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 **Tuesday, July 19, 2011,** at **9:00 a.m.**

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:

PHIL ORNOT, United Steelworkers
FAITH CLARK
G. ROGER KING, Jones Day o/b/o Society for Human Resource Management
PROF. PAUL F. CLARK, Department of Labor Studies and Employment Relations, Penn State University
ELIZABETH MILITO, National Federation of Independent Business, Small Business Legal Center
JOHN RAUDABAUGH, Nixon Peabody o/b/o National Federation of Independent Business
CHRISTOPHER N. Grant, Schuchat, Cook & Werner
PATRICK J. O'NEILL, United Food and Commercial Workers International Union
MAURICE BASKIN, Associated Builders and Contractors, Inc.
BRIAN BRENNAN, IBEW
HAROLD R. WEINRICH, Jackson Lewis LLP, o/b/o Atlantic Legal Foundation
ELIZABETH BUNN, AFL-CIO
KIMBERLY FREEMAN BROWN, American Rights at Work
FRANCIS T. "TOM" COLEMAN, Printing Industries of America
SARITA GUPTA, Jobs with Justice
C. STEPHEN JONES, JR., Chandler Concrete Co., Inc.
PROF. DORIAN WARREN, Columbia University

APPEARANCES

Afternoon Session Speakers:

LEXER QUAMIE, The Leadership Conference on Civil and Human Rights
STEVE MARITAS, International Union, Security, Police and Fire Professionals of America (SPFPA)
WILLIAM MESSENGER, National Right to Work Legal Defense Foundation
JOSEPH L. PALLER, JR., Gilbert & Sackman
RUSS BROWN, Labor Relations Institute
DR. DEAN BAKER, Center for Economic and Policy Research
YONA ROZEN, Gillespie, Rozen & Watsky PC
R. BRIAN BIXBY/KARLA KOZAK, TWU International
JAY P. KRUPIN, Epstein Becker Green o/b/o National Grocers Association
DAVID MADLAND, Center for American Progress Action Fund
MICHAEL E. AVAKIAN, The Center on National Labor Policy, Inc.
PETER J. LEFF, Graphic Communications Conference of the International Brotherhood of Teamsters
DAVID KADELA, Littler Mendelson
PROF. KATE BRONFENBRENNER, Cornell School of Industrial and Labor Relations

I N D E X

P R O C E E D I N G S

(Time Noted: 8:56 a.m.)

CHAIRMAN LIEBMAN: Good morning, everyone, and welcome to the second day of our open meeting of the National Labor Relations Board.

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

This meeting concerns the Notice of Proposed Rulemaking published in the Federal Register on June 22, which proposes amendments to the Board's Rules and Regulations governing the filing and processing of petitions relating to the representation of employees for the purposes of collective bargaining with their employer.

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

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

We had an excellent session yesterday hearing from a very diverse group of speakers including practitioners, workers, academics, and public policy advocates.

Today we have a similarly impressive line up of

speakers, and we are truly grateful for the showing of interest and for the efforts of all the speakers to study the proposal, to reflect on it and to share their reactions and suggestions with us.

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

We take this meeting very seriously, and we look forward to hearing your thoughts about the proposals, how they would work, what might work better, and I assure you that our minds are open.

Now, I've been asked to cover a few housekeeping matters, and for those of you who sat here yesterday, please indulge me as I run through them again.

When you checked in, you were given a badge and a number. Please keep those with you at all times. If you leave the room, please take them with you. Speakers don't need a number to attend the session during which you will speak, but if you wish to stay for the afternoon, and we hope you will, you must have a badge and a number.

Most important, when you leave the building for the day, remember to return your badge and 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. No food or beverages are allowed in this room.

Bathrooms are located outside the hearing room, both to the right and to the left. We have staff in the hallway to escort you either to the restrooms or down to the first floor in the elevators. We ask that you not wander around the building and other areas.

Today's meeting will be divided into two sessions, a morning and afternoon. In addition to a lunch break that will begin at about noon, we will take a midmorning and a midafternoon break. Please limit your walking around the room as much as possible, but if you have to leave during the session, please move quietly to the nearest exit.

If you are a speaker, you are welcome to remain in the room to listen to other speakers. If you prefer to leave, you may obviously do so.

Now, let me quickly review the guidelines for our speakers. We are going to follow the order of speakers that's set out on the list that was handed to you as you entered the room. It's been suggested that we might have a surprise appearance from a large balloon at some point, but every person making an oral presentation will be given five minutes to present his or her remarks. The Board Members will then have the opportunity to pose 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 with you, you may also introduce that person. Your five minutes will begin after your introductions.

Our Deputy Executive Secretary Gary Shinners, who is seated below me to my right, will be our timekeeper. There are lights on the podium to assist you. Your five minutes, as I said, will start after the introductions, and the green light will turn on. The yellow light will indicate you have one minute remaining, and the red light indicates that your time has expired. We ask that you observe the lights so we can try to remain on schedule today.

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 anteroom to my left, before you leave for the day.

If my colleagues have additional questions for you based on your written statements, we will endeavor to have those provided to you within the week, and you will have until August 22nd to provide your written answers.

