON: Thank you.

CHAIRMAN LIEBMAN: Thank you then, both of you, for coming and being with us today.

Our next speaker is Ross Eisenbrey, and then we will conclude the morning session with Mr. Ronald Holland.

Good morning.

MR. EISENBREY: Thank you very much. Madam Chairman, I'm Ross Eisenbrey from the Economic Policy Institute, and Mr. Bell told you a few minutes ago that employees are business people making a deal. If he's right, they've been getting a raw deal, indicating that the process is flawed and they're getting bad information.

Many of the employer witnesses are telling you that the rules are fine. They like them the way they are. They don't

need changed, that they're working perfectly more or less, but the -- in my view, has been a failure in a very important way. It's failed to meet one of the fundamental purposes of the National Labor Relations Act. The way it's been administered has failed to meet one of the fundamental purposes, which is to encourage collective bargaining and help equalize the very unequal bargaining power of corporate employers and individual employees. The consequences for average workers and for the economy have been very serious.

The Board's rules have been tilted to favor anti-union employers. There's, in my view, an excessive weight given to the employer's rights and too little to the rights of employees and the unions. The employees are denied access to union organizers in the workplace, to information about the benefits of organizing, but they're bombarded with fear-mongering and personal intimidation by employers who know there is no effective punishment even for egregious violations of the law. You'll hear much more about this from other witnesses including Professor Kate Bronfenbrenner of Cornell.

The proposed rule will help level the playing field a little by making it easier for unions and employees to communicate with each other and by reducing procedural delays that serve only to create opportunities for anti-union employers to intimidate workers.

The failure of the Board over the last 40 years to protect the right of employees to form unions can be seen in the numbers. Union representation in the private sector has fallen from about 30 percent of workers in 1970 to 7 percent today. This decline didn't reflect the preferences of the employees. Polling over that time reveals that 30 to 50 percent of non-union workers wanted a union, but they didn't get one. There can be no collective bargaining without unions, and there's no other effective mechanism in our economic system to ensure that the wealth we create is fairly shared between employees and the corporations that employ them.

As union representation and employee bargaining power have declined, inequality has grown. Economists agree that the loss of union representation, as inequality has grown, is more than a coincidence. It's a substantial factor. When union representation was at its peak, the ratio of CEO pay to the pay of the average worker was about 25 to 1. Today it's more than 250 to 1.

Middle class families derive almost all of their income from wages and salaries, and wage stagnation is the main cause of stagnating family incomes. The typical worker has seen stagnating wages for a long time. While productivity grew 80 percent between 1970 and 2009, the hourly wage of the median worker grew only by 10 percent, with all of this

growth occurring from 1996 to 2002. Workers have produced more and more, but they haven't had the leverage in the workplace to win a proportionate share of the nation's growing wealth.

A share of national income claimed by the bottom 90 percent of Americans fell from 65 percent in 1968 to just 52 percent in 2008, while the share of the top 1 percent nearly doubled from 11 to 21 percent. Last year alone, that meant a transfer of more than $1 trillion from the bottom 90 percent, the middle class, the working class, and the poor, to the top 1 percent.

The consequences of this growing inequality are very serious. As the middle class's share of national income declines, the entire economy is destabilized. To maintain their living standards, families, and especially women, have increased their work hours and resorted to heavy borrowing. In the early 2000s, families used their home equity as a piggy bank until the housing bubble burst, destroying trillions of dollars of home equity and shutting off that strategy. Now, unable to borrow freely, consumers have retrenched, and the economy is dragging with 16 percent of the workforce unemployed or underemployed.

Finding a way forward from wage stagnation and worsening inequality depends on increasing the bargaining power of America's workers, which can be accomplished only through

collective bargaining.

In February, two years ago, 40 noted economists, including three winners of the Nobel Prize, issued a statement calling on Congress and the Board to restore the right of employees to form unions and engage in collective bargaining. In their words, a rising tide lifts all boats, only when labor and management bargain on relatively equal terms. In recent decades, most bargaining power has resided with management. The current recession will further weaken the ability of workers to bargain individually. More than ever, workers need to bargain together.

To sum up, the proposed rule will provide some modest help. It provides better access for employees to unions and for unions to employees through the changes in the Excelsior list, and anything that does away with unnecessary delay is a good thing that will prevent employees from being subjected to campaigns of fear and harassment which they are currently subjected to. Thank you very much.

CHAIRMAN LIEBMAN: Thank you for contributing your perspective here. Does anyone have any questions?

MEMBER HAYES: Just quickly. Are you -- I'm trying to understand what you're suggesting is the appropriate metric for us to be determining whether or not our procedures and rules with regard to representation cases are fair.

MR. EISENBREY: I'm suggesting that when you're

balancing and you're paying excessive attention to the rights of employers, to their free speech rights and losing sight of the bigger issue, which is are you succeeding in one of the fundamental purposes of encouraging collective bargaining, you've got to look at your record and say we've been failing, and you should, therefore, when you're making those balances, be more considerate of the right of employees to get the union that they want.

MEMBER HAYES: Well, that suggests to me that you would then judge the efficacy of our rules by in how many instances it leads to a union certification. Is that correct?

MR. EISENBREY: I think if you step back from how the Act has been administered and look at it, you'd have to say that with 50 percent, 30 to 50 percent of non-union workers over a period of 20 years saying we want a union and throughout that period union representation falling, you'd have to say that you're doing something wrong.

MEMBER HAYES: I'm asking how you judge in terms of petitions that are filed? Are our rules better if they yield a higher number of certifications, of union wins? Is that fairness?

MR. EISENBREY: I think for the good of the economy, yes, that that's absolutely true, that if employees start off wanting a union and they're dissuaded because your rules give employers free reign to intimidate them, then you've got a

failure on your hands.

MEMBER HAYES: Thank you.

CHAIRMAN LIEBMAN: Anything else?

Thank you, Mr. Eisenbrey, for being with us today.

MR. EISENBREY: Thank you.

CHAIRMAN LIEBMAN: Mr. Ronald Holland is our next speaker. Good morning.

MR. HOLLAND: Good morning, Madam Chairman, Members of the Board.

My name is Ron Holland. I'm a partner with the law firm Sheppard Mullin Richter and Hampton in San Francisco. My partner, Ellen Bronchetti, and I, who is here in the audience, appreciate the opportunity to appear and provide a practitioner's perspective, a West Coast practitioner's perspective. Ms. Singer, good morning.

Sheppard Mullin, if you don't know, is a large law firm with 550 lawyers or so, approximately 85 of whom practice labor and employment. Many of us practice routinely before the Board in its Regional Offices.

While the apparent intent of the Board's proposed changes is to level the playing field, to give employees expanded rights to organize, and to streamline the process from petition to election, we believe that there will be practical consequences of the proposed changes that will have an impact on invading employee rights to privacy, chilling

employees' exercise of their Section 7 rights, and increasing delay and costs for all of those involved.

Now, based on this morning's testimony, I'm going to limit my remarks to the proposed required inclusion of additional private information such as phone numbers and e-mail addresses on the Excelsior list provided to labor organizations, and we're going to also briefly comment on the 20 percent rule whereby pre-election disputes affecting less than 20 percent of the proposed unit will be dealt with post-election. However, if you have any questions regarding any of the proposed rules, I'd be happy to answer them if I can.

In summary, the impact of the proposed Excelsior list changes will further invade employee privacy without any compelling interest to do so. The potential misuse and unanticipated consequences of providing this information to petitioning labor organizations outweighs any argument that this information is necessary to communicate with potential bargaining unit members.

The Board's proposed 20 percent rule is frankly a don't ask, don't tell approach to pre-election eligibility issues. If the dispute affects less than 20 percent, like whether it's single, individual, or as a supervisor, the Board will no longer ask whether that individual is eligible, nor will it tell the parties or the voter if the voter is eligible until after the election. This simple yet drastic change is

likely to delay the certification results and increase the number of rerun elections, a result which is at odds with the very purpose of the Board's proposed rulemaking.

Current Board law, with regard to the Excelsior changes, current Board law and rules, carefully balances an individual's privacy rights and the union's need to communicate with potential unit members.

Now, being from California by way of Queens, New York, my state of residence currently has a stated commitment to individual privacy. It's in the constitution actually, Article 1, Section 1 of the California constitution says all people are by nature are free and independent and have inalienable rights. Among these are enjoying defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Madam Chairman, you commented earlier that if we already give out home addresses, what's the big deal if we give out e-mail addresses? It's a simple deletion of an e-mail. I beg to differ.

Here the Board proposes to go far beyond disclosing one's home address where you can simply shut the door, go back to dinner, and be done with it. The simple deletion of an e-mail and another e-mail and another e-mail and 100 e-mails and 100 e-mails to your coworkers on workplace e-mail, on your workplace cell phone if it's via text, you're

surely going to disrupt the workplace and intrude on an individual's right to privacy.

This personal information in most instances is only given out for the purpose of emergency contact. I know many of us have to give that information to our employers. We don't give it out to the employer so they can give it to a third party labor organization. We give it out in the event that there's a death or an emergency at work, so our family can be contacted. That's why we give it out.

From a privacy standpoint, employees should have the choice as to whether or not to provide their phone numbers or e-mail addresses. Certainly, at the very least, there should be some notice requirement. As one of my colleagues commented earlier, many employees are shocked and surprised to find out that their home addresses are being given to a union as part of the election process. This is something that they're unaware of, being unsophisticated in union elections.

Yet simply now by going to work and because 30 percent of their coworkers desire union representation, the federal government will now require the disclosure of their home addresses, personal cell phones, work cell phones, e-mail addresses.

Boy, time goes quickly, doesn't it.

CHAIRMAN LIEBMAN: And you came all the way from San

Francisco.

MR. HOLLAND: I know, and you guys are cutting me off here. I'm going to go ahead and skip to the 20 percent rule if I may, just briefly.

One of my colleagues commented earlier that that change changes the standard of an appropriate unit to any appropriate unit, and I believe that that's true. By delaying consideration of unit issues, it's unclear if you're a voter what group you're voting for, what group of representation you'll be voting for. In addition, you're making obsolete in my opinion the community of interest factors. If you have a facility that has 500 drivers in one location and 75 drivers in another location, if my math is right, that's less than 20 percent, the union can petition for that unit where, in fact, maybe there are different lines of business, different supervisors, different compensation scales and there's actually no community of interest between those two groups.

Only after the election does the issue of whether these two groups should be lumped together for purposes of bargaining, an employer -- may I continue?

CHAIRMAN LIEBMAN: Yes.

MR. HOLLAND: -- an employer after a long, emotional, expensive campaign, who loses that campaign at the end of the 42-day period or whatever period it is, now is faced with the

question, do I contest or do I just cave? Do I try to work it out at the bargaining table, or do I pursue my legal right to have the community of interest factors tested and these two groups separate, notwithstanding the fact that the 75 in the smaller unit, their votes are minimized, if not made irrelevant completely.

CHAIRMAN LIEBMAN: Thank you. Did you need another minute?

MR. HOLLAND: Well --

CHAIRMAN LIEBMAN: Is there something else you want to add?

MR. HOLLAND: Sure. I jumped around quite a bit, but I think one perspective on the supervisor issue, as many who have discussed the issue have talked about, if you have a supervisor in the unit and it's unclear whether the supervisor is a lead person in part of the unit or a supervisor, the issue is how will the employer utilize the supervisor, but I haven't heard anyone say what is the effect on the individual who is in limbo? The lead person or supervisor now doesn't understand whether he can actually engage in conduct on behalf of the employer because that's where their sympathies lie. They lie with the employer and would be a no vote, but knowing that their conduct may actually affect and overturn the results of the election, their right to free speech, their right to provide their

opinion to the bargaining unit if they're actually in the unit may be completely stifled and restricted, and I haven't heard that position, but it's certainly ironic coming from the management side labor lawyer to be concerned about the individual's right of expression as part of the campaign process, but I'm not sure that I've seen a comment or actually any discussion on that particular issue.

CHAIRMAN LIEBMAN: Thank you for your thoughts. Any questions?

MEMBER BECKER: I've got a quick question on the e-mail point which hasn't been discussed a lot this morning, so I appreciate your bringing it up. Again, we are unfortunately handicapped by having only the information available to us really through cases, but we do have a number of cases where we see employers campaigning by e-mail, and I'm just curious why you would think it would be more of an invasion of privacy after a petition is filed for the union to get a list which includes e-mail and to be on a campaign via an e-mail message versus the employer doing the same thing, which is currently the case.

MR. HOLLAND: Well, the employer, right now, first of all, the employer's property is that e-mail address when it comes to an employer network, if we're talking about a workplace e-mail as opposed to a personal e-mail, and so that's one point. The employer is paying for an employee's

time. They have them there, and they do have the right, as the Board has articulated, to hold captive audience meetings, to furnish employees information about a variety of issues.

But the second complicating factor I think is the development of the solicitation policies for employers and the development of rules regarding the personal use of e-mail. Many of these policies are terribly comprehensive now, and if the union now has the ability, in fact, they're encouraged to utilize workplace e-mails to issue mass e-mails, I posit that you're going to have a variety of issues come up with violations of no solicitation policies during the campaign period. You're going to have discipline of workers who are violating those policies. Indeed, it really seems that you're encouraging employers to ensure that they're monitoring employees' e-mail and monitoring their use of the internet as part of the campaign process or in an effort before the campaign to ensure, of course, no change during the critical period.

The unanticipated consequences of that is that an employee who now is used to sending out personal e-mails, are used to having a correspondence between their coworkers or their supervisor via e-mail is now unsure as to whether they're being watched. During that critical period now, they feel since the union has their addresses and the union is corresponding with them, now they feel like they're being

watched, and maybe there's been no increase in monitoring whatsoever, but at the same time, it's going to have those unanticipated consequences that none of us can really predict right now with regard to the workplace, workplace morale, and just simply how workers communicate in the workplace with each other.

MEMBER BECKER: Do you have any sense just based on your own experience how common it is for the employers that you represent to use e-mail to communicate during a campaign?

MR. HOLLAND: It depends on the employer certainly. You know, many of my clients are in trucking, the solid waste industry, and most of those individuals don't have computers, don't have e-mail access, at least not in the workplace. However, many of my clients do have employees who have not only workplace e-mail but carry BlackBerrys or phones or cell phones where they can retrieve their e-mail. It depends. It depends on whether we're looking at traditional say manufacturing and transportation jobs or some of them more -- some of the newer industries that are currently being targeted for organization by labor organizations.

CHAIRMAN LIEBMAN: I think we're going to break for lunch now. For everyone who spoke this morning, we are very grateful to you for your thinking and your time. It was a very interesting airing of views, and we thank you.

For those of you who may not be returning after lunch,

we want to thank you for being here and participating. Don't forget to return your badge and number at the security desk in the lobby. Those of you who are returning after lunch, remember to bring your badge and number with you. You're going to have to go through security again on the way back. You probably should take your belongings with you, and we look forward to seeing everyone again after lunch. Our first speaker will be Christopher Cozza, and we will resume at 1:00 p.m. promptly. Thank you.