Please note that the meeting is limited to issues related to the proposed amendments to the Board's Rules governing 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 which are now pending before the Board because there are important rules governing ex parte contact that we do not want you to run afoul of.

So at this point, I would ask you to make sure that your cell phones or other devices are turned off, and unless my colleagues have something they wish to say, we can begin with our first speakers, Faith Clark and Phil Ornot of the United Steelworkers, and our next speaker will be Roger King.

So, Ms. Clark, Mr. Ornot, welcome. Good morning.

MR. ORNOT: Good morning. My name is Phil Ornot, and I'm an organizer for the United Steelworkers, and with me today I brought Faith Clark, who was an employee of a campaign that I had ran in DuBois, Pennsylvania, Rescar.

This campaign was no different than any other campaign, and I believe it really ties into the Board's, you know, proposed rules that you're looking at. One of them was, was this particular campaign, the employer refused to reach a stipulated election agreement, said that they wanted to exercise their opportunity and their right to take it to a hearing. A hearing was set within seven days of filing the petition. Naturally the employer then asked for an extension. The extension was automatically granted. In most cases, a week to 10 days, sometimes even longer. That

hearing date was set.

After that hearing date was set, the employer then tried again to get another postponement for the hearing. The issues that were raised at that hearing by the employer we believe were frivolous. Out of a unit of 87, we were looking at a disagreement of only 3 people out of 87. One was that Faith Clark was a supervisor and should not be eligible to vote. The other two were that two members of management were in the office and should be eligible but worked in the office. This was a typical campaign, multiple days of -- we had one day of hearing. The employer was not available again for another 11 days. After that hearing there, our testimony only took roughly two hours to present to the Board.

A decision was rendered down from the Board, you know, and an election, you know, was subsequently directed.

This is no different than the typical campaigns that we face. You know, these modest changes are welcomed by the Board and I think are very important to the workers for a fair process to their vote without the built-in delays. Many of times, not just this issue here, but many of times in elections, employees end up making decisions to include some people that the management tries to throw in to thwart their efforts. Most of the time employers try to throw in managers or people that are, you know, covered under Section 2(11).

So when that happens, the employees then are faced with

pretty much a double-edged sword.

What do we do here? Do we take all the delays of going through a RC hearing, or do we end up eating those people, agreeing to those people, reach a stipulated election agreement and hope that we can, you know, hold everything together afterwards.

So with that, I would like, you know, to turn it over to Faith Clark.

MS. CLARK: Good morning. I started with Rescar as a secretary in 1997. I had worked for 12 years with them, working all different types of jobs as an administrative assistant, quality assurance manager, outbound inspector. The last job was inventory control and receiving.

In October of 2007, my fellow employees called the Steelworkers to see about getting the union. I became involved with the effort in the spring of 2008, at the time that I was told that I was denied my right to vote stating that I was a supervisor.

Because of delays of having the hearing, the company brought in union busters. They threatened that they would take away our 401(k), that we would lose our pay, we would have to work for minimum wage. We could lose our medical benefits and vacation benefits. They showed us videos of how people who were on strike could lose their jobs and the difficulties with strikes and that the union could force us

to strike.

Initially we had 60 percent cards signed with the union. With all the scare tactics and stall tactics, people became unsure of whether they wanted to bring the union in or not.

We won all our points with the NLRB, and that made the company very angry. The company took people in groups to listen to one of the company presidents explain and tell people why the union was bad for the company. They required us to watch a four-part video series and asked if we had any questions of which they never answered or gave us explanations.

We filed charges against Rescar based on the fact that they gave more onerous work, and they also made other threats to the company. We won all of our issues, and the company had to post a 60-day posting of their things. They, of course, explained that they didn't agree with the posting but they just wanted to get it over with. That's why they signed it.

We lost the vote. On April 14, 2009, six months after the vote, I was called into the office and told that my job was eliminated. I was terminated and wasn't given any other explanations. The day that I was fired, I called the NLRB and the United Steelworkers, and we filed charges.

After nine months of waiting to resolve my issues, I finally signed an agreement with the company, a settlement

agreement as my coworkers were afraid to testify with us.

I think that if we had had a vote in a timely manner without delays, that we would not have had to have all the union busting and scare tactics and we wouldn't have lost the support for the union.

I've lost my job, and it's a financial strain on my family.

CHAIRMAN LIEBMAN: Thank you for your testimony here today.

MS. CLARK: Thank you.

CHAIRMAN LIEBMAN: Do my colleagues have questions?

MEMBER BECKER: Maybe I missed it. What was the nature of the workplace? What did you do?

MS. CLARK: It's a railcar facility. They paint, repair, and clean railcars.

MEMBER BECKER: And there were 87 employees in the unit, and how many employees all together at that particular location?

MS. CLARK: It varied at that time. We had had a fire at our facility. So we had employees who were laid off, although we included them in the collective bargaining and with the votes. So it could have varied anywhere from the 87, probably office people and personnel, would have been about 105 I would think.

MEMBER BECKER: Thank you.

MEMBER PEARCE: Do you know how many days it took from the time the petition was filed until the actual election?

MR. ORNOT: The petition was filed in February. I believe it was the 14th or something like that. The election took place in October of that same year.

MEMBER PEARCE: I see. Were there unfair labor practices filed prior to the vote?

MR. ORNOT: Yes.

MS. CLARK: Yes.

MEMBER PEARCE: Was there a request to proceed or were there blocking charges?

MR. ORNOT: No, there were blocking charges.

MEMBER PEARCE: Thank you.

CHAIRMAN LIEBMAN: Thank you for coming here today. We appreciate your contributing to this meeting.

MS. CLARK: Thank you.

MR. ORNOT: Thank you.

CHAIRMAN LIEBMAN: Our next up will be Mr. Roger King, and after that will be Paul Clark. Good morning, Mr. King.

MR. KING: Good morning, Chair Liebman, Members of the Board. Thank you for providing an opportunity for the Society for Human Resource Management to share their thoughts and views this morning regarding this important process.

With me this morning is Mr. Layman, Mike Layman of SHRM, my associate Scott Medsker, and a legal intern, Chair

Liebman, that now has a significant interest in the National Labor Relations Act, and we thought it would be helpful if he came this morning. His name is Josh Hammer.

I'm sure as this Board is well aware, the Society for Human Resource Management is the largest human resource group in the world. With over 250,000 members, SHRM has constant contact with employers of all sizes and many diversities.

We submit the comments today, reserving our right to file written comments on or before August 22nd. We do have a written statement, Chair Liebman, that we would like to enter into the record today with your permission.

CHAIRMAN LIEBMAN: Yes, absolutely.

MR. KING: Thank you. We fully understand that the job that all of you have is difficult. Balancing the rights of employees, employers, and unions is a challenge. We fully appreciate in case law adjudication you constantly are looking at complicated factual records and having to balance the rights of the stakeholders.

We submit, however, rulemaking takes on a particular importance. In essence, this is only the third time that this Board, or the Board as a whole, has undertaken rulemaking. That is a very significant responsibility. I know you are well aware of that.

What you do in this process has lasting implications with respect to unions, employees, employers, and all

stakeholders, and I know you will not undertake that process lightly.

A summary of our position is as follows. First, we do not believe there's been a predicate established at all for the proposed rules. This Agency is one of the most effective, most efficient agencies in the United States Government. You have had great success in processing petitions, C cases, unfair labor practice charge cases. There's simply not a record for the proposed rules.

Second, we believe you're proceeding in a procedural manner that is flawed. I had the opportunity, perhaps the only speaker that you will hear from these two days, to fully participate in the healthcare rulemaking process, a process that went on for a period of time. I'm not submitting that you need two years to engage in this type of rulemaking, but it was much more carefully done, much more scholarly, much more thorough. I will submit that you should reconsider the very expeditious nature, i.e., 74 days of proceeding as you are at present.

SHRM and other trade associations filed a request for you to reconsider the manner in which you are proceeding. We'd like you to again look at that motion.

Next, the proposed rules will have a significant adverse impact we believe on small business particularly. Members of the bar, like myself and others, who I believe are well

acquainted with your rules and regulations, frankly are having a difficult time understanding how all the proposed rules fit together. For a small business entity, and you'll hear more about that later, I believe that's a particular challenge, but also for large employers, and diverse and large units, your rules cause significant due process and procedural questions.

Further, as a matter of policy, I think the Board really is looking at this incorrectly. I would submit you ought to be looking at certainty prior to an election, for the rights of employees, unions, and everyone else that's involved in this process, employers particularly from our perspective perhaps.

We ought to have certainty of who's voting, and I'll get back to that in a moment.

Let me go into some of the specifics. I'm not going to share with you the stellar record this Board and other Boards have had with the General Counsel's Office in processing petitions. That's well established.

I would submit that the so-called study that recently surfaced from Professors Bronfenbrenner and Warren is not a sufficient justification for the proposed rules. Time does not permit me to go into the deficiencies of such study, but certainly that will be address in our written statement.

Next, I don't believe the Board is proceeding in

compliance with President Obama's Executive Order 13563. Frankly, there should have been comments requested from this Board, as Member Hayes suggested yesterday, I believe in one of his questions. What's wrong with having all stakeholders come forth, whether it be the American Bar Association and others, and have a meaningful, thoughtful exchange, a scholarly exchange, in this process? It simply wasn't done here.

Next, with respect to the healthcare rulemaking, yes, we understand your point that here you believe you have special expertise because it's your own rules but then you have not, from our perspective, examined your own data. We have an information request and we have -- others for you to do so. We're hopeful that that will be expeditiously responded to on or before certainly August 22nd.

With respect to the substance of the rules, obviously time does not permit us to get into meaningful dialogue. I really am quite concerned about not having an opportunity frankly. I thought the dialogue yesterday, Member Becker, that you had with Brian Caufield was excellent.

There are all kinds of procedural problems with the statement of position. It's not in conformity with the Federal Rules of Civil Procedure. Whoever drafted your comments for the majority simply is not well acquainted with the Federal Rules of Civil Procedure.

What these rules will require is a Hearing Officer who may not even be an attorney, to make a decision perhaps sua sponte on what is the genuine issue of representation. In the federal court, we get at least three briefs and we get oral argument. That's not available here. And there are many other procedural aspects that are troubling.