(Whereupon, at 11:52 a.m., a luncheon recess was taken.)

A F T E R N O O N S E S S I O N

(Time Noted: 1:00 p.m.)

CHAIRMAN LIEBMAN: Okay, I think we can get started now. Thanks everyone for being here this afternoon. I think we probably have some new people in the audience, a new group of speakers. So, if those who were here this morning will forgive me, I'm going to just quickly run through some of the guidelines that I've been asked to discuss with you.

First of all, very important, when you checked in this morning, you were given a badge and a number. Please keep those with you at all times. And if you leave the room, please take it with you. You'll need it to get back in the room. Most important, remember at the end of the day when you leave to return the badge and number so you can retrieve your ID.

Also, there are two exits from the room, one to my left, which is the main entrance to the room, and an exit also to my right. You can exit out of either one. There are restrooms located outside the hearing room to the left and right. We have staff in the hallway who can help escort you anywhere you need to go, including back to the first floor.

This afternoon we will take a mid-afternoon break probably around 2:30. If you need to move around during the hearing time, please do so quietly. Obviously, if you're a speaker, we are delighted to have you stay with us through

the afternoon. But if you need to leave, we understand, and you are free to do so.

So, just a few guidelines for the speakers. We are going to follow the order of speakers that's set out on the list that was given to you when you entered the room. Every person scheduled to make an oral presentation will be given five minutes to present his or her remarks, and the Board members will then have an opportunity to pose questions. After that, the speaker will be excused. Every speaker should be ready to proceed in turn, and please move quickly to the podium. We ask that you introduce yourself and indicate who you're representing, if anyone, and if you have someone with you, please feel free to also introduce that person. Your five minutes will start after the introductions.

Our Deputy Executive Secretary Gary Shinners seated below me, to my right, is our timekeeper.

There are lights on the podium to assist you. Your five minutes to speak will start, as I said, after the introductions. You'll have -- the green light will go on at that point. The yellow light will go on indicating you have one minute remaining, and the red light indicates that your time has expired. I think people who were here this morning will be able to say that I'm not a tyrant about the time clock, but it is important that you observe the lights

generally, so we can try to keep on schedule. If you have a written statement that you wish to put in the record, please give it to our Executive Secretary Les Heltzer, who is in the room to my left. Please do that before you leave for the day.

If my colleagues have additional questions for you based on the written testimony or the written statements that you provide today, we may decide to pose written questions to you. I've asked them to make those available within seven days. And you will have until the close of the comment period for this rulemaking on August 22nd to supply your written answers.

Just a couple of final points, please note the meeting is limited to issues related to the proposed amendments to the Board's rules governing our representation case procedures and other proposals for improving representation case procedures. No other issues are to be considered at this meeting today. I want to especially alert our speakers that they should not discuss matters which are currently pending before the Board, as there are important rules pertaining to ex parte communications that we don't want you to violate.

So, with that, I ask everyone to turn off cell phones or other devices. And unless my colleagues have anything to say at this point, I think we can proceed to call our first

witness of the afternoon, Mr. Christopher Cozza. Next up will be Andrew Kramer.

Mr. Cozza?

Oh, okay, so, Mr. Cozza it seems is not here. And so, we'll start with Andy Kramer.

Welcome. Good afternoon.

MR. KRAMER: Good afternoon. Thank you, Chair Liebman and Members of the Board. I appreciate the opportunity to be here this afternoon. My name is Andy Kramer. I'm a partner in the Washington office of Jones Day. I'm here representing HR Policy Association, which has had a long and sustained interest in the issues being presented by the Notice of Proposed Rulemaking. We appreciate the offer to provide comments today as well as written comments, which we will provide in August.

While the Notice of Proposed Rulemaking raises a number of questions, I'm going to concentrate on three particular areas that are of importance to the association and its members, but I note it's not to the exclusion of other issues which will be covered in our written comments.

At the outset, we believe that by allowing a Regional Director or a Hearing Officer to deny an employer or another non-petitioning party the right to a pre-election hearing with respect to the appropriateness of the petitioned unit, if the dispute concerns rather the eligibility or inclusion

of individuals who would constitute less than 20 percent of the unit, is counter to the direct language of Section 9(c) of the Act and the requirement of the Act to hold the hearing if there is reasonable cause to believe that a question concerning representation exists.

Even more fundamental is the fact that the Board, as one of the reasons for this proposed rule, is to try to minimize disputes and litigation. Unfortunately, I think the 20 percent rule will on occasion actually be the very opposite. It will, among other things, bring into play issues which are likely to deal with more litigation and not less, including supervisory status issues which are critically important for the parties to know who might be a supervisor during a campaign. The fact that an arbitrary bright line rule of 20 percent might not present, that will not help an employer or the petitioning union in terms of knowing who could be an advocate for one or the other during the representation process. If you add to that the removal of discretionary Board review, we think the 20 percent rule is not a proper application of what the Board's policies should be in this area.

Equally problematic, and maybe even more so in my view, relates to the required filing of statements of position. Time today is far too short to go into all of the problems raised, but let me just note a few that I think are important

for the Board to hopefully consider as you listen today and as you review the written comments.

I don't have a problem that an employer should take a position as to whether a unit is appropriate. I think an employer should take a position one way or another saying the unit is not appropriate and present evidence as to why that unit is not appropriate. That's a far cry, however, from requiring an employer to not only offer an alternate unit selection, but one that is most similar to what the parties might agree to. This to me is a burden that I think is improper under the statute, but moreover will cause significant issues and problems as you move forward. And some of those problems were even discussed this morning in the sense of preclusion issues, which I will get to in a second, in terms of both preclusion of your right to a hearing initially as well as post-election challenge.

Similarly, the information that's required from the employer about alternative units would provide a petitioning union with information it's not seeking, though even relevant to its own petition. This information would include full names, work location shifts, and job classifications. That goes to the petitioning union. Another list that the Regional Director gets relates to the Excelsior list issues of e-mail, telephone numbers, home addresses. I have no idea what happens to that list. Numerous concerns, however, in my

view are raised for the need for such information. If you're simply asking the employer to say contest the unit, that's one thing. Here what you're doing is providing information, that to me the only real value is to beat the future union organizing efforts for groups of employees that the union is not even seeking in that particular representation case.

Finally, and perhaps most important of all, the statement of position requirement, like the 20 percent rule, will likely disfranchise a number of employers from their right to a hearing on whether or not the petition is an appropriate one and contest post-election issues. Within a seven-day period and perhaps even a shorter period of time, employers are going to be required to basically affirmatively put forward positions, positions which I believe are way too short in terms of time and will end up actually leading to preclusion issues.

The final point that I would make in my limited time is the Excelsior list issues, because it's clearly uncertain from the proposed rule as to whether e-mail addresses and phone numbers are work addresses or home numbers. In either case, they're going to represent both property as well as privacy concerns, very significant. And I would also note as a practical matter that we live in an electronic world. I don't mean to suggest that you can't limit some way from seven days, but to just go down to two because the

information is there would not be enough.

My time is up. Thank you very much, and I appreciate the opportunity to speak.

CHAIRMAN LIEBMAN: Thank you.

Does anyone have any questions?

MEMBER PEARCE: This 20 percent rule, the -- if I understand you correctly, you're saying that relying on a 20 percent rule would deprive the employer due process of 10(c) -- a 10(c) right?

MR. KRAMER: Well, it's a 9(c).

MEMBER PEARCE: 9(c), excuse me.

MR. KRAMER: Right, it'd be a 9(c) right, because the statute talks about a hearing if a question concerning representation exists. Angelica Healthcare is a Board case where that issue did come up. It's noted in the proposed rules, and it's distinguished by the majority in the proposed rules. I would argue that I don't agree with that rationale. But the point is, Angelica Healthcare clearly is the case, and Member Cohen actually I believe was at that time before Member Cohen was on the Board. But to me, Member Pearce, I do believe that's a statutory issue over and above the practical one that I raised as well.

MEMBER PEARCE: Now, if it's 20 percent or less, and as the current rules stand now, if there is a small percentage that are an issue, the Regional Director has the discretion

to have them vote under challenge. And if the challenge is a determinative, then there's a post-election proceeding. And this process provides similar availability of process in that regard. How does this differ?

MR. KRAMER: Well, first of all, I'm not sure I agree with you that this process so provides. As I noted, you have two sections that come out entirely new to us, no dialogue, no discussion. Here we have a proposed rule. One is the 20 percent rule that says automatically if I have a unit of 500, and 100 people could be contested, I don't have a hearing about those 100 people. That we'll just go ahead and vote them subject to challenge. Now, maybe you do; maybe you don't because then comes the statement of position.

What happens in the statement of position if I didn't mark all of these people off, and I didn't say that this 100 group was there? Member Pearce, under my reading of this, I waive that. I'm not sure I get to go back to that. I'm not sure what happens in that case because it's not simply pre-petitions, as at any time you are precluded, if I remember the actual wording in the register. So, to me, I think this is part of the serious problem that you have with both of them together interplay that there's a serious issue.

But I'll give you a practical one that I think actually Professor Estreicher noted this morning in his testimony. Why shouldn't a party know who is a supervisor for purposes

of an election when you're asking that person to potentially be an agent? What possible reason is there to say that that should not be one of the core issues that the Board should be interested to make sure? There's been enough litigation over the years, including at the Supreme Court, about who is a supervisor. Why wouldn't we want to have those issues decided? And what you're doing is a bright line test, and I understand that. It's a bright line test of 20 percent. But I think tied together, I'm not sure we do have those rights.

MEMBER BECKER: I'm puzzled -- I really am -- in terms of what you describe as the proposal versus the current practice. One thing the Board was clear about, I think, in prior precedent is even if the parties don't wish to defer eligibility issues, there is no right to a decision on those issues, only to litigate them. In many cases, it's certainly been our experience that when there's a supervisor issue that's disputed, and there's a request for review that's granted, there's no decision prior to the election. And, of course, if the cases go up to the Court of Appeals, the status remains uncertain. So, there's no right currently to a decision on supervisory status prior to the election.

MR. KRAMER: But there's a right to a hearing.

MEMBER BECKER: But what I'm trying to understand is how does that help the parties?

MR. KRAMER: Because it informs the parties. As a

practical matter -- look, first of all, pardon, because I didn't get into it. It's my concern about the whole rule, because most elections are consent or stip elections in vast majority because parties agree to it because we deal with those issues, Member Becker. I'm not arguing about that.

What I'm simply saying is this is a bright line test. This isn't an issue of saying -- this is you don't get the hearing, okay. You don't even get the facts out there. You don't let somebody get informed. I know I hopefully am a good enough lawyer and counsel to my clients where I have facts that I didn't know or might come out that I might have a different view of where things go, and I'd rather know that early rather than late. And I'd rather be able to deal with that early rather than late. I'm not one who is going to say that there's no benefit of that because I think there is a benefit.

And by the way, I think in most cases you're absolutely right. In my own experience after 40-some years, it's absolutely right. We don't have a lot of that. But when we do, I think I've been informed, okay. And I think what I'm simply raising is for the Board to consider those issues as you go forward with it. Because what you're simply saying is --

MEMBER BECKER: How does that stop the employer from informing itself? The employer has a question about whether

certain individuals are supervisors. As the case law stands now, there's no right to a final decision pre-election.

MR. KRAMER: But there's a right to a hearing.

MEMBER BECKER: But I'm really struggling to understand how that difference affects the employer's ability to plan and decide who can be used in election and in what way. We're not precluding if these provisions are adopted. There'd be no preclusion of the employer from conducting any kind of investigation into the facts that it wishes to.

MR. KRAMER: An employer can conduct any investigation. This is a one-way. This is the Board saying you don't get a hearing. This is the Board saying we're not going to provide you with the opportunity to explore this issue and have the Regional Director decide the issue. You're absolutely right. The Board doesn't have to decide the issue, but you've eliminated Board review anyway. You've eliminated Board review at the early stage in this proposal, so there is no Board review in this proposal.

MEMBER BECKER: But under the current procedure, the Board when it grants review doesn't issue a decision.

MR. KRAMER: But under the current procedures, the Board reviews it as a request for review.

MEMBER BECKER: Correct.

MR. KRAMER: All right, and the Board can decide to review it, or it doesn't have to decide to review it. But at

least you have that opportunity. You're saying here there is no opportunity. You're saying here it's okay to remove that right. I'm saying I disagree with you.

MEMBER BECKER: It's a related question. Again, I'm trying to understand the difference between current practice as you have experienced it and the proposal. In terms of the obligation described in the proposal to make an alternative proposal when the scope of the unit is contested, it's certainly been my experience that you don't have under the current practice a party coming in and simply saying the unit is inappropriate. What the party does is say the unit is inappropriate because it should also include this facility, or it should also include these classifications. That is, from what I see, we're simply codifying what is already current practice.

MR. KRAMER: Let me deal with that because I think that's great because it actually came up at lunch today. Because there was a case when I started my career years ago in Chicago to deal directly with this, because then it raises a serious question of how this all would work in that context.

Okay, let's assume we have a single unit store. Okay, and I'm the employer and I say, no, I think there are three stores. Okay, for interchange, personnel, common -- I don't have to explain. All right, so we say that should be the

unit. Okay, now, under the proposed notice, as I read it now, you know -- this is just out just a little less than a month, so I'm not as familiar as maybe you are or I should be, but it's pretty quick to be up here talking about them. But the fact of the matter is is that I then say, okay, I think it's a three-store unit. And let's assume that in my statement of position I put in a three-store unit rather. Okay, and the union still wanted the one store, couldn't get agreement, and it's abandoned. Okay, and they don't seek the three-store unit because they don't have a showing of interest, or whatever reason or what have you. They then come back with a three-store unit a little bit later. Am I precluded from now saying, well, maybe it's not a three-store unit? I now have looked at it more carefully, and it's a six-store unit or a city-wide unit. How does that all work? And why does the employer have to put the most similar unit as distinct because I normally, when I did the three-store unit, didn't think of the most similar to what the unit would be appropriate. I was thinking of what might be the appropriate unit. So, how does the most similar rule have any application?

Then my final question with respect to that is is, okay, because I understand what you're -- what the purpose is, but then it says, employer, you provide all of this additional information on this other unit. But why would I provide that

information on the other unit when the only question is is whether the unit that the union is seeking is most appropriate? It doesn't have to be most appropriate. It's an appropriate unit. I'm sorry. It doesn't have to be the most appropriate under the Act. To do it, that's my concern, Member Becker.

That's my concern. And these are real concerns that I have as to how this works, okay. And they're concerns. I understand what you're saying abut current law. What I'm simply saying is this changes a lot. This changes the dynamics. This has other consequences to it. And all I would ask the Board is to give careful consideration as you go forward with respect to it, because these are significant issues that we have to deal with in terms of it. And I appreciate your time. I'm sorry.

MEMBER BECKER: If I could just ask one follow-up question?

MR. KRAMER: Sure.

MEMBER BECKER: Let's take the scenario that you're describing. So, union petitions for one-facility unit. Employer says I believe that's an inappropriate unit, and the most similar appropriate unit in my view would be this unit which includes these additional facilities and modifications. Wouldn't it help the ensuing discussion in terms of trying to work out that dispute for everybody to know who's working in

those classifications?

MR. KRAMER: I -- look, I think there are vehicles -- this goes to a process point. I only wish there had been dialogue on some of this because I think there are vehicles where it does help.

But the point is helping is one thing; mandating specific information of the type being asked is more than simply helping to know. Because typically, when in the case that I gave you, which I tried a long time ago, we did present what other classes were there. We had to present because we were arguing that the unit was inappropriate. All of that came out, but that wasn't names and addresses. That wasn't who the job titles were. That wasn't anything else. That was demonstrating that we thought under Board law the appropriate unit was X rather than Y. That's my point.

CHAIRMAN LIEBMAN: Thank you very much. Thank you for your thoughtfulness.

MR. KRAMER: Thank you very much. I appreciate your time and attention. Thank you.

CHAIRMAN LIEBMAN: Thank you for helping us out.

And our next speaker is going to be Thomas Meiklejohn, and after that will be Michael Hunter.

So, good morning -- good afternoon.

MR. MEIKLEJOHN: Good afternoon. Thank you, Chairman Liebman, distinguished Members of the Board. My name is

Thomas Meiklejohn. I'm with the law firm of Livingston, Adler, Pulda, Meiklejohn & Kelly in Hartford, Connecticut. I've appeared on behalf of unions in representation cases in the Boston office, Hartford, Brooklyn, and Manhattan. I also worked as a Field Attorney and a supervising attorney for the Board in Hartford and in Philadelphia before that. I come here to speak -- I'd like to speak.

Well, first, I guess I'd like to resist the temptation to -- I may not, but I'll try to resist the temptation to get into a debate with the previous speaker, but I probably won't resist it. I was going to speak from, try to speak from the perspective of a practitioner. I appear in front of a number of different court and administrative bodies, a practitioner who believes that litigation should be a process for resolving the issues that are before the body to be decided and not a process for achieving other ends. I'm not -- you know, we all have an idea of what ends we think the parties sometimes seek to achieve in representation case hearings.

But with all respect to Mr. Kramer, clarifying who the parties can use as their advocates in a campaign is not the function of a representation case hearing. The function of a representation case hearing is to determine whether the unit proposed by the union or the petitioners is an appropriate unit and who would be eligible to vote as members of that bargaining unit. And, frankly, as a practical matter, the

employer has tremendous access to information about who, what authority alleged potential supervisors might exercise. And the union is often shooting in the dark and taking a big risk in allowing potential supervisors to become their advocates in a campaign.

But the way to deal with that is to not have a hearing on an issue that's not necessary to resolve the core question of whether there is a -- whether the petitioned-for employees have a community of interest. So, I guess my first point is just that I don't see anything particularly radical in limiting the issues to ones that are necessary to deciding the questions before the Board or before the Regional Director.

And I don't see anything particularly radical at all in requiring the parties to clearly state a position beyond, you know, this particular unit is not appropriate. In my experience in Hartford, and I will say and throw my two cents worth for the Hartford Regional Office. They do an excellent job in most cases of putting the employer's attorney in a position where they have to state what their position is if there's going to be a hearing. And, in fact, most of the management attorneys that I deal with, generally speaking, do state a clear position on what the bargaining unit is. But there are those exceptions.

There are the employers who come in and describe a unit

using job descriptions and job titles that the employees have never heard of. And if the employees and the union don't have access to the names of the people, then we don't know who they're really litigating about. We can't figure out -- I do remember clearly one hearing where the employer litigated job classifications for two days and on the third day came in and said, oops, well, that's really not the job titles that we use in this particular factory. It was a factory. This was awhile ago, obviously.

So, the information that the Board is asking is the kind of information that I think in any kind of litigation you expect to have available to you before the hearing starts, and it enables opposing counsel to figure out what the issues are and what's relevant. And it allows the Hearing Officer to determine what evidence does and does not need to be admitted.

So, that leaves me 45 seconds to do my prepared remarks. So, I will just mention one case that I had in the past year involving a company called Autumn Transport. We received what's still called the Excelsior list, bad names and addresses. These were the names and addresses that the company used to communicate -- that the company had in its records, and dozens of those addresses were incorrect because the employer didn't use addresses to communicate with its employees. Employees were required to provide current,

accurate telephone numbers where they could be reached, but the addresses that the union got were, by and large, pretty or almost useless. So, simple changes like requiring names and addresses will enable the unions to communicate with the voters in the same fashion that the employers are already communicating with their employees. Thank you.

CHAIRMAN LIEBMAN: Any questions?

MEMBER HAYES: I just have a couple of quick questions. First, I guess, is that I guess you'd know that the bulk of R cases proceed to election on the basis of a voluntary agreement between the parties. I'm wondering if you have any view as to whether or not the proposed rules would decrease the likelihood of the parties entering into voluntary agreements.

MR. MEIKLEJOHN: Actually, I did give that some thought when they first came out. I had some hesitancy about it, but I think that by requiring the parties to clarify their positions and take their positions quickly that in the long run there may be an adjustment period, but I think in the long run it will result in an improvement in that regard. You know, in my view, it's the Regions and the Regional personnel who are most effective in getting those agreements. It requires cooperation from the parties. And I think that if you view this collection of rules as a whole, it provides the Regional personnel with additional tools to use in

bringing the parties to an agreement.

MEMBER HAYES: And just if I can to follow up on one other thing, is my understanding of your position correct that Section 9(c) of the Act doesn't statutorily require a hearing in the event the parties raise issues with respect to the supervisory status of named individuals?

MR. MEIKLEJOHN: 9(c) requires a hearing when there's a -- to determine whether there is a question concerning representation. And the precise parameters of the bargaining unit are not necessary to be determined in order to address the 9(c) question.

CHAIRMAN LIEBMAN: Anything further?

MEMBER PEARCE: With regard to this case, this Autumn Transport where you got a lot of information that was not up to date, the proposed rules are asking for additional information in the Excelsior list. How do you think that that would impact on scenarios like you described in Autumn Transport?

MR. MEIKLEJOHN: What I'm saying is that the employer had in this case it was cell phone or telephone numbers that were critical. They had certain information that they used to communicate. In a particular case, you may not know whether the employer, you know, communicates by e-mail or telephone or whatever. But in this case, they would have had to provide telephones. That was the information that the

employer used to communicate with the employees. And really just, you know, providing names -- I mean, providing addresses, you know, is what the rule required. It's all they had to do. But it was really hiding information from the union. It was the telephone numbers in that case that would have been useful. In many other circumstances, I think, in the modern workplace it would be e-mail addresses.

MEMBER PEARCE: Thank you.

CHAIRMAN LIEBMAN: Thank you very much. We appreciate your contribution.

Our next speaker will be Michael Hunter, and after him Ron Mikell.

Good afternoon.

MR. HUNTER: Good afternoon, Chairman Liebman and Members of the Board. I appreciate the opportunity to be here. My name is Michael Hunter. I am a union attorney based in Columbus, Ohio.

I primarily want to address the Board to encourage you to adopt the preliminary view that questions concerning the eligibility or inclusion of individuals into a bargaining unit that constitute less than 20 percent of the potential unit should be deferred until after the election, and that persons in that disputed area should be permitted to vote under challenge.

There appear to be two broad categories of resistance to

this proposal. The first is that the employee in not knowing the final composition of the unit upon which they're voting, would somehow be deprived of a meaningful right to vote, and secondly, that employers will be deprived of a pre-petition or pre-election determination as to the supervisory status of alleged supervisors who occupy the disputed positions.

Going to the first objection or concern regarding the composition and scope of the unit, it should be noted that the Board has proposed that, in situations where there are individuals who are going to vote under challenge, that the final notice of election would set forth notice to the employees of that situation and would let the employees know how that may ultimately be determined. In that case, there really is no difference in that procedure than what currently takes place, for example, in a Sonotone election, where the professionals have the right to vote on inclusion or non-inclusion in the wider unit, and there is some uncertainty for an employee in either unit as to what's the ultimate composition of this unit going to be.

The same occurs when two unions may petition for equally appropriate units, maybe one plant versus three or what have you, and there's a self-determination election. As long as the notice of election informs the employees of what they're voting on and what the potential outcomes could be, and particularly with the proposed rule what the methodology may

be to resolve those potential disputes, there simply is no infringement upon the meaningful right to vote.

The second broad objection to the proposed procedure is that the employer, and the union for that matter, could be deprived of a pre-election determination as to the supervisory status of individuals who one party or the other believe should be in the unit. The proposal to allow such individuals to vote under challenge is simply an extension of procedures that already exist. When the hearing record is inconclusive as to the supervisory status or the managerial status of particular individuals, those individuals have been permitted to vote under challenge. And the courts have approved this process as a well-established method by which the Board assures the speedy running of representation elections. Under Harborside Healthcare, unions as well as employers take their chances when there are supervisory issues in dispute, and unions take their chances as well as employers if there's pro-union or anti-union coercion on the part of a supervisor. However, it's not a case of whether or not that individual is predetermined to be a supervisor or not that matters. It's the supervisor's behavior in the election campaign that matters. And whether they're determined to be a supervisor or not prior to the election, it's their status and behavior that determines whether or not they can taint an election and not whether they were

permitted to vote under challenge. Thank you.

CHAIRMAN LIEBMAN: Thank you.

MR. HUNTER: Any questions?

MEMBER HAYES: I just have one quick question, and that is is it conceivable that the scope or the composition of the unit might not be an issue which a voter would want to know before he or she cast their ballot?

MR. HUNTER: Might not want to know?

MEMBER HAYES: Yes. In other words, the scope or the composition of the bargaining unit, is it conceivable that that would have an influence on how an individual employee might vote?

MR. HUNTER: I'm not sure it would, but the Court of Appeals certainly seem to think it's possible that it would, that if they don't know what the potentialities are that it might have an outcome. I think as a practical matter, people vote whether they want to be represented by a union or they don't. But I do think it's clear that if the notice of election tells people what the potentialities are, such as you're having in a Sonotone election, that there's no problem with it.

MEMBER HAYES: But would that notice cure some of the problems, in your view, that the Courts of Appeals have suggested with respect to the voters knowing the scope and the composition of the unit?

MR. HUNTER: Member Hayes, I believe it would. If you look at Morgan Manor, for example, when the Fourth Circuit in their unpublished decision denied enforcement in that case, they did indicate that that decision may have been different if the employees in that situation knew there was a -- knew that the LPNs in that case were in play. And it's because they didn't know that they were in play that that became a problem. And here when the notice lets people know what's in play, I just don't think there's a problem.

CHAIRMAN LIEBMAN: Other questions?

Thank you for being with us today.

MR. HUNTER: Thank you.

CHAIRMAN LIEBMAN: Our next witness is Ron -- I hope I'm pronouncing it correctly -- Mikell.

MR. MIKELL: You have pronounced it correctly.

CHAIRMAN LIEBMAN: I have, good.

And up next will be Ron Meisburg.

Good morning -- good afternoon, Mr. Mikell.

MR. MIKELL: Good afternoon, Chairman. My name is Ronald Mikell, and I stand here today representing my union, the Federal Contract Guards of America, and also at the request of colleagues up in Briarcliff Manor, New York, of the United Federation of Special Police and Security Officers.

We're essentially both of us 9(b)(3) unions representing

guards and security professionals in this field. I appreciate the chance to speak to the Board. I want you to know that I've followed all of you for years, and it's like meeting famous people.

I've read Mr. Member Hayes' dissent to the new rules, and I've listened with rapt attention to Mr. Kramer, and I think that you folks sitting up here in Washington, D.C., as we all are -- I happen to live and work up here -- but it's easy to see where you can turn 5 minutes into 22 minutes like Mr. Kramer does, and you understand the whole concept of delay in R cases.

MEMBER BECKER: I think that was mostly my fault.

MR. MIKELL: I lay some of it at your feet, Member Becker. Yes, sir, I do.

First of all, I listened to Mr. Holland, you know, in the morning session talk about the right of privacy and his concern out of California and the California constitution and about telephone numbers and e-mails and how those things would be terrible in the hands of the union. It almost sounded like the arguments made against Excelsior back a few years ago. The fact is, in order to reasonably maintain the laboratory conditions and give the unions and the companies a chance to have their story told, everybody's got to have the same seat at the table. Now, in the modern era, you know, the lack of access to cell phones and e-mails locks out a

legitimate attempt to communicate on most issues. I have members that I represent who don't have a regular phone. All they have is a cell phone. The way people get in touch with me, whether it's my wife or my son when he's in Iraq, is he calls my cell phone with my 503 area code.

And by the way, while I'm here in front of the Board, I wish to commend to you the good people of the Regional offices, especially the folks at Subregion 36 who really know what they're doing. Out there in the hinterland, there are a lot of people that really know what they're doing. That's one of the reasons that I like the rulemaking. You leave some of these decisions to the Regional Director.

Now, I tell you the whole idea of the expedited policies and the anticipated rulemaking, this is one of the reasons I'm very much in favor of it. Delay is the enemy of all of us. And when one of these cases, one of these R cases achieves the patina of age, nobody has been done any good at all. You know, recently my union was arguing a case out of the boot of Texas, 16-RC-10929, FJC Security. We filed that in March.

CHAIRMAN LIEBMAN: I just want to stop you for a moment.

MR. MIKELL: Yes, ma'am. It's been resolved, ma'am.

CHAIRMAN LIEBMAN: It's been resolved? Okay, good, good, good, thanks.

MR. MIKELL: I remember that.

CHAIRMAN LIEBMAN: I didn't want you to walk into any problems.

MR. MIKELL: I'm not going to fly in the face of the ex parte rules. But that case was filed around St. Patrick's Day in 2010 and resolved in June of 2011, and that was all about whether or not somebody was an appropriate part of the unit. And we had two or three before election hearings and one afterwards. And these rules would have kept that from happening, and the issue would have been resolved a lot sooner.

You know, delay is the friend of the incumbent power, whether that's the incumbent union or it's the company with their authorities over these employees. In that particular case that I cited, we were arguing with the incumbent union, which eventually we threw out. But the people that we represent now in the particular location say they wanted them out a long time ago. But because everything could be appealed all the way to the Board on every single issue, on every single time, then everything that was done was delayed and delayed and delayed.

Now, the resolution, and I hold to what the gentleman from Connecticut had to say, is essentially that it's better to resolve these things. And resolution is what we should all be about. Now, I am not a member of the bar. I have beaten several of them at the bar and in front of the

National Labor Relations Board, and that's the beauty of the NLRB. It's not necessarily set up just for some high-end, high-paid management or labor attorney, but for people who are there to express their rights and their views in front of somebody that can resolve them.