Last point, we should have certainty prior to the election, particularly supervisory issues, if we don't know who the supervisor is, the employer's at risk because those individuals may or may not be our legal agent. It's not about campaigning. It's about unfair labor practice charges perhaps, election objections, and also, of course, under the Harborside line of cases, the union may be at risk also. But it's even more fundamental than that. Once that election occurs, if the labor organization is successful, the employer, as you know, cannot make unilateral changes in terms and conditions of employment if, in fact, the employees have selected lawfully and correctly a labor organization. Anything the employer does is at risk there.

So I really would emphasize that point. Very important. Let's get certainty prior to an election.

In summary, Chair Liebman and Members of the Board, we're concerned not only about these proposed rules but what I would consider frankly, and many of my colleagues, a regulatory tsunami. We have at least nine initiatives, and

we have these in our written materials laid out for you, and you're well acquainted with them. What this Board has undertaken in the last few months, that is a very significant burden in such a short period of time for anyone to digest. We really ask you to reconsider the speed with which you are proceeding and give much more thought and consideration to what you are doing.

Frankly, I submit, and I think many of my colleagues would say the same thing, that the institutional credibility, neutrality of this Agency frankly is at issue here, and how you proceed not only here but in these nine other areas or these eight other areas is extremely important.

Thank you for your time and attention.

CHAIRMAN LIEBMAN: Thank you, Mr. King, for your comments. Do my colleagues have questions?

MEMBER BECKER: If I could, I have two questions. One, in terms of certainty, I'm trying to understand the difference that you perceive between the proposal and the current system because the current system, as I understand it, guarantees a right to present evidence if the parties so wish, say on a supervisor question. It does not guarantee a decision even at the Regional level. If it's a contested question, if there's a request for review which is granted, we almost never reach a decision before the election. The election goes forward. The ballots are impounded. Moreover,

we're powerless to produce certainty because of the possibility of judicial review. So I'm trying to understand the difference that you see between the proposal in respect to that aspect, certainty, say as to a supervisor and the current system.

MR. KING: Certainly, Member Becker. First, the statement of position procedure articulated in the rules is extremely broad, for not only small employers but large employers. As we read that particular provision, the employer must articulate any and all positions it may have, the most relevant or similar unit which I think is a -- burden in and of itself to put on the employer, each individual unit placement issue. I've been involved in elections, and I actually practice day in and day out. It's a challenge sometimes to get through this process but to work through with the union, who's eligible to vote. If we don't do that in a written, very complete manner, under the statement of position, as the rule is written, we waive, we are precluded from proceeding. That's a kind of certainty. You're taking that certainty away, and if I may, then the Hearing Officer is permitted, as I understand the rule, to perhaps permit some additional statement by the employer that may have been missed, but there's no standard for that, and these are individuals that may not even be lawyers, and you're applying a Rule 56, Federal Rules of Civil Procedure,

burden at that stage.

So that's one element of lack of certainty, that we're never going to have absolute certainty. I can see that, but look at the Fourth Circuit's decision in the Beverly case. There the Court of Appeals held the Board to task for not having a fuller explanation as to who was permitted to vote.

We would articulate -- frankly, I think you have it backwards. You ought to be pushing more issues to pre-election so all stakeholders know who's eligible to vote, who is a supervisor. In a multisite unit, as Mr. Kramer mentioned the other day, particularly complicated. Why wouldn't we want to know how many stores or how many factories are in the unit?

I fail to see why we are having such a rush to judgment here. This Agency is so good at what it does and you have very good people. You can figure these things out. We don't have delay here. We hear all about this delay. The record doesn't support delay. If we have delay, it's because of blocking charge procedures, and pardon the footnote, I do commend the Board, SHRM commends the Board for at least putting that issue up for consideration. Of course, there are no proposed rules. I think again had you gone back and done it differently, you would have had a much more receptive bar.

Anyway, I hope I have at least responded in part to your

question.

MEMBER BECKER: Well, if I could follow up. You understand that the proposal provides for no preclusion on eligibility questions such as supervisory status. That is, if the employer or any party fails to raise in its statement of position or at the hearing an eligibility question such as supervisory status, it can be raised without preclusion through a challenge, and the proposal provides that there must be a finding of an appropriate unit. So the question, for example, of a multisite versus a single site must be decided under the proposal at the hearing.

MR. KING: I don't read the rule the way you read it. The preclusion, the rule -- now the comment, it's a bit broader, but if you go back and look at the rule, I think the rule is quite clear that the employer's precluded if it has not raised its position in the statement of position absent some extraordinary showing to a Hearing Officer that's not well equipped to make that decision.

I believe with all due deference, Member Becker, that the employer is precluded, and its due process rights I think are significant impeded here. I frankly don't think this is going to stand a court challenge. If you're up in front of a Federal District Court Judge or Court of Appeals Judge, and he's trying to understand this procedure, this is not the waiver procedure that you're articulating here that's

provided for in the Federal Rules of Civil Procedure. If the Board by the way is going to down to the Federal Rules of Civil Procedure path, they ought to look at the C case procedure where we could have some discovery, but at any rate, these rules do preclude, I submit, the employer from articulating at any point post that statement of position its articulated reason for challenging or not agreeing. Yes, you can have challenges, but we're back to the point, why don't we have some certainty with respect to the pre-election process.

MEMBER BECKER: Thank you.