And, again, I hit you with the R word, resolution. If there's any doubt, let me speak quite clearly that I speak in favor of the new rules. And I've conducted several elections, and a lot of times the extra times that the good gentleman Mr. Kramer would want to use for the employer to speak, it's mostly used to just denigrate the union and not used to advance the point. Ad hominem arguments are no one's right. And, again, I speak in favor of the rule. Thank you.

CHAIRMAN LIEBMAN: Thank you very much for being here.

Does anyone have some questions?

Is there any aspect of the rule you'd like to see improved?

MR. MIKELL: Oh, that I'd like to see improved?

CHAIRMAN LIEBMAN: Yes.

MR. MIKELL: Well, I have to tell you, ma'am, as a unionist, I still believe in and think that there's a lot of efficacy in that Employee Free Choice Act, but I don't know that that will ever get anywhere.

CHAIRMAN LIEBMAN: We're not here to debate that one.

MR. MIKELL: I knew that that would be your answer,

ma'am. But the expeditious use and the fact that all of us communicate these days with e-mail and with cell phones, and I think it was just this last week Verizon announced they're not even going to publish the White Pages anymore, you know, and distribute them all over the place. So, people are moving away from the addresses and telephones and regular mail. And so many people use P.O. Boxes that you can't really communicate with these people. But the employer must always be able to so he can at least tell them when to come to work, okay?

CHAIRMAN LIEBMAN: Okay, thank you very much for being here.

MR. MIKELL: Thank you, Chair.

CHAIRMAN LIEBMAN: Our next speaker is Ron Meisburg.

Good afternoon, Mr. Meisburg.

And then next up will be Professor Kaplan.

Welcome.

MR. MEISBURG: Thank you, Madam Chairwoman, Members of the Board. Good afternoon. My name is Ronald Meisburg, and I'm with the law firm of Proskauer Rose, and I'm here to represent the United States Chamber of Commerce. We appreciate the opportunity to participate in this proceeding.

There can be no doubt that the Board's proposal raises very important issues for the labor management community. In the coming weeks, we're going to continue to work to identify

and consider the issues presented by your proposal and to do the research and analysis necessary to draft and file comments by the August 22nd deadline.

As we go forward, however, we believe that meaningful discussion in this area requires some mutual acknowledgment of some important points. The first is that employers have a legitimate and substantial interest in NLRB representation proceedings and the rules that govern them. While this may not be universally acknowledged, we think it unassailable. After all, an employer undertakes risk, invests money, develops a business plan, makes commitments to vendors, suppliers, customers, hires and supervises the employees. And while the interest of employers may not eclipse those of other interested parties, they are undeniably legitimate and substantial, and they include the right of the employer to communicate effectively with its employees about unions and union representation.

Second, we believe that a great number of employers involved in representation proceedings are relatively small. This is strongly suggested by the Board's statistics showing that the median size of units and representation elections in the last decade is between 23 and 26 employees, and, of course, that means half of the elections held involve less than that number. The Chamber is particularly interested in this because more than 96 percent of the Chamber's members

are small businesses with less than 100 employees, and 70 percent of those have less than 10 employees.

Now, most of us here in this room are very familiar with the arcane labor law terms and rules and concepts involved in representation proceedings. And yet, even we can sometimes struggle with their meaning and application. So, we must not lose sight of the fact that a small employer faced with perhaps its first and only organizing campaign will not have anything like the familiarity and the expertise that we have. Instead, that employer will have to locate and retain counsel, and that takes time. While the stated goal of the proposed rules is to streamline the election process, we believe the rules must take into account the due process rights and realities of employers, especially small employers.

Third, it must be acknowledged that a union does already have substantial advantages in a representation proceeding. The prevailing wisdom seems to suggest that it is the employer who holds all of the cards because purportedly, it can without regard to the demands of running its business communicate constantly and incessantly with its employees about unions and unionization. On the other hand, it is the business of a union to organize and represent employees. A union may conduct an organizing campaign for weeks or months without an employer becoming aware of it. During that time,

the union can frame the election issues, communicate them to employees, and determine what unit it wants to seek. The union can file the petition at a time when it feels it is most advantageous to do so. The union will have had the opportunity to consider and prepare for any anticipated legal issues and will have its resources in place to handle that.

Simply put, we think that under the current system, unions do enjoy significant advantages. So, we believe that the proposed regulations and any suggested changes made for them need to be viewed through the lens of these facts. Otherwise, whether intended or not, there's a very significant and substantial risk that employers will be greatly disadvantaged in the exercise of their legal rights both to respond effectively and appropriately to election petitions and possibly to communicate with their employees as well.

And, finally, there is no deficiency in the Board's current handling of representation cases which demands changes contemplated by the proposed regulations. The Acting General Counsel has described the current representation case handling as outstanding. The Board continues to meet its overarching representation case handling goals that are mandated in connection with the Office of Management and Budget and the Office of Personnel Management. Unions do not appear to be disadvantaged by the current system, winning

upwards of 60 percent of elections that are held. And we believe a system that processes 92 percent of the petitions filed on stipulation should not lightly be set aside or changed without a good degree of deliberation, in which we appreciate the Board's opportunity for us to help you deliberate on this. And we look forward to further and full participation in this rulemaking proceeding.

CHAIRMAN LIEBMAN: Thank you, Mr. Meisburg.

Any questions?

MEMBER BECKER: I've got a question, and you can answer it in any of your roles, private lawyer, former General Counsel, counsel to the Chamber, but I think you're well positioned to answer it in all of those roles.

CHAIRMAN LIEBMAN: Board Member.

MEMBER BECKER: I've left one out? We put a set of options on the table in terms of blocking charges, and I'm just curious as to your view of what would be appropriate if we were to change the blocking charge policy. For example, the question of if one has a charge and if the General Counsel has found merit in the charge, should we simply go ahead with an election? Should the ballots be impounded? If you have any preliminary views on that question.

MR. MEISBURG: Well, thank you, Member Becker. I do appear today in one role, and that is to represent the Chamber of Commerce. But it is informed, obviously, by my

background and experience.

I don't think there's any question that blocking charges, if you looked there was an -- IG did an audit a few years ago of the Board's representation case handling, and the blocking charges were routinely the outliers that brought up the median times for handling cases. So, I think it's a legitimate, a very legitimate question for study. I don't have the answer to that here today. But I do say, and I have said in the past, I think the fact that the blocking charge may be responsible for skewing the statistics in a way is something that we'll certainly be addressing in our comments to you, and I think it is a very legitimate area for Board inquiry.

I wish I could be more insightful about that. I don't have an elegant solution for that this morning or this afternoon. I didn't have one this morning either.

CHAIRMAN LIEBMAN: Let me -- go ahead, please.

MEMBER PEARCE: How are you doing?

MR. MEISBURG: I'm doing all right.

MEMBER PEARCE: Great. Good to see you. With respect to the statistic that you did cite though, the 60 percent of the elections held being won by the union, it's probably even larger than that. But elections -- wouldn't you agree that elections held is the key phrase?

MR. MEISBURG: Sure, I know that there is a complaint to

say well, there's a lot of petitions withdrawn. I don't know that these rules would address that issue, I mean, if that's what you're driving at.

MEMBER PEARCE: Well, I mean, well, certainly, if the argument on the other side of the issue is that if it ain't broke because of the amount of success that unions have in the elections that are held, if we are to balance the ability of the parties to engage in collective bargaining with employee free choice and free speech, wouldn't you say part of our charge would be to make sure that if there is opportunity to file petitions, then they're not encumbered by a process in order for us to do that?

MR. MEISBURG: I don't think there's any question that you want to have a process that is efficient and fair, and I don't think there's any -- you know, it's all going to be about the details of what results in that. My citing the 60 percent statistic was merely an effort to demonstrate that the current process is not so skewed that it results in -- I don't know what a person would think needs to be the right number for that, but certainly it seems to me that any process that has resulted in 92 percent of matters being handled by stipulation and results in a 60 percent win rate by unions, it is to me within the range of a reasonable system. There will never be a perfect system, and I understand we can't stop aiming at trying to improve things.

But I don't think that the question about the percentage of wins and losses is more of a matter of trying to demonstrate that the current system is a reasonable system.

CHAIRMAN LIEBMAN: Anything further?

MEMBER HAYES: I just -- I guess I just have one question. It goes back to something that Mr. Kramer raised. In terms of what we have done in this proposed rulemaking, we have essentially with respect to blocking charges, we haven't proposed anything specific but invited a conversation in the first place. That's to be contrasted with everything else that has been done in the rule where it's very specific in terms of exactly what we would do. On reflection, would we have been better off, do you think, to have invited the conversation about the entire R case situation rather than just doing that selectively with respect to the blocking charges?

MR. MEISBURG: Well, you know, I don't -- you sit in the seats of responsibility. I do not. And so, I feel a little bit reluctant to second-guess discussions that were had that I wasn't party to that may have involved matters that I don't know about. But I can say that I do think in this kind of rulemaking, which is going to affect -- it will be the biggest change in the representation rules in the history of the Board. I think that an appropriate time of deliberation before proposing, along with an opportunity to have pre-

proposal input, particularly since the Board deals with, for example, the ABA regularly, other groups regularly, there are already avenues of communication and thought available.

I know when I was back early in my career at the Labor Department, and we did pre-proposal rules where we got comment from the regulated community before we even made a proposal. I don't think that that would have been a bad idea, but I don't want that to be taken as somehow I know all that you know, and therefore, I'm telling you what you should have done. But I do think that idea has merit.

CHAIRMAN LIEBMAN: Thank you.

Anything else?

Thank you for being with us today and for your thoughts.

MR. MEISBURG: Thank you very much for the opportunity.

CHAIRMAN LIEBMAN: Our next speaker is Professor Ethan Daniel Kaplan. Good afternoon.

PROF. KAPLAN: Good afternoon. Thank you, Chairman Liebman and Members of the Board for allowing me to speak. I am here to speak in favor of the proposal.

And first though, I would like to respond to a question that Member Hayes raised, which I think is a good question. He raised a question of whether or not it was important that people had the right to know who was in the unit before they voted. And, you know, I think with any type of rulemaking there are tradeoffs. And in an ideal world it would be great

to know who all the members of the Board -- members of the unit would be before making, you know, before casting a ballot. However, though I think there are substantial tradeoffs, which I'm going to address in a minute. I think that when you're dealing with 20 percent of the unit that for the people -- for most people who aren't being contested, it won't matter that much. I think the people where it will matter more is for the 20 percent who are under contestation. But precisely for those members, they will -- their ballots will only count if they end up being members of the unit. And, therefore, I don't think they'll have as much uncertainty in terms of the impact of their casted ballot as you might think.

So, now on to my comments, basically I would like to talk a little about empirical research and the impact of streamlining, expediting union election processes. And this research is not my own. I have some research that is related to the efficiency of production during union elections which, if I have time, I will address. And if not, I will submit in writing.

So, there's a decent body of literature, mostly in the Industry and Labor Relations Review. I'm an economist and in industrial relations do journals that do address this question. And most of the work that has been done has been done on Canada because Canada, one, has a very similar system

to the United States. It is decentralized to the provincial level, but they do have a somewhat similar system. And second of all, they actually have experimented in changing rules exactly, you know, not exactly similar to this rule, but similar in terms of having an expedited process or not. And the experience in Canada suggests that a rulemaking change like this would benefit unions, but it would benefit unions primarily through the reduction in unfair labor practices filed.

So, what the evidence seems to suggest is that when Canada switched, in particular for British Columbia, switched from a system where they had a suggested guideline on the number of days before a hearing to remand it, that there was an increase in union wins, that there was also an increase in percentage of filings that turned into elections. And since something like 30 percent, I believe, of filings never actually -- eventually get withdrawn, that is a large percentage of potential elections. And that most of the difference is highly correlated with whether or not unfair labor practices were filed, and also, unfair labor practices being filed seems to be very predictive when there's a longer time horizon of whether or not elections come to fruition and whether or not unions succeed.

So, if it were the case that there would just be a reduction in -- there would be an increase in union wins

because employers wouldn't have the ability to make their case, then I think that this would be, you know, at least a more questionable rule. But it seems that the empirical evidence suggests that, in fact, the reduction is mostly through firms using tactics that the Board itself oftentimes deems to be unfair, and it does end up having impacts on whether elections get -- filings get withdrawn and whether or not unions win. So, I think the Board has a difficult task in balancing workers' rights with firms' rights to represent themselves.

But I think the current rule is very sensible, and I think it goes a certain amount of the way towards adjusting the huge differential between the 7 percent unionization rate and the very high percentages, oftentimes more than 50 percent percentages that you see in polls of people who say that they wish to be in a union.

CHAIRMAN LIEBMAN: Thank you for your thoughts.

Questions?

I don't think you started off by telling us your association or who you are.

PROF. KAPLAN: Oh, I'm sorry. So, I'm a visiting professor currently at Columbia University, but I'm moving into the area. As of the fall, I'm going to be a professor at the University of Maryland, College Park in the Economics Department.

CHAIRMAN LIEBMAN: And are you studying these issues yourself, doing empirical research?

PROF. KAPLAN: So, actually, the empirical research that I didn't have time to talk about, but that I will try to expedite and submit before the August 22nd deadline, deals more with the impact on efficiency of production of prolonged election proceedings. So, there's been some body of work in economics that has looked at disruptive impacts on product quality. For instance, the Firestone Tire withdrawal, it turns out, was very related to labor relations disruptions. So, I'm actually looking at nurse unions in California. And so far what we're finding is that in the period leading up to a union election, there's a decline in quality of nurse service provision measured in a bunch of different ways, like urinary tract infection rates, falling rates, things like that.

In specific what we have not done but which I would like to do in light of this rulemaking contemplation is to look at how the length of the time from the filing to the election relates to the severity of the decline and also the length of the decline. But what we do find is that after the elections occur, there is recovery in the quality of service provision.

CHAIRMAN LIEBMAN: Thank you very much. We appreciate your being here today.

Our next speaker is Robert Garbini.

Good afternoon.

And after that will be Margaret McCann.

MR. GARBINI: Thank you. Madam Chairman and Members of the Board, I want to thank you for allowing me to speak. My name is Robert Garbini. I'm the president of the National Ready Mix Concrete Association founded in 1930. NRMC represents 1300 member companies and their subsidiaries that employ more than 125,000 American workers, of which many are unionized. The Association represents companies that operate in every congressional district in the United States. The industry is currently estimated to include more than 65,000 concrete mixer trucks.

NRMC represents a unique industry which relies on numerous employees located at many different production plants in order to provide a perishable product for a just-in-time basis on all hours of the day. Currently, the vast majority of the Ready Mix Concrete industry is made up of small businesses. As with most small businesses, owning and operating a Ready Mix Concrete company means that you are responsible for everything, whether it's ordering inventory, hiring employees, meeting environmental and safety regulations, dealing with an array of government mandates, and when appropriate even educating employees about union organizing decisions and their labor rights.

Due to the unique features of the Ready Mix Concrete

industry such as isolated plant locations, unpredictable delivery hours, dispersed employees, and unusual business hours, it is the opinion of NRMCA and its members that the NLRB's proposed rule will not allow companies ample time to accurately and thoroughly assess the process, actions, and options associated with a union election or to educate employees to make an informed decision.

Contrary to the intent of the proposed rule, we believe that the proposed timeframe will lead to a longer union election process. Many Ready Mix Concrete companies do not employ in-house counsels or experts knowledgeable about labor laws. As such, many of these same companies are located in rural areas, and thus legal counsel specializing in union organizing drives is not readily accessible. This very real scenario will lead to a greater number of pre and post-election complaints and possibly unfair labor practices due to objectionable actions on part of the employers who are unfamiliar with the intricate and confusing laws and rules governing union elections.

Furthermore, we believe that the proposed rule restricts employees' ability to hear from their employer on issues that involve and affect employees, employer, and union alike. This amounts to a grave disservice to employees' capacity to make an educated decision about their employment future. The ability of unions to hear from both union employers about

creating a collective bargaining relationship should be the foundation of any proposed rule to be built upon.

As mentioned, many Ready Mix Concrete companies are already unionized. It is their experience that a trustworthy, honest, and accountable open cohesion between union, employee, and employer is necessary for all parties to prosper and to maintain a productive working relationship. NRMC believes that this proposed rule does not adhere to these principles.

Also mentioned before, concrete companies have many employees that work at various hours at numerous concrete plants. The current rule, although not perfect, provides the flexibility for the concrete companies to reach out to each individual plant and the entire employee base in order to thoroughly inform them about a collective bargaining relationship, their rights, and the proposed roles of the union and employer should they choose to organize.

NRMC believes that the proposed rule will not allow companies ample time to hire legal counsel, accurately identify all of the issues needing consideration, draft a statement of position, determine employee categories, prepare an accurate preliminary voter list, discover relevant evidence and thoroughly educate the employees about creating a collective bargaining relationship. The flexibility in the current system allows companies to accurately and thoroughly

assess the process, actions, and options associated with the union election as well as to adequately educate employees and thus should be kept intact.

NRMC supports employees' rights to make informed decisions about their employment future. We also believe in protecting an employer's opportunity to be part of that process. Creating a collective bargaining relationship should not be a closed process or a snap decision.

NRMC encourages and urges the NLRB to refrain from issuing a final rule on these proposed changes. Thank you for allowing me to speak. I'm happy to answer any questions.

CHAIRMAN LIEBMAN: Thank you for being here.

Some questions? This gentleman didn't even use up his whole five minutes.

MR. GARBINI: Just in time.

CHAIRMAN LIEBMAN: You still have a minute. Anything more you want to add?

MEMBER BECKER: I've got one question just in terms of the folks you work with and what would be helpful to them in the process that you described. One of the things which hasn't been discussed today is in the proposed revisions that, if they were to be adopted, the petitioner would be obligated to serve immediately on the employer followed up by the Region serving as well a written description of the process accompanied by a written essentially narrative of

what the employer will have to do if it so wishes at the hearing.

I guess my question is will that be helpful in the preparation in your view, or what would be? That is, if we were attempting to make it more transparent, what the process consists of for people who may have had no experience previously and to specify exactly this is what's going to happen, and here are the choices you're going to have to make, and here's what you're going to have to do when the hearing opens. Will that be helpful, and what would be helpful?

MR. GARBINI: Well, to answer your question, Board Member Becker, I think that would be helpful. Certainly, it would be helpful, especially when a lot of these Ready Mix companies are one-plant operations. They might include no more than 15 or 20 employees, and many of them are the family owned companies. They've never probably had experience with a unionization or petition that goes on.

I think the problem is going to come in with the length of time or the amount of time though. I think that's an excellent suggestion, but I still think there's going to be some necessary time for them to prepare. They're not going to have the experience to be able to go out and say oh, I know exactly who to call. What do these terms mean and everything else? So, that's why at this point in time we're

urging that we just remain with the current rule.

CHAIRMAN LIEBMAN: Let me ask you a question based on your experience in this industry. A lot of the comments this morning have been about how these proposed rules would curtail an employer's ability to campaign with its employees and inform its employees of its point of view. Is there some kind of general practice that employers in your group do in terms of campaigning?

MR. GARBINI: I can't say with any certainty that there's very specific things that go on. I know a lot of the -- I'll say the companies that are familiar with the union process and so forth, they want to make sure that their employees, first and foremost, are taken care of, whether it's in the salary area and benefits and so forth. So, a lot of those things I can't say categorically that they act in this particular fashion, but I do know that a lot of them are very, very caring about their employees and try to ensure proper compensation. And if that's -- I don't consider that to be trying to -- of any move to try and prevent unionization. They're trying to say we're providing a very good standard of living for you, and that's our offer to you. But in any kind of other capacity, I couldn't address that.

CHAIRMAN LIEBMAN: You can't say. Anything else?

MEMBER BECKER: Do you have any idea what percentage of your industry is unionized?

MR. GARBINI: I think it's about 12 percent.

MEMBER BECKER: Thank you.

CHAIRMAN LIEBMAN: Thank you, Mr. Garbini.

MR. GARBINI: Thank you.

CHAIRMAN LIEBMAN: Thank you for being with us today. I appreciate your comments.

And our next speaker will be Margaret McCann, and I think we'll take a break after.

MS. McCANN: Oh, after, okay.

CHAIRMAN LIEBMAN: No, after.

MS. MCCANN: I didn't know I had that effect on people.

CHAIRMAN LIEBMAN: Good afternoon. Welcome.

MS. McCANN: Good afternoon. I am Margaret McCann, and I am an attorney for the American Federation of State, County, and Municipal Employees. Before being an attorney with AFSCME, I was an attorney at the Labor Board, and I was also before becoming an attorney, I was a union organizer and a collective bargaining representative. I want to thank the Board for the opportunity to speak about the Board procedures, which speaking on behalf of an organization that is dedicated to workers' rights to organize and collectively bargain, the Board's processes are important to us and to all American workers.

We commend the Board for undertaking this process of revising the rules because process does matter. The Board is

charged with regulating the process of organizing and collective bargaining and accommodating the competing interests of the parties. The Board's election process is actually okay if you were in the 1960's. The Board needs to comport with today's technology and come into the 21st Century and the 21st Century world. The Board processes as they exist today have become hijacked by the employers.

How has it become that the employers -- that the election process has been subsumed by the employer's right to communicate to its workers? Under the Act, employers can communicate with their workers, and they should be able to as long as their communication is not threatening. But the Act was enacted so that workers could collectively communicate and bargain with their employers.

The premise that has been set forth today that somehow the proposed rule will stifle employer's speech is just not true. And any statements put forth today or tomorrow to the contrary are just inaccurate.

How can filing a representational petition electronically in realtime stifle employer's speech? It does not. How can sending an Excelsior list within two days instead of the current seven days stifle employer's speech? It does not. How can convening a hearing within consecutive days stifle employer's speech? It does not. What it does, it injects some certainty into the process so that all

parties, the employer, the union, and most of all the workers know when the hearing will convene.

How will having the employer take a position about the petitioned-for bargaining unit stifle employer's speech? It does not. In fact, that rule would be asking the employers to speak a little more, to tell the Board what they believe the petitioned-for bargaining unit represents. How can delaying 20 percent or fewer of the workers' eligibility status delay employer's speech? It does not. What the proposed rule does is allow the Board to control the election process, to eliminate undue delay, and provide certainty to all the parties.

The Supreme Court mandated that the Board should be promulgating rules that are recorded accurately, efficiently, and speedily. And the Board's proposed rule attempts to comply with this mandate. The proposed rule contains common sense changes to the election process. It is injecting fairness, provides certainty, and updates procedures in this technological age. Thank you. And I thank the Board for the opportunity of letting us address this important issue.

CHAIRMAN LIEBMAN: Thank you. Thank you for being here today.

Are there any questions?

Thank you very much.

Why don't we take a break at this point and be back

promptly at 2:30?

(Off the record.)

CHAIRMAN LIEBMAN: Let's go back on the record.

And our first speaker this afternoon will be Douglas Darch. And following him will be Professor McCartin.

Good afternoon.

MR. DARCH: Good afternoon, Chairman Liebman. Good afternoon to you, the Members of the Board, distinguished counsel who are joining us, guests, and Board staffers. I am here today on behalf of the Illinois Chamber of Commerce and the Wisconsin Manufacturers Association. Collectively, these two -- whoops. That's called a rather dramatic entrance, I believe. Fortunately, it didn't touch the ground, right, or we'd have to burn it.

The combined economies of the states of Illinois and Wisconsin exceed $895 billion, placing it among the roll call of nations at number 17, ahead of the Netherlands, Turkey, Indonesia, and Switzerland to name just a few. For 30 years I have practiced before the federal courts and before the National Labor Relations Board where I have appeared as an advocate in Section 8 proceedings as well as a representative under Section 9.

In the late 1980s and early 1990s, I represented employers in seven unit hearings involving the appropriateness of units limited to meat department

employees. I would like to share that experience as part of my comments. But if you will indulge me a moment, I need to put the case into context.

During the last 30 to 35 years, the retail sale of fresh meats underwent a transformation. The changes made the industry more cost efficient, which is good for the public. And in today's buzzwords, it created many new green jobs. What happened? The NLRB had developed a presumption in the 1930s and in the 1940s that in a retail grocery store, meat department employees constituted a separate appropriate bargaining unit because the butchers in the department employed traditional meat cutting skills. Traditional meat cutting skills were required or applied in the breaking of carcasses of beef and pork into retail cuts of meat. Also back then was a lot of lamb and veal, not so much today. But today carcass beef is no longer shipped to market. Rather, only boxed beef or case-ready beef is shipped. The traditional meat cutting skills are kept at the abattoirs and the waste products generated in the breaking of beef, such as fat, inedible tissue, and bone are kept at the site of the abattoirs as well.

The seven cases I referred to above all involved boxed beef retail stores, which the only work performed in the meat department was similar to the work performed by the deli clerks. One of these hearings eventually resulted in a

reported decision. It was Copps Food Center, 301 NLRB 398 (1991). And I invite the panel to review the first sentence of that decision. It recites that the case sat for two years and one week from January of 1989 to January of 1991 while the Board considered the Regional Director's decision and direction of election. The case is of note because the Board reversed the Regional Director's finding that a separate department of meat department employees was appropriate, and it eventually dismissed the petition.

And against that backdrop, I would like to make three points. Point number one, some of the delay that the Board is attempting to eliminate here, and I am loathe to use that word delay when it involves the processing of petitions, but the case Copps Food illustrates some of that delay is attributable to the Board's failure to manage its own internal processes. It appears that under the proposed rules the Board's solution is not to effect changes at the Board, but it is simply to outsource that process and send it to the Regions or simply cease doing the work altogether. If that work is substantial, as the comments accompanying the proposed rules suggest, there should be layoffs here at the Board headquarters, and I can tell you the management community will be alert to see whether layoffs occur. No layoffs mean the work was not substantial, and therefore, it does not serve as a justification for the rules change. In

any event, I trust the Board intends to lead by example and has already negotiated with its unions over this tentative decision to subcontract and its effects.

Now, to address the proposed rule change in Section 102.66, the introduction of evidence and rights of parties, in a Rule 56 proceeding, the Plaintiff, which would be the petitioner in the R hearing, files the Rule 56 motion. The presumption is the Defendant wins. Compliance with the law is presumed. The NLRB's proposed procedure turns that presumption upside down. At the NLRB, the petitioned-for unit is presumptively appropriate. Instead of having to overcome a presumption, the petitioner is aided by it. The motion is written, not oral. The parties file briefs, three of them, a brief in support, a response, and a reply. The court takes the motion under advisement and may hear oral arguments. In any event, it is only after a period of deliberation that the court issues a decision.

Now, consider the Board's proposed procedure. The Hearing Officer makes an off-the-cuff decision from the bench after hearing at most oral arguments. There is no opportunity for case study, deliberation, or reflection as to whether there are genuine issues of material fact. The Board should not presuppose a Hearing Officer can adequately address offer of proofs, complicated issues on the fly without benefits of proof.

In short, the Board is attempting to sacrifice getting it right on the altar of expediency. We urge the Board to modify its proposed rule to provide that if the parties dispute the appropriateness of the unit, the Hearing Officer shall immediately forthwith take evidence on the scope of the unit. Thank you.

MEMBER BECKER: First, I am completely sympathetic to your description of the delay which rests at our feet. But I wonder if you think this is accurate in terms of the proposal. The proposal does a couple of different things in terms of the Board's own caseload. So, the proposal suggests that the pre-election request for review would be eliminated. That's a fairly substantial amount of our weekly diet at present. And it proposes not simply that those cases just be shifted to the post-election process, but that many of them or some of them will be mooted out because of the election results.

So, in terms of the delay which is attributable to the Board, it does make some sense that if the proposal were to be adopted, the case load would be constricted in those two respects, and hopefully we could do a better job. Doesn't that make sense?

MR. DARCH: It absolutely does not, sir, and here's why. The reason is that with technology, the Board should be able to move its caseload through the process here faster, not

slower. It used to be the cases were done on note cards, and now you can use computers. You can do the research online instead of going to the library. You have precedent banks which are found much more quickly. If you've been in the private sector, you will know that there is a huge emphasis on reducing the amount of time spent on research because it's so easy to expedite the process.

And this Board's staff here has increased in size over the years, so presumably, and it has aged as well I might add through my own personal experience with a number of the members, but not of the Board of the staff, excuse me. I want to make that absolutely perfectly clear. But one would presume that with experience comes some degree of familiarity and the ability to handle it well.

I look at the weekly case reports, and I must say for a five member Board sitting or four member sitting in panels of three, it's not particularly a heavy case load compared to what is done, for example, in the Court of Appeals in Chicago where I practice and it's your home, I know. But you look at the case load that comes out of there, and it's much heavier, and they do do briefs, and they have oral argument, which the Board does not do here.

CHAIRMAN LIEBMAN: I just want to make one comment. I'm not going to touch your comment about aging, but Board staffs have, in fact, quite substantially been reduced over even the

13 years that I've been here, quite substantially.

MR. DARCH: Okay.

CHAIRMAN LIEBMAN: Our Board staffs have shrunk enormously. So, I just wanted to correct that.

MR. DARCH: I'm not limiting -- I'm not addressing the Regions. I'm talking about the headquarters staff.

CHAIRMAN LIEBMAN: That's what I'm talking about too. Quite substantial reduction. I'm sure even since the time former Member Cohen was here, his former staff is much smaller than it was when he was here. So, any other questions?

MR. DARCH: Can I volunteer one comment?

CHAIRMAN LIEBMAN: Sure.

MR. DARCH: And that is the rule that speaks of the parties or the petitioner -- not the petitioner, the employer making a recommendation as to the appropriateness of the unit, in the Copps Food cases, the parties had sat down and negotiated the appropriate unit before any of the hearings started. When the union was unable to organize in the unit, it then attempted to ignore the petition -- I mean, ignore the agreed upon unit, and you'll see that that matter is addressed in the Board's decision as well, saying that it should not -- the union was not bound to its agreement.