MEMBER HAYES: If I could, just to follow up, in the instance of when a question regarding the scope or composition of the unit is raised under the proposed rules and a Hearing Officer on hearing an offer of proof orally from an employer determines that no hearing is necessary, what happens if there's a subsequent technical refusal to bargain? What's the record that the Appellate Court is going to rely on? Or what's the record that the General Counsel is going to rely on in trying to enforce our order?

MR. KING: Member Hayes, there is no record. You're going to have that case sent right back here to the Board, and you're going to start all over again. It's probably going to go back to the Regional Office frankly.

I would submit, and this came up in Mr. Kirschner's

statement yesterday, you're going to have more litigation. I know exactly what my advice is going to be on the statement of position that Member Becker and I were just talking about. We're going to articulate every possible unit configuration and every possible position like we do in an answer today in Federal District Court to preserve our client's rights.

Back to your question, Member Hayes, I don't see any record at all. The Court of Appeals probably won't even consider that pleading. It's going to send it right back. Having great familiarity with the Court of Appeals system in this country, there is no record. There will be no way for that matter to proceed.

So what you're attempting to accomplish, or certainly some are, is much more rapid processing of paper, and it's frankly going to be just the opposite. We don't understand it. We really don't understand it, but again that's why we should have had some dialogue about this at the beginning. Certainly I know SHRM, I know the Chamber, I know others would come forth. I know the labor community would be happy to sit and talk with you, but this is not the right way to go. Excellent question.

CHAIRMAN LIEBMAN: Thank you, Mr. King, for your thoughtful comments. They're very helpful.

MR. KING: Thank you very much.

CHAIRMAN LIEBMAN: Thank you for being here.

Our next speaker up today will be Paul Clark, and after him will be Elizabeth Milito and John Raudabaugh.

Good morning.

PROF. CLARK: Good morning. Thank you for the opportunity. I am Professor and Head of Labor Studies in Employment Relations at Penn State University, and I also have had experience in a nonacademic setting both as a union member and as a manager.

As a university faculty member, I have observed, studied, and taught about the American system of employment relations for many years, and so my comments will take a broader focus, look at the broader picture, in terms of the issues we're talking about here today.

For the majority of American employees, the legal framework for the system of employment relations in the U.S. is spelled out in the National Labor Relations Act.

Each time I introduce a new set of students to the Act, I begin by having them read Section 1. This section provides the rationale for the Act's passage. Central to that rationale is the concern that "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce and tends to aggravate recurrent depressions by

depressing wage rates and purchasing power of wage earners."

It seems clear that in writing this legislation, Congress recognized that when employers held all of the power in the employer/employee relationship, when they made all the decisions unilaterally, not only did individual employees suffer but so did society at large.

The danger of concentrating power in any one institution is something that the architects of our political system clearly recognized, and it's the basis of the system of checks and balances that have been part of the foundations of American democracy.

The architects of our system of employment relations recognizes danger as well. The opportunity to organize a union and bargain collectively, that the National Labor Relations Act extended to American workers, represents a check on the absolute power of employers in the workplace, and it serves as a mechanism for balancing the interest of employers and employees.

Senate Majority Leader Harry Reid recently referred to the principle of checks and balances in a statement of support for the changes the Board majority has proposed.

Let me just state here that I believe I'm making a slightly different point than the Speaker made. My point is that the right to organize and bargain collectively is itself a check on unilateral power in the workplace. If employees

believe that an employer is exercising that power, the power they have responsibly by employing good human resource practices, providing reasonable pay and benefits and using their right to employ at will judiciously, those employees will likely forego the right to organize a union.

However, if the employer does not exercise its power in a responsible way, does not employ good HR practices, doesn't pay reasonable pay and benefits, or abuses its right to employ at will, its workers have a legally protected way to do something about it. They can organize a union and try to impact the employer's practices for the better.

One of the aphorisms about employment relations that I first heard when I was a student and have heard many times since is that an employer who gets a union probably deserves one. We've all heard that, the idea being that employees in almost every case organize a union because in their view, the employer has not lived up to its responsibility. I think that was actually or is actually a pretty insightful aphorism that applied for probably the first 40 years or so of the Act's existence. For much of that period, unionism grew to the point that up to a third of eligible workers exercised their right to organize and bargain.

And for the two-thirds of employers without a union, the threat that their workers might follow suit provided a great incentive to provide good pay and benefits and otherwise

engage in good HR practices.

Regrettably, the thoughtful system of employment relations that the Act created and that served this nation well for several decades no longer functions as intended, and that's to the detriment of our employment relations system.

In my opinion, this is because the check and balance the Act offered to employees, the opportunity to form a union and engage in collective bargaining, is now unattainable for many American workers. It is sometimes unattainable because the process for exercising that right has become a minefield and a marathon, and many employees who might want to organize a union simply chose not to because the price is too high.

This assertion is backed by research conducted by Rogers and Freeman that indicates that 50 percent of the American workforce would like to be represented but will not attempt to organize. The minefield they face consists of many sophisticated elements of the modern anti-union campaign, skillfully designed by attorneys, psychologists, and communication specialists.

And the marathon aspect of the process, of course, is caused by the endless delays that have become part and parcel of the process, a phenomenon identified in a number of studies including a recent one at the University of California.