So, the suggestion I think that you're proposing here that by making the employer move forward with a suggestion as

to the appropriate unit is somehow going to speed up things, I think will only do so to the extent there is, if you will, honor among the parties and that there will be an effort to abide by that agreement. Otherwise, you're back to 92 percent of them are stipulated anyway, which I don't think advances the case at all. So, thank you very much.

CHAIRMAN LIEBMAN: Thank you for your comments.

Professor McCartin will be next, and after him Mr. Kirschner.

Good afternoon.

PROF. McCARTIN: Good afternoon.

CHAIRMAN LIEBMAN: Nice to have you here.

PROF. McCARTIN: Thank you. Thank you, Chairman Liebman, Members of the Board for giving me this opportunity to comment on the proposed rule change for representational proceedings. My name is Joseph McCartin. I'm an associate professor of history at Georgetown University, where I also serve as executive director of the Kalmanovitz Initiative for Labor and the Working Poor. Unlike many who have and will address you over the course of this session, I am not a lawyer, nor am I an employer or union representative or a worker whose fate will be directly affected by the proposed rule changes under consideration today. Rather, I come before you as an historian of the 20th Century, of 20th Century American labor relations and as one who has written

about the origins of the nation's policy toward collective bargaining, one whose present research is concerned with the problems of the nation's working poor. From my perspective as a scholar and a researcher, I would like to speak to several pertinent aspects of the proposed rule change.

First, the proposed rule change provides a marked improvement over present procedures in my view. It is responsive to the changing context within which your governing statute is applied in the real world, and yet it is modest in scope and content. Under present conditions, numerous obstacles can be raised to delay workers' access to a timely process through which to make a choice for or against union representation.

This proposed rule change reduces the opportunity for those who specialize in creating delays in representational proceedings through duplicative appeals and pre-election litigation. Yet it does so without weakening due process or compromising the legal rights of any party to a proceeding. Beyond ensuring timely elections, your rule change also facilitates worker's rights to obtain full, fair, and accurate information regarding whether to choose union representation. Employers have the right to speak to workers during work time and in the work place about unions, whereas unions and pro-union workers do not.

Many employers begin laying out their opposition to

unions and collective bargaining during the orientation process for new employees. In any workplace setting where employers are opposed to unionization of their employees, employees have ample opportunity to learn their employer's views. Indeed, they know those views well. Yet, fair elections require that both parties have a chance to make their case to an electorate.

Because unions can only communicate with workers away from the workplace, it is vital that employers provide promptly full and accurate contact information so that unions have the ability to provide their own information to workers in a timely manner. Your rule provides for this and thus helps ensure that when workers choose for or against union representation they do so with the full benefit of the full range of arguments before them.

Your rule also modernizes the way in which workers can communicate with this Board and its representatives, allowing the use of electronic technology at a time in which workers increasingly send and receive information electronically. This change is an important improvement and will save both time and money.

As a historian, I see these various provisions of your rule change united by a common theme, a good faith effort to respond to fundamentally significant changes and the context within which the labor law you are sworn to interpret and

uphold operates. To put it simply, history has moved on in ways that have made your existing rules increasingly archaic and inadequate. Indeed, since the statute was last amended and the rules governing representational proceedings were last adopted, the context within which workers exercised their rights to organize and bargain collectively has changed markedly.

A thriving industry of consultants has emerged who specialize in exploiting the existing rules, not to protect the legitimate rights of employers, but rather to create whatever delays they can throw up in order to delay and thus obstruct a worker's ability to choose a union. Employers have become decidedly more aggressive and persistent in their campaigns to dissuade workers from even considering exercising their rights guaranteed under the statute you uphold while unions and pro-union workers have continued to operate under the handicap of having unequal access to workers in order to present their side of the issue.

Since these rules were last revised, a communications revolution symbolized by the internet, e-mail, smart phones has transformed Americans and how Americans transmit and receive information. This change in context demands that rules be revised and updated in order to keep the fundamental balance between workers' rights and employer's rights that is provided for in your governing statute. This rule change is

no radical revision. Rather, it provides a sober, fair, necessary and timely modernization of procedures, one that keeps faith with the intention of the nation's labor law.

Let me conclude by noting that the Wagner Act was born in an era in which inequality was rampant and growing, in which democracy was threatened to cross the world by totalitarianisms of the left and right. The industrial democracy that your predecessors helped implement through the Act played a crucial role in bolstering this nation's credibility as a bastion of democracy. What you have done through this rule, I believe, is to update the both letter and intention of the Act which you are sworn to uphold and interpret, and therefore, I come before you to speak in favor of this rule change. Thank you.

CHAIRMAN LIEBMAN: Thank you very much for your thoughts. I appreciate your perspective here today.

Anybody want to ask a question?

PROF. McCARTIN: Thank you.

CHAIRMAN LIEBMAN: Thank you.

Mr. Kirschner is next, and then we'll have Dora Chen.

Good afternoon.

MR. KIRSCHNER: Good afternoon, Chairman Liebman and Members of the Board. I'm Curt Kirschner of Jones Day speaking on behalf of the American Hospital Association and the American Society of Healthcare Human Resources

Administration. The AHA represents more than 5,000 hospitals, health systems, and other healthcare organizations and 42,000 individual members. ASHHRA represents over 2,900 human resources healthcare professionals who serve in our nation's hospitals. AHA members run the gamut from large hospitals and health systems to small rural hospitals.

Over 40 percent of our nation's hospitals are standalone hospitals, often the sole healthcare provider for their communities. The burdens placed on these organizations affect the delivery of patient care throughout the country. The hospital community has significant concerns about the extensive rule changes proposed by the Board. The AHA and ASHHRA will be submitting written comments during the period allowed by the Board.

In light of the limited time available today, I'm going to only address the following four points. First, the Board's process in proposing these amendments is inconsistent with President Obama's executive order, the Board's own prior practices, and provides an inadequate opportunity for genuine public discussion about the proposed rule changes.

Second, the inadequate process leaves unanswered many questions about the actual net effect of so many changes occurring simultaneously, in particular with respect to the statement of position.

Third, the Board's proposal to have employers produce

overlapping employee lists on an expedited basis would impose unfair burdens on employers and place well-intentioned employers at the undue risk of violating the Act.

And, fourth, electronic signatures should not be accepted for the purposes of mandatory showing of interest and representation cases.

Starting with the first point, the NLRB's process appears to be inconsistent with President Obama's executive order with respect to the publishing of new rules. Executive Order 13563 provides that "before 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." The Board's cursory explanation in footnote 34 of the proposed rules that such advanced discussion was not provided in order to provide and obtain more orderly comments fails to demonstrate why advanced and genuine dialogue on such extensive and important rule changes was neither feasible nor appropriate. Spanning 35 three-column pages in the Federal Register, the proposed changes amend the Board's entire election process from start to finish. The only Board rule changes of somewhat comparable significance in the recent past relate to the establishment of appropriate bargaining units in acute care hospitals with which the AHA was

extensively involved. In those rule changing procedures, the NLRB gave interested parties substantial opportunity to participate in the rulemaking process, including advanced notice, Regional meetings, and opportunity to cross-examine, and the second notice with an extensive comment period. This process did not end all disputes, but it allowed all parties to vent their concerns and allowed the Board to set rule changes that withstood court review, including by the United States Supreme Court. Here the Board's rule changes modify over 100 sections of its election rules and affect a much broader scope of employers in the acute care roles. But the process being afforded by the Board appears truncated and almost perfunctory.

The second point, this lack of adequate process leaves unanswered many questions about the actual net effect of the rule changes. With so many overlapping and simultaneous changes, I think it's difficult to determine exactly what the effect will be of these. So, for example, with the compulsory statement of position, in the context of providing that in an expedited timeframe, this may result in employers or respondents doing what defendants normally do in civil litigation in their answers, which is to assert as many defenses as possible in order to avoid waiver. Employers will be forced essentially to put as much down on the paper to avoid waiver. Currently, Board procedures result in

election agreements in approximately 90 percent of all cases. These cases on average are resolved much more expeditiously than contested cases, but the net effect of the statement of position, the compulsory statement of position could be that you're going to end up with further contested hearings and thus more delay in actual holding the elections. We would suggest that the Board adopt for all of its rules the process that the Board is using with respect to blocking charges, that is to raise questions about that to investigate and get opinions on this. And if the Board was truly interested in reducing the time period for elections, the Board should look strongly at the blocking charge issue. Blocking, although the Board does not publish data on this, and it has been requested of the Board, based on a published 2008 study, it appears that blocking charges comprise one of the most significant, if not the most significant delay in representation cases, increasing the length of time to an election by about 100 days. So, we would request that the Board revisit its process and actually raise questions about the election process before and not proceed with the current proposed rules.

The third point that I'd like to raise just briefly is that the process of overlapping list of employees is going to place unfair burdens on employers. Hospital employers, like most employers, do not have their IT systems set up so that

they can with the push of a button push out lists of employees that are consistent with the way in which the Board's rules are. So, for example, identifying who's technical versus who's professional. Even more importantly, who meets the multi-factioned test of who is a supervisor and who doesn't? Having employers be forced to produce multiple versions of those lists in a short period of time places undue burden on employers and puts well-meaning employers at the risk of violating the law.

And then the final point is just that there's been no showing that there's any reason to accept electronic signatures for the mandatory showing of interest. That would pose significant administrative burdens in evaluating whether a valid showing of interest exists, and it creates a high potential for fraud and abuse. Thank you very much.

CHAIRMAN LIEBMAN: Thank you, Mr. Kirschner.

Questions?

MEMBER BECKER: I've got a -- it may seem like a technical question, but your association obviously represents a very broad spectrum of types of healthcare providers.

MR. KIRSCHNER: Correct.

MEMBER BECKER: And that has led to simple R cases and incredibly complex R cases, and several have gone up to the Supreme Court. So, there is a very wide spectrum of types of cases and types of employers and types of units that have

been petitioned for. The seven-day proposal, as the NPRM suggests, the seven days is taken to be consistent with Croft Metals, where the previous Board held that that was the minimum period considered consistent with due process and with the Act. But the proposal is currently to qualify that to say except for in special circumstances, and we specifically invited comment on whether that is the right term. So, I guess my question is given the wide variety of types of employers in your associations, wide variety of types of R cases, do you have any thoughts about what would be the appropriate qualifying term to accommodate the types of concerns you're describing in preparation?

MR. KIRSCHNER: I believe to answer that question you would need to know what is the employer required to do by the commencement of the hearing. If the employer has to walk in the door with a statement of position that definitively sets forth all positions at the risk of waiver, has a list of the required requested employees who would be under the union's list, and has a second list that has all of the employees listed on the employer's proposed list, I think seven days is inappropriate.

I think that, as I stated before, the mandate that the employer set forth all positions at the risk of waiver places employers, especially on such an expedited timeframe, in a position where they are going to be forced effectively to put

in more defenses than they otherwise would under the current rules. Under the current rules, the Board is successful. The parties are successful in reaching agreement in almost all cases. And I really fear that the expedited process that you're going down is going to result in people just automatically going to the hearing putting out the required information and then letting the Hearing Officer sort through that. And I think that's going to result in more contested elections and ultimately therefore a longer time period to get to the election than what you see in the current rules. But I think more dialogue about this would help ferret that out, and we would see how these different rule changes could possibly affect the actual process.

MEMBER PEARCE: Well, wouldn't you say that the current, the way the current rules are now, the current process is, and my experience as a practitioner makes me recall that in a representation proceeding where the parties have no obligation to provide any information with regard to issues, you find parties showing up and some parties feeling blind-sided, and the Board even being blind-sided by positions that are presented at the eleventh hour or are on the fly, which oftentimes creates the need for a continuance and a protracted nature of the process. In this proposal, not only do you have a statement of position, but there's a requirement of an offer of proof relative to the issues at

hand. Don't you think that that should eliminate a problem that currently exists?

MR. KIRSCHNER: With respect to the problem that currently exists, I am not here, the AHA, or ASHHRA is not here to try to defend bad actors. If people try to abuse the process, and you can see that on all sides of this situation, I think that there are ways to address that issue that are well short of the proposed rules that you're making. So, for example, requiring an employer to state a position I don't think is nearly as complicated of a rule change as what the Board has put forward. And I think that may help address some of the abuse that you might be referring to, but I'll also go back to the statistics.

In 90 percent of all cases, an agreement is reached. And so, the aberration, the abuse that may occur may be something that needs to be fixed, but it should not drive a wholesale change to the entire election procedure. And it's very important to in that agreement that the parties understand who is eligible to vote and who is not.

The supervisory issue is critically important to determine who is the employer needing to train in order to ensure that that person doesn't inadvertently violate the law. So, for example, one conversation between two employees about the union may be entirely fine, or if one of those persons happens to be a supervisor, and they ask the other

one what do you think about the election, and that person is actually a supervisor, the employer has now just violated the law under the current rules. And so, identifying in advance who is a supervisor is critically important, and I think that's one thing that happens under the current rules now is that because so many petitions end up in getting a stipulated election or consent election, I think the parties work out in advance largely who is going to be a supervisor and who is not. And that's very important to the process.

MEMBER PEARCE: The proposed rules would not abandon those opportunities. In fact, as was stated earlier, that 90 percent of stipulated elections should continue. The proposed rules seek to scale down the process that comes to light as a result of those issues that cannot be stipulated to or where parties do not reach agreement. So, and, of course, the statistics as I recited earlier with respect to those current cases where there is no stipulation are pretty -- we're talking about the time period between election, petition and election far exceeding that 38 number.

MR. KIRSCHNER: Correct, I think the average would be 58 days. And where there is a blocking charge, it can be substantially longer to actually having the election. So, there are many moving pieces here. Our request to the Board is that it carefully think through how these different pieces are going to affect each other, so it can come up with a set

of rule changes that are actually going to meet the goals of the Board and not themselves inadvertently put employers at risk and delay the election process.

CHAIRMAN LIEBMAN: Thank you for your thoughtful comments. Appreciate your participation.

MR. KIRSCHNER: Thank you.

CHAIRMAN LIEBMAN: Our next witness is Dora Chen, and after that we'll have Mr. Charles Cohen.

MS. CHEN: Members of the Board, my name is Dora Chen. I'm an Assistant General Counsel at the Service Employees International Union. We're a union of 2.2 million members in healthcare and building services. We've submitted the written testimony of our president, Mary Kay Henry, for your consideration. But here today we have Veronica Tench, an employee at St. Vincent's Medical Center who is going to speak on behalf of SEIU today.

CHAIRMAN LIEBMAN: Hi.

MS. TENCH: Good afternoon. Thank you for the opportunity to testify here today. My name, as she said, is Veronica Tench, and I work for St. Vincent Medical Center in Los Angeles since 1981, first as a nursing assistant and now I do work as a lab assistant. My coworkers and I began trying to form a union in our workplace 13 years ago, but it was not until last month that we finally succeeded. I am now a new member of Service Employees International union, United

Healthcare Workers West.