The fact that the employment relation system created by

the Act does not function as intended serves the interest of employers, but it does not serve the interest of employees or of our larger society.

I believe the changes proposed by the Board majority are a small but important first step to restoring the opportunity for employees to choose union representation and collective bargaining. Thank you.

CHAIRMAN LIEBMAN: Thank you very much, Professor Clark.

Do my colleagues have any questions?

Thank you for joining us here today and providing your perspective.

Our next speaker will be Elizabeth Milito, and up after her will be Christopher Grant.

MS. MILITO: Good morning. My name is Elizabeth Milito, and I'm an attorney with the National Federation of Independent Business, Small Business Legal Center. I'm going to provide an introduction here, and then I'm going to turn it over to John Raudabaugh, who is representing NFIB in this matter. John will share two key concerns that NFIB has with the Board's proposal.

NFIB is the nation's leading small business advocacy organization, with a national membership of about 350,000 independently owned and operated businesses. While there is no standard definition of small business, the typical NFIB member employs 10 people and reports gross sales of about

$500,000 a year. NFIB's membership is a reflection of American small business, and I am here today on their behalf to share a small business perspective.

Currently small businesses in this country employ just over half of all private sector employees. Small businesses pay 44 percent of total U.S. private payroll. Small businesses have generated 64 percent of net new jobs over the past 15 years.

In 2008, there were just over 29.5 million businesses in the United States. Businesses with fewer than 500 employees comprised 99.9 percent of those 29.5 million businesses.

Small businesses are America's largest private employer. For this reason, it's critically important that the Board understand small firms' unique business structure and the exceptional problems that the Board's proposed amendments to NLRB election rules could place on the smallest, but arguably most important employers in this country.

Despite small businesses' impressive employment statistics, only 12 percent of small employers have at least 1 employee dedicated to personnel or human resources matters. And 57 percent of small business owners have no experience in personnel or human resources before owning their current business. It's no wonder that small businesses struggle to decipher the mysteries of overlapping and sometimes even conflicting federal, state, and local labor

and employment laws.

In these companies, most employment concerns including issues related to labor matters are made by the owners of the business who upon receipt of an election petition wouldn't have a clue what to do, and would not only need to consult with an outside advisor, they would first need to find such an advisor with whom they could consult.

I will close by saying that small businesses face unique challenges that make compliance with the NLRA and all employment laws exceedingly difficult for even the most determined business owner. I hope that the Board in considering this proposal understands and appreciates how detrimental the proposed amendments could be for America's small businesses. Thank you. I'll turn it over to John.

CHAIRMAN LIEBMAN: Thank you for your comments.

Mr. Raudabaugh. Good morning.

MR. RAUDABAUGH: Thank you, Elizabeth. Good morning, Chairman Liebman and Members Becker, Pearce, and Hayes. Thank you for this opening meeting. I'm an attorney with the law firm Nixon Peabody. I speak today on behalf of the National Federation of Independent Business.

Our nation's labor law was conceived for the purpose of protecting the free flow of commerce by encouraging collective bargaining to avoid disruptions. Under the 76-year-old law, bargaining employees' terms and conditions of

employment can only occur between employers and labor organizations chosen by employees to be their representatives. The same law was later amended, one, to allow employees to refrain from third party representation recognizing that labor organizations, too, can obstruct commerce and a collective voice may not be desired; two, to encourage the expression and dissemination of views, arguments and opinion; and, three, to direct the Board to investigate representation petitions and provide an appropriate hearing upon due notice whenever a question of representation exists.

The starting point for representation is employee choice. Choice is the act of selecting freely following consideration of options. Section 8(c) encourages free debate on issues dividing labor and management. For an employer to engage, it must first become aware. As Canadian experience proves, covert union campaigning results in significantly higher rates of union representation over an open exchange of views by both the union and the employer, to inform employees and respond to issues raised.

The Board's proposed rule would significantly undermine an employer's opportunity to learn of and respond to union organizing by reducing the so-called critical period from petition filing to election, from the current median of 38 days to as few as 10 to 21 days.

To ensure due process in representation case matters, Congress amended Section 9 requiring the Board investigate each petition, provide an appropriate hearing upon due notice, and decide the unit appropriate. The Board's proposed rule would restrict the presentation of evidence enabling fair deliberation of unit appropriateness issues by creating a 20 percent voter eligibility unit placement review threshold, imposing a claim it or waive it rule regarding unit scope and related evidentiary issues and requiring production of detailed employee lists and identifiers.

Should the Board proceed with its proposed rule, NFIB believes that employee informed choice and due process, notice and hearing required by Section 9, may be compromised particularly for small employers lacking labor relations expertise and in-house legal departments.

Respect for the rule of law is critical when administrations change and case precedent is reversed. When as in fiscal year 2009 unions won 74.1 percent of RC elections for units of 10 or fewer employees and 63.8 percent over all. When Executive Branch agencies coordinate actions with independent agencies to assist organized labor, when decades of Board and General Counsel reports -- successes and meeting time targets, it would be inadvisable for the Board to take actions that compromise substantive statutory rights of speech and due process, all viscerally understood by

fellow citizens.

Finally, the NFIB requests that you consider small businesses' lack of experience, knowledge, and resources to defend their interests regarding labor law, process, and procedures.

We respectfully suggest that the Board redirect their investigation to identifying the statistically relevant independent variables explaining deviation from the desired median. Thank you.

CHAIRMAN LIEBMAN: Thank you, Mr. Raudabaugh, Ms. Milito.

MR. RAUDABAUGH: Thank you.

CHAIRMAN LIEBMAN: Do my colleagues have questions?

MEMBER BECKER: I've got a question for both of you really focused on your expertise in working with small businesses. One thing that the proposal attempts to do is both make the process more transparent and provide compliance assistance in the form of a much more detailed description which will be mandatory for the union to serve with its petition and somewhat duplicatively for the Region to serve as well, so that the types of businesses you work with will have a blueprint of what to expect if there is a hearing, and then also in the statement of position, a written document such that they will know exactly what they'll be expected to or at least what they'll have the option of taking a position

on at the hearing.

My question is, is that helpful? Are there other things that we could do in that respect in terms of making the process more transparent and accessible for your clients?

MS. MILITO: I mean I certainly commend the Board for the offer to provide additional compliance assistance, and certainly NFIB, that's one thing that we always ask for, and it's very helpful for small businesses. That said, when it comes to preparing the document, the statement of position, and pulling together all the documents that are going to be needed at the hearing, the small business is going to need an outside adviser, and that's where they're going to need to look for help, and with all due respect to, you know, the fabulous labor attorneys in this room here, our members don't have folks like that, that they can pick up the phone and call. It's going to be, you know, a process where, you know, my goodness, what will I do with this? Who do I call? They call the person they identify as their attorney. Their attorney doesn't do labor issues. I haven't a clue, you know, call John Smith down the street. He might be able to help you.

So even though it's fabulous, it will spell out more and make it more transparent to provide a blueprint, I think they're still going to need outside legal help when it comes to preparing for the petition.

MR. RAUDABAUGH: I would second what you just said. I do think that is a good idea. I think help and bringing someone through the process would be a step forward.

I would just like to go back again to that last comment. It's been decades since I finished my graduate degree in econometrics. So I don't remember the term, but when you do the distribution and you get a median of 38 days, what I was trying to suggest was that if we take whatever that term is for the right side, anyway, where it gets strung out, what is it, beyond one standard deviation of the desired median, I think that -- I honestly believe that if we took say a fiscal year and then mapped out each case that was beyond your median target, and then map characteristics that we would define as identifying variables of size of employer perhaps, even geographic region, if you look at distribution of labor attorneys, there aren't a whole lot of them in certain states, but if you could map through that, I honestly, truly believe it would yield some results. It would help us all decide what it is that causes these longer delays and litigation related issues, and then perhaps you could zero in on those and target those types of employers or industries with particularized assistance of the kind you were suggesting.

CHAIRMAN LIEBMAN: I have a question. Is there any standard practice within the members of your Federation for

what to do when an election petition is filed in terms of, the employer's right to get its views out? Is there standard advice that you give, or is there a standard practice that your members follow? And how long in your view does it take for one of these small employers to communicate its views with what's going to be a pretty small workforce?

MS. MILITO: As I pointed out in my remarks, in most of the businesses, most NFIB members, 90 percent of NFIB members employ less than 10, 20 employees. So in those instances, there was not even an employee dedicated to handling human resource matters. So we do not have -- our members do not necessarily have somebody on their staff who is a member of say SHRM. So when it comes to labor and employment matters, it oftentimes is the owner of the business or his or her spouse or the bookkeeper who is also, you know, kind of the administrative person who will open the mail and get the petition. So you can probably picture how this would go, you know. Opening the mail and you kind of, oh, this is a legal document, what am I going to do with this?

So it's going to take some time. You know, the owner's going to have to look at it. As far as pulling together what's required before the hearing and the position, I don't believe there is a standard practice. I mean it's going to be, you know, the owner picking up the phone, trying to get help from their attorney who is going to pass them on

probably, try to find a labor expert who can help them out and figure out what to do, but I don't believe that there is a standardized practice just because this is not something that they're confronted with very often. You know, they don't have, you know, standard operating procedure because this is not something that comes up in their business.

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

Our next speaker is Christopher Grant, and up next will be Patrick O'Neill. Good morning.

MR. GRANT: Good morning. Thank you, Members of the Board, for inviting me here today. My name is Chris Grant. I'm a partner at Schuchat, Cook and Werner in St. Louis, Missouri. I represent labor unions and members and workers. I've represented unions in numerous representation proceedings and unfair labor practice cases involving union elections.

In addition, prior to becoming a lawyer, I helped organize a union in my workplace and then helped workers at other stores in the same retail chain to do the same.

The Board's proposed rules do much in my mind to eliminate unnecessary and wasteful litigation from the representation process and to focus on the primary goal, which is to allow employees to promptly exercise their right to choose whether they want union representation.

The need for prompt elections is critical. The Supreme Court, over 40 years ago, in Boire v. Greyhound Corporation, noted that the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment in strength and attrition and delay.

More recently in a slightly different circumstance in Fall River Dyeing, the Court emphasized "the significant interest of employees in being represented as soon as possible."