Our story helps show why the Board's proposed rules are necessary to modernize an election process that places too many barriers in front of workers like me, delaying and sometimes preventing us from voting altogether to gain a voice on our job. Our story also illustrates how employers have plenty of opportunity to speak to employees about unions and the kind of action they can take during a drawn-out process.

Looking back more than a decade ago to the time we started talking about joining a union, I remember both why we wanted to organize and how the delays in the process and worker intimidation played a part in stifling our efforts to form a union. Sadly, this process took so long that three of the respiratory therapists who were part of our original organizing effort have now passed away since then.

In 1998, we started the process of forming a union because we wanted to increase the number of staff assigned to each patient care unit per shift so we could better provide our patients with the high quality care they deserve. Our employer learned about our campaign. Long before we filed a petition at St. Vincent, managers tracked union activity and began an anti-union campaign.

Supervisors began meeting frequently with employees to advocate against the union and immediately distributed "say

no to union" fliers. They hired outside lawyers and held meetings with us about why we shouldn't join the union. Management also increased security at the hospital, posting security officers on patient care units to try to prevent us from talking to the union organizers.

My coworkers and I realized that we couldn't talk freely. We couldn't talk freely. I'm sorry. We couldn't talk freely about the union at work, so we had to meet outside the hospital to discuss these issues. Word got around that the hospital told some workers they have to pay more for parking if they join the union. A department manager went as far as to tell the employee that the union only wanted money from us. Even at this early stage, I don't think there were any employees who were unaware of St. Vincent's argument about the union.

We tried to move forward, but the hospital management stopped us from every angle. We persevered through this campaign and filed our petition January 5th of 2000. On February 1st, with just over two weeks to go until the election, it was announced that St. Vincent would be subcontracting 27 respiratory care therapists who were core union supports. This would prevent them from voting, completely undermining everything we had worked for.

We filed an unfair labor practice charge, and St. Vincent was eventually found to have violated Federal

law, but that was in 2007. After more than six years of litigation, management posted a notice and started employing the respiratory care therapists directly again, but we had to start organizing all over from the beginning.

Today at St. Vincent it is a different kind of employer, and we were allowed to vote in a fair and timely election on June 24th of this year. Although we succeeded in winning this new election, it was clear to us that the process that took 13 years to resolve was flawed and broken. If there were rules, if these new rules had been in effect back when we first started trying to organize, the election might already have been held before St. Vincent tried to subcontract my coworkers, and the 11 years of delay since then would have been avoided. I appreciate and strongly support the Board's effort to reduce unnecessary delays in the election process so that other workers who want a union won't have to wait 13 years to get one like I did.

And I thank you very much for allowing me to present this. Thank you.

CHAIRMAN LIEBMAN: Thank you very much for being with us here today and for your comments.

Any questions?

I appreciate it.

Mr. Charles Cohen is next, and then John Brady, I guess. John Brady maybe and David Linton, I'm not sure.

Good morning or good afternoon, Mr. Cohen.

MR. COHEN: Good afternoon, Chairman Liebman and Members of the Board. Thank you for the opportunity to speak. I've been working under the Act for the past 40 years in various capacities, both for the NLRB and in private practice. While at the NLRB, I personally conducted NLRB elections, served as a Hearing Officer, litigated in the Court of Appeals and performed the myriad of other functions of a Board Agent, supervisor, and Deputy Regional Attorney. From 1994 to 1996, I had the honor of serving as a member of the Board.

In my representation of the Coalition for a Democratic Workplace, with the five-minute limitation, that gives approximately two seconds per page of the 145 pages that my printout was. If I can be presumptuous enough to state as a result of my experience, I believe that I know the tricks of employers. I know the tricks of unions. And I know the tricks of the NLRB.

Over four of the last five presidential administrations, the members of the NLRB have pushed the proverbial envelope. Appointees supported by Republicans and Democrats bear some measure of responsibility for the increased polarization. But these proposed rules which have brought us here today do not push the envelope; rather, they blow up that envelope and do violence to the fair administration of the Act.

In virtually every controversial initiative which I have

witnessed in the past, the emphasis has been on enforcing the law while plugging opportunities for parties to violate the law or gain the system. Unlike any of these other initiatives, this one transparently seeks to deprive law abiding and non-games playing employers of their rights to communicate under Section 8(c) of the Act.

The entire employer community is presumed to be on the wrong side, standing ready to trample the rights of employees. The proposal deprives employees of the right to receive key information from all sides in order to be fully informed on how and whether to express and exercise their Section 7 rights.

There are some points I believe you the Board and I know to be the case. Union density in the private sector has been on the decline and is currently below seven percent of the private sector work force. Whatever the cause, the scope of which is beyond this debate, it is deeply distressing to organized labor. Over the past 15 years, unions have been seeking alternatives to winning secret ballot elections, typically through neutrality and card check procedures often obtained through the pressure of corporate campaigns.

Unions have unsuccessfully sought legislation through the Employee Free Choice Act that would have functionally eliminated secret ballot elections conducted by the Board. It is commonly known that the longer the period of time

between the filing of an election petition and an election, the less likely it is that the employees will select a union. This is so whether or not unlawful or objectionable conduct has occurred. There have been legislative calls from organized labor to dramatically shorten the period of time from petition to election, and the possibility of shortened election periods was widely discussed during the policy debates surrounding the Employee Free Choice Act. No legislative change has occurred.

So, what has the Board come up with? In my view it is a bag of tricks. 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 the time of issuance, and frenetic time deadlines that disregard other obligations of employers and their counsel, all an attempt to get that election as soon as humanly possible and without giving the employer time to communicate with the employees. There will, of course, be no tears shed for unrealistic burdens on employer counsel.

Simultaneously with the proposal of these rules, the Department of Labor’s proposed persuader rules are designed to deprive employers of representation in the first place. An issue that's come up several times today is what would happen to the stip rate, the in excess of 90 percent. I

believe that that stip rate will plummet if these rules go into effect. And I used to be in enforcement, and we used to have over 60 attorneys a substantial portion of whose time was defending technical 8(a)(5) cases, certification test 8(a)(5) cases. That has become a dinosaur now. The number of certification test 8(a)(5) cases one can count on less than one hand.

If these rules go into effect, you'll be hiring staff to handle those cases because that will be the option of choice for employers who feel deprived by the system. In his dissent, Member Hayes has taken the unusual step of calling out his fellow employees on his view of the true reasons for the Board in proposing these rules. As a former Board member, I appreciate how difficult it is to make the kind of statement that he made in his dissent.

The majority has denied those motives to be true, stating that these rules are about efficiency and savings, asserting that the effect on the outcome of elections is unpredictable and irrelevant. Only the individual Board members know in their hearts and consciences what the true motivation is. But I feel compelled to observe that if the Board were called upon to assess motive or mixed motive, as it is often called upon to do, the present circumstances clearly would support an inference of outcome determinative rulemaking.

Several of the academic and public interest views expressed here today lay bare the desired effect of these rule changes themselves. That concludes my statement.

CHAIRMAN LIEBMAN: Thank you.

Any comments or questions?

MEMBER BECKER: The relationship between the hearing and the employer's ability to campaign, currently the hearing can cause that period to vary widely. I guess my question is what is the appropriate period, and why should it vary depending on the amount of litigation? That is, you stated a very strong position that a certain period of time is necessary, but why should that period of time hinge on the accident of what litigation takes place?

MR. COHEN: And, Member Becker, you, of course, asked that question earlier, and it is a good question, and I believe that analytically, it should not. But we have a system. We have a system that has achieved enormously beneficial results of plus 90 percent of people not availing themselves of that opportunity. As Professor Estreicher said, there's a certain legitimacy factor that has to go with that. If the situation is understood that is one thing, but if it is artificially compressed down to the period of time that we're talking about here, it is my belief that employers will view themselves as not being treated fairly and then look for something else which will give them at least some

modicum of time.

We've had many initiatives over the years that have resulted in the statistics today. They haven't all gone down easy to be sure, and I was on the Board when some of them came in. But we have adapted with that, and employers have had opportunities. Of course, there are some abusers of the system. And just as Mr. Kirschner said, I'm not here to defend those abusers of the system. We have the overwhelming percentage that are not abusers of the system. I believe the Board should be very careful about dismantling the system that it has now and, in the name of trying to get these quick elections, doing a lot of injustice and violence to the well-oiled machinery that is there today.

MEMBER PEARCE: As a former Board member and a practitioner before the Board and an employee of the Board and other capacities, you're familiar with certain aspects of the process that currently exist like, for example, the 25 day hold on elections after a hearing for a request for review when the purpose of that hold for elections is to give the Board the opportunity to decide the case, and it contemplates a stay of an election in that process. But in reality, less than one percent of requests for stays prior to the Board's decision get granted. The elections get held, and the ballots are impounded. Now, having that 25 days there, you'd have to concede, doesn't serve any real

practical purpose, does it?

MR. COHEN: I think it does not necessarily except a pesky little thing. The statute talks about having an appropriate hearing. I was on the Board when Angelica, Barre National, and Bennett Industries came down. I was in the majority in Bennett getting at the games-playing employer. This should not be about games. But we have a system where well over 90 percent of the employers are not even seeking to avail themselves, Member Pearce, of that 25-day stay period of time. That should tell us all that something is being right and that there may well be some abusers to it. But they are not carrying the day here. The tough, day-to-day efforts, the fact that the Regional Directors and the supervisors and the Field Examiners and the Field Attorneys sit on the parties with whom they deal and ensure that the time targets which have been established which are quick get enforced, those are the people that I think have brought this system to its successful state. And if you make these kinds of changes, you will be undoing that entire system and creating decades more of games to be played.

CHAIRMAN LIEBMAN: Can I ask a related question, similar to what Member Pearce asked? The 25-day period is built in even in those cases where there's no hearing. So, it's just part of the process. Is there any reason -- I actually don't think I've heard any speaker today criticize the part of the

proposal that talks about doing away with the pre-election request for review. And so, I'm just wondering what your view is. Given that the vast majority of cases are consented to or stipulated to, is there any reason to have this built-in 25-day waiting period?

MR. COHEN: Chairman Liebman, it's a chicken and egg situation that goes right back to Member Becker's question about should it all hinge on it. The world in which we live, for better or worse, has a trade, and that trade is I won't assert my legal rights and trigger a request period of time, and in exchange for that, I'm going to be treated fairly, I'm going to have an opportunity to communicate with my employees, and the system has worked over this period of time. If one's goal is to, come hell or high water, have the election in a 10 to 21 day period of time, then the Board might be able to make that happen. But I think ultimately if you look at your statistics five years down the road, you're not going to be getting any real benefit. There aren't going to be that many valid elections that are going to happen in that period of time, and you're going to create an opportunity for the various Circuit Courts of Appeal to pick at these rules one by one in terms of due process that has not been observed. And I believe at that point it's not worth the candle.

CHAIRMAN LIEBMAN: Thank you for your thoughts. I

appreciate your comments and your being here today.

Our next speaker is John Brady, and next up will be Brett McMahon.

Good afternoon.

MR. BRADY: Good afternoon. I'll be splitting my time with David today.

CHAIRMAN LIEBMAN: Okay.

MR. BRADY: My name is John Brady, and I'm a registered nurse. After 17 years of working at Backus Hospital in Norwich, Connecticut, I felt I could no longer care for my patients or my family properly without joining together with my coworkers and forming a union. We nurses spent several months discussing this. We began organizing with AFT Connecticut, an affiliate of the American Federation of Teachers. Management did not remain silent or neutral during this process, but fiercely argued against our forming a union. Despite daily encounters with managers who sought to impede our efforts, an overwhelming majority of regular staff nurses signed union cards.

On March 21 of this year, 30 of us signed a public letter to our CEO letting him know a majority of us wanted to collectively bargain in an attempt to demonstrate our majority to avoid the cost of the election process and to avoid delaying the clear will of the majority, but management flatly refused. We submitted our cards and petitioned for

recognition to the NLRB on March 28. The hospital responded that they wanted an election in mid-May and wanted to include all RNs. The date the hospital chose, 8 of the 30 nurses who had signed the public letter were on a scheduled vacation. The date was well beyond the 25-day waiting period and resulted in 44 days between filing and election.

When we asked why they wanted a date so far away, they told us it was so they would not interfere with national Nurses Week. When we pointed out the national nurses week was actually on the week they had chosen, the hospital said they had planned on celebrating a week early. Management's vague response that all nurses be included also left us with many questions about who they expected in the bargaining unit. We asked them to clarify, and we asked the election be held a week earlier, but they would not budge. They threatened that if we did not sign the stipulated agreement, they would make sure that the unit determination hearing be lengthy and difficult. They threatened to raise issues of supervisory status and casual employment status and made it clear that we would not get an election anytime soon if we did not agree to their terms. Reluctantly, we agreed.

The Excelsior list that the hospital provided on April 12th did not include any job titles, work site information, or reasonable contact information. There were people on the list we had never heard of. We asked the

hospital to clarify, but they refused. We had to drive all over the state to find these nurses. When we finally tracked them down, we found 39 of them were supervisors or not eligible to vote. We even discovered three who were not RNs.

Under the proposed rules, we would have received a clear list of eligible voters on April 4th. With phone numbers and e-mail addresses of other nurses, we would have had a real ability to communicate in private away from the intimidation and pressure of managers. We would not have had to wait 44 days for an opportunity to vote. By the time workers get to the stage of filing, they have had plenty of time to make up their mind. Including such an excessive bureaucratic delay only discourages workers from exercising their right to bargain collectively. Incidentally, during the 44 days between the filing and the election, management flooded our hospital with anti-union literature. They pulled nurses from their work and lectured them about the perils of joining together. At one point, two managers cornered me and pulled me into a storage room and pressured me to stop talking to other nurses. The hospital used the 44 days to create a high-pressure atmosphere. It was a long and difficult process. I am grateful we were able to hold together long enough. The rules should be changed so that no other nurses have to wait for their rights to be recognized. Thank you for your time.

CHAIRMAN LIEBMAN: Thank you very much, Mr. Brady.

Mr. Linton?

MR. LINTON: Madam Liebman, thank you very much and Board members for the opportunity to appear here. My name is David Linton. I'm a professor of communication arts at Marymount Manhattan College. I'm also the president of the New York state conference of the American Association of University Professors. I'm appearing here at the invitation of the American Federation of Teachers and their New York affiliate, New York State United Teachers.

Marymount Manhattan College is a small school with a very modest endowment. We are largely tuition driven in our financial arrangements. Therefore, it came as a surprise that the administration hired an expensive law firm that ended up costing the school well over a million dollars in a failed attempt to break a collective bargaining drive that the clerical and support staff had instigated. Despite over a year and a half of hearings and delays, that's 18 months from filing to election, the staff voted by a margin of 65 to 27 to unionize. During that time, the administration frequently redirected the workload of nearly a dozen administrators, including four vice presidents, to meetings, hearings, and strategy sessions aimed at defeating the drive or dragging out the process.

For 25 years, I have been a faculty leader as well as a

mid-level administrator as I was chair of the humanities division of the college for 15 years. Because of my knowledge of the history and the employment practices and general operations of the college, I was invited to testify before the Labor Board by the union committee. I testified for three long sessions. There were a total of 46 days of protracted hearings in all. Much of the time that I was testifying was taken up with questions as to whether my part-time administrative assistant was actually a supervisor or a boss because she directed our work study students as to when they should go to copy machines or to pick up the mail. The administration's attorney repeatedly contended that since the work study students were somehow employees and that my assistant told them when to copy a syllabus that made her a boss. I was struck by the irony of this approach, since at other institutions law firms were arguing that graduate assistants and teaching assistants could not be considered employees and therefore were not eligible to unionize because they were students.

May I have an extra minute just to finish, please? Thank you. Meanwhile, not only did the drawn-out process have a demoralizing effect on the staff, it also took employees, those administrators who were working to defeat the union drive, but also the staff members who were being called to attend mandatory anti-union sessions away from

their real jobs of providing the best possible education to our tuition paying customers, our students. This is what I believe Professor Kaplan previously referred to as a negative productive impact. As I said, we're a small school with about 100 staff members, an equal number of faculty, and about 2,300 students. It's inconceivable that it should take so long and cost so much to settle a collective bargaining election at places like ours. Thank you very much.

CHAIRMAN LIEBMAN: Thank you for being here today and sharing your thoughts with us.

Any questions.

MR. LINTON: Thank you.

CHAIRMAN LIEBMAN: Thank you.

Next speaker is Brett McMahon, and then we'll close this afternoon with Michael Pearson.

Good afternoon.

MR. McMAHON: Good afternoon. My name is Brett McMahon. I'm a Vice-President for Business Development for Miller & Long Company, Inc. We're a concrete construction contractor here in the Washington, D.C. metropolitan area. I have been employed in the construction industry for about 19 years, and I come to you speaking as an employer. I am not a lawyer, so I'm in a decided minority here today.

Miller & Long was founded by two World War II veterans in 1947. Jack Miller and Jimmy Long started out with a

pickup truck and a wheelbarrow. Their first two employees were African-American men who were excluded from joining the unions that dominated the trades in those days. Those two men actually ended up retiring from Miller & Long after more than 40 years of employment each.

Throughout the '40s, '50s and '60s, Washington, D.C. was very much a union town in the construction trades. Strikes by truck drivers and other trades routinely shut down all the work in the city, and construction workers missed out on a lot of income, especially during the summers.

Starting in the '70s, things began to change. Unions began to get stuck on big public works projects such as the metro system, and the private commercial market took a chance on merits shop contractors. Workers then discovered they did not need a union in order to work in the construction industry. Construction boomed in the '80s, and unions found themselves further and further outside the cost model.

Today, other than elevator and escalator constructors, there is no specialty trade in which unions hold a majority. Labor's loss of market share was not the result of some designed, organized, orchestrated effort. It was the market. Every business model that fails to adapt to a changing market has a choice, to adapt or to disappear.

Nowadays, keeping hard working men and women employed is a serious challenge. Our competition is fierce. Margins are

extraordinarily tight if even existent. And it seems like every day there's a new regulation or proposed legislation that will make our investment even more risky. No private business person that I know of is very optimistic. The perception of our current government in the eyes of businessmen and women is simply this, the government is against us.

Miller & Long has been under some form of attempt at union organization for most of our 64 years in business. We have never had a vote because unions have never been able to demonstrate to our employees that they can get them a better deal than they already receive from us. We cannot imagine running a business where we would even need a go-between to relate to our employees. We respect our men and women, and we work hard to retain their respect as well. The proposed rule change profoundly disrespectful to the people that it would affect, namely workers around the country. It shows no respect for their intelligence or their judgment.

It is patently unfair to make it virtually impossible for an employer to present the other side of the organizer's pitch. How can anyone in good conscience take away the opportunity to discover the truth and weigh the options for someone. Were any of the lawyers in this room required to take the bar exam after their first year of law school? Or how many doctors had to take their MCATs as freshmen in

college? None of that seems reasonable because it would deprive the participant of a complete set of information. Why would you deny the same level of respect to workers during an organizing drive?

There have been numerous decisions by this Board that highlight hazards for unsuspecting workers. This Board allows organizers to exaggerate and make promises which have no weight during negotiations. I've cited a couple of examples. I won't bother reading them here. But is it remotely reasonable to expect that every person out there, every worker in this country would actually know the intricacies of all of this stuff? Frankly, as one who prides himself on at least being somewhat up to speed on this, I've learned so many things today. It has shocked me. And frankly, I don't know how it's even reasonable to expect anyone to keep with up with all of these things while you're trying to meet a payroll, meet with your accountant, your surety auditors, and everything else that goes with actually running a business.

Changing one's working conditions is a matter of utmost significance affecting the worker's immediate and long-term futures. Such a decision is more personal and important than any political election, yet we expect and we demand extended political campaigns where both sides get to make their case. A politician would be showing extraordinary disrespect to

voters if they were to stand for election without even campaigning. And what is to be feared from a reasonable argument given over a reasonable period of time?

Significant regulations already exist to limit the speech of the employer, yet no such restrictions exist for union organizers, and there's been no indication that a change such as the one proposed is necessary. There is no demand for it other than from pro-union allies. The small employer is nearly hamstrung to the start, even if they were aware of an organizing effort. Many employers are not aware of the effort until the organizer presents their cards. Most small businesses do not retain employment counsel. In fact, until the recent headlines, I doubt many small employers had ever even heard of the NLRB.

With all of the challenges in the current economy, it is unreasonable to expect an employer to drop everything and then respond in the potential timeframe contemplated by this rule. Again, what is to fear from a fully engaged presentation of the facts from the employer's perspective? Certainly, any Board charged with guaranteeing workplace rights should be guaranteeing that those workers are shown the proper respect, and that respect is demonstrated by ensuring that both sides of an argument that is so important to their working lives are given ample opportunity to be heard and understood. I see my red light is flashing. So,

with that I'll --

CHAIRMAN LIEBMAN: Do you need another minute?

MR. McMAHON: I would love to. Thank you. Under Section 8(c) of the National Labor Relations Act, an employer's right to free speech is protected, but this proposed rule undermines that right. What good is a right if there's no practical way to assert it? This Board should not adopt this rule. Were it to adopt this rule, the NLRB will have firmly planted itself on the side of unions and in opposition to employers and workers and, frankly, reason. Unions have been winning over 60 percent of the elections that are held, so what is the need for the change?

The NLRB is making itself in this respect a hazard to the economic well being of working people by chilling the entrepreneurial spirit of free enterprise. It has brought more prosperity to more people than any other system in human history. It is not now, nor will it ever be, the single catalyst that causes large layoffs or stifles job creation. Rather, it is the series of actions that this Board takes that adds to that weight that's affecting today's small business climate. Please don't adopt this rule. It's unwise in this economic climate, and it's unfair to workers and employers. Thank you.

CHAIRMAN LIEBMAN: Thank you.

Are there any questions?

MEMBER BECKER: How many employees do you have?

MR. McMAHON: 1,100.

MEMBER BECKER: And I think you said 40 years. How is that compared to over time?

MR. McMAHON: No, no, since 1947.

MEMBER BECKER: Since '47, more than 40 years.

MR. McMAHON: It's about 2,500 less than we had two and a half years ago.

MEMBER BECKER: And you indicated that throughout that time there have been various organizing efforts but never an election?

MR. McMAHON: That's true, including the current one by a labor union.

MEMBER BECKER: And how have you become aware of those efforts?

MR. McMAHON: Usually, somebody would say something. One of our employees would say, "Hey, guess what? Somebody handed me this. What is this all about?"

MEMBER BECKER: And typically what has been your response to that as a company?

MR. McMAHON: We have a whole prescribed set of things. We know we're given a little card of what you're allowed to say and what you're not allowed to say, which frankly is really kind of shocking that any process like that even exists in the relationship between the employee and the

employer. But as was noted earlier, somebody talked about what an employer or supervisor, who I guess we used to able to determine who that was. I guess we can't anymore. Whether somebody might inadvertently say something that violates the law. I mean, the whole process strikes employers, especially small business people. That's just ludicrous on its face that there's all this intervention. We get it a lot in the construction industry from Davis-Bacon on through. And to be honest, another issue as sort of an aside, when you're talking about units, I can tell you this from example, the definition of a laborer in Montgomery County, Maryland is different than that in Prince George's County, Maryland, and it's different than that in the District of Columbia.

MEMBER BECKER: Not our jurisdiction, fortunately.

MR. McMAHON: Well, but the point is, what unit are they? I mean, you get into a lot of varying, very difficult things as you get into this unit determination.

MEMBER BECKER: Thank you.

MEMBER PEARCE: So, your issue is not just with this proposed rule, but with how the Board's processes are generally?

MR. McMAHON: Yeah, I think there's been a series of things that most people honestly I don't think had ever been even remotely aware of the NLRB, or I am for one concerned by

all of that, especially at this time. I mean, if we have the luxury of full employment and happy profit margins and things like that, if the idea then is okay, well, let's experiment with some things, fine. But the last thing in the world you ought to be doing during a time where in my industry where it's 17 percent top line unemployment, the real unemployment figures are closer to 30. Our margins -- I don't know virtually anybody who made any money over the last year and a half. The idea that all of the sudden we end up in a situation where it's, to our mind, it's patently unfair the whole process, just drives people bananas, and I don't know why you'd want to do that at this time. That's my point.

MEMBER PEARCE: Thank you.

MR. McMAHON: Thank you.

CHAIRMAN LIEBMAN: Thank you.

And our last speaker for the afternoon is Michael Pearson.

MR. PEARSON: Good afternoon. I wish to thank the Board for allowing me the opportunity to present my opinions concerning proposed changes to the Board's representation case procedures. My name is Michael D. Pearson. I was a Field Examiner with Region 7 of the NLRB in Detroit for nearly 34 years. I retired in 2005. At that time, I believe I was the longest serving non-supervisory Field Examiner in the history of the Detroit Region, the Agency's largest and

busiest office. I was involved in the processing of thousands of petitions and unfair labor practice charges. On a daily basis, I was involved in every phase of representation cases. I believe I was in an excellent position to evaluate the Board's procedures. I observed things that I thought could have been or should have been done differently. I am here today because I care deeply about the enforcement of the National Labor Relations Act. If I was not here today, I would be golfing. But I had a decision to make, and I decided it was more important to be here.

I believe the most important change that should be made by the Board involves speeding up the election process. Very careful reading of Section 1 and Section 7 of the Act establishes that the Board has an obligation to see to it that employees are guaranteed the right to have fair and prompt elections. The Act does not establish that employers have the right to run seemingly endless anti-union election campaigns. I recall one case where a management consultant spent every working minute of every workday at the employer's facility for an entire four weeks prior to the election. Was that really necessary under the Act?

The proposed changes will not mean that employers cannot campaign. They may have a somewhat shorter time period to campaign after a petition is filed. But most employer

campaigns begin well before petitions are filed. Currently, employers hold mass meetings of employees. They hold frequent one-on-one meetings, sometimes on a daily basis. Employees are frequently required to view anti-union videos. Employees are flooded with fliers, letters, or e-mails from their employer. In that regard, I once heard an employee waiting in line to vote say to a coworker, "At least there won't be any more letters."

After changes to the Board's procedures, employers will continue to be able to use all of the tactics that I've just mentioned in election campaigns. I know that some will say that if the election process is speeded up, employers will be taken by ambush. My experience tells me that this will not be the case. Two facts lead me to that conclusion. First, whenever a petition was filed by a union, I always tried to call the employer the day it was filed. In almost every case, the employer already knew about the organizing and had already contacted a labor attorney or consultant.

Second, during investigations, I frequently had to determine how and when the employer became aware of the organizing activities of the employees. I almost always found that the employer became aware very shortly after the organizing began. I recall one case where I was investigating the discharge of an employee. After I had completed my interview of the owner, she commented that she

noticed that I had spent quite a bit of time going over when the employer became aware of the union activities of the employee. She said to me, "You know, we always know."

You might ask why do I believe that it is so important for elections to be conducted more promptly? Under current Board procedures, employees can hammer away at employees on a daily basis for several weeks. In many cases, employees eventually cave in and drop their support of the union. During my investigations, it was frequently necessary to find out what employer officials said to employees during campaign meetings. I did so hundreds of times. In almost every single case, one or more of the employees would initially give me a version that, if accurate, would constitute a violation of the Act or would be evidence of objectionable conduct. However, when I carefully questioned the employee to find out precisely what was said, it often turned out that the employer had said something slightly different which artfully skirted the law.

I believe the employees had heard so many times that a strike was possible if the union was voted in that they naturally came to believe that a strike was inevitable. And the employees had heard so many times that they would be replaced if there was a strike that they naturally came to believe that they would be fired if they went on strike. I am not suggesting that employers should not have the right to

campaign. I am saying, however, that after a reasonable period of time, employees should be allowed to freely decide whether or not they want a union. Employees should not be browbeaten into submission by excessively long election campaigns. Now, as to whether or not some employers would be taken by surprise, my experience was that if an employer did not already have an attorney or a consultant when a petition was filed, in almost every case they had an advocate within a day or so. On a daily basis, consultants check the public filings of RC petitions in the Regional offices to solicit business. The campaigns waged by employers are extremely well known. Management attorneys and consultants have used the same arguments for decades. Their scripts are ready and waiting on computers. Forty years ago I had a case where the employer's campaign speech was prepared by a management attorney who later became a Board member. The exact arguments used in that speech are still used today by employers.

It was an honor to be here today. It is my hope that the Board will adopt the proposed changes to its procedures to make the NLRB as efficient and effective as possible. Thank you for your time.

CHAIRMAN LIEBMAN: Thank you, Mr. Pearson.

Questions?

I appreciate your coming in to share your thoughts.

And on behalf of myself and all of my colleagues, we are very grateful to all of you who spoke today. Obviously, we've had a range of differing views, competing views, very strongly held views, and we appreciate the candid airing of positions and beliefs. We've had a wide perspective of different kinds of organizations, and that also has, I think, been very useful. So, with that we will recess for today and begin tomorrow morning at 9:00 a.m. with another full round of speakers, morning and afternoon. I hope you'll come back and join us tomorrow.

Meanwhile, have a good evening, and we're in recess now.

(Whereupon, at 3:50 p.m., the public hearing in the above-entitled matter was adjourned, to reconvene the next day, Tuesday, July 19, 2011, at 9:00 a.m.)

CERTIFICATION

This is to certify that the attached proceedings before

the National Labor Relations Board (NLRB) in the matter of the **PUBLIC MEETING ON PROPOSED ELECTION RULE CHANGES** at Washington, D.C. on July 18, 2011, were held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing.

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Timothy J. Atkinson, Jr.

Official Reporter