One proposal I think is particularly important here, and that is the requirement that the employer provide a statement of issues and information on unit position such as job titles. This proposal will remove the gamesmanship in R cases that commonly delay elections. In my experience, some employers refuse to provide its position and information, not because they do not know, but to gain an advantage in litigation, and this inhibits the development of the record at the R hearing and proper resolution of those legal issues.

I also want to speak to a broader problem. As a participant in R case process as an employee in the past, as an organizer and as an attorney, what strikes me is how stressful that process can be to employees. Delay only makes that process more stressful. Employees wonder when they'll get to vote, will the employer let them vote, and when a decision will be made. Employees also fear retaliation

during this time, and when the effect of delay is to make the process more stressful, then employees are increasingly likely not to base their decision on careful consideration of the facts, but to respond emotionally to stop that stress, and that is I think contrary to the purpose of the Act.

There have been some arguments about employers needing more time to voice their opinion, and that employees cannot meaningfully exercise their right to vote without knowing the unit with complete finality.

Now, in my experience, the employer almost always knows of the union activity pre-petition. For example, in a recent case I handled, ADB Utility Contractors, the employer's general manager told employees that he knew the employees were meeting with the union, and he fired several lead employee organizers before the petition was filed. Not surprisingly in that case, the employer also abused the R case process. It refused to provide a statement as to the issues prior to the start of the hearing, and it made frivolous arguments about supervisors accounting for less than 20 percent of the unit, and this created a delay during which the employer threatened, coerced, and fired more employees.

I also want to say the obvious I think is the employer controls the workplace and is free to give its opinion on unionization at any time, and to say that unions benefit from

months of supposed covert organizing, while the employer cannot voice its opinion or view, I think ignores the imbalance and power between the employer and employee.

Finally, defining the bargaining unit is not rocket science. For the most part, we're talking about relatively simple issues. It's the mechanic in the unit. There are two plant clericals. Are they out? Should we combine phlebotomists and lab technicians? Are crew leaders supervisors?

The 20 percent rule draws an appropriate line. If fewer individuals are at issue, the complaint that I hear from employees is not I can't meaningfully exercise my right to vote because I don't know if the mechanic is in the unit. Rather the complaint is why is there a delay? What is happening?

The presumption is that the Board is not controlling the process. The proposed rules in my view simply empower the Regions and the Hearing Officers to properly manage and control the process and provide for prompt elections. Thank you.

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

MEMBER HAYES: Do you have any views with respect to the portion of the proposed rule relating to blocking charges?

MR. GRANT: Do I? I did not prepare any comments on

that, and I'm not quite sure. I know the Board proposed. I didn't really offer any opinion on that. You know, in certain cases where there are significant unfair labor practices that hinder the ability to have a free and fair election, I think you have to allow for a blocking charge.

CHAIRMAN LIEBMAN: Would it make sense to have the election proceed and then have all the issues litigated after the election is held to avoid the delay?

MR. GRANT: I think the union should be able to exercise its right whether to go forward or not, based upon its view of the unfair labor practices, and this is subject to the Regional Director's consideration, too, but whether those unfair labor practices inhibit the ability for employees to exercise their free choice. When there's significant unfair labor practices in my experience involving the discharge of employee organizers, threats to close the facility, threats to subcontract out work, that makes a free election impossible. If you have to litigate that post-election, and then perhaps have the problem of a rerun election, there are multiple studies showing that the delay from the initial election to the rerun election costs unions, that it's very difficult, and the more time there is between the initial and the rerun election, the more likely the union is to lose.

MEMBER HAYES: I just had one other question. You indicated under our present system, when the parties -- it's

been my experience anyway, that our Hearing Officers and attorneys in the Region are extraordinarily good at being able to solicit the position of the petitioner and of the employer with respect to the unit ahead of time. Do I understand you to say that you don't believe that to be the case, that the parties don't know at the time of the hearing what the issues are?

MR. GRANT: That is correct. There are multiple occasions where I've participated in representation proceedings where the employer has flat out refused to provide what its statements would be prior to the start of the election.

Typically how it works in Region 14, where I am, is that the Hearing Officer will attempt to solicit the views of the employer, whether there's a supervisory issue, what's the composition of the unit. There are unfortunately employers who will not provide that information prior to the start of the hearing. So you don't know as the union who to subpoena, you don't know what the issues are to be to properly prepare them, and so as a result, you go in there and you suddenly learn on the first day of the hearing that the employer's contesting that so and so is a supervisor. You don't have the ability to get them there. You don't have the ability to properly argue based upon the facts, and then as a result, you have a really bad record, and that makes it very

difficult for the Region in my view, and the Hearing Officer and Regional Director to make a good decision.

MEMBER HAYES: So let me understand. How would that be changed under the rules which don't require the statement of position until the day of the hearing in most instances because of the relatively short timeframe between the filing and the hearing?

MR. GRANT: My understanding is that the statement would be, as now, would be attempted to be provided or attempted to be solicited prior to the start of the hearing, days before. I suppose if the employer is absolutely refusing to provide it, I guess you don't have the statement of position until the day of the hearing, but at least you aren't caught midway through the hearing where the employer is raising a new issue.

MEMBER HAYES: Thank you.

CHAIRMAN LIEBMAN: Anything further?

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

Mr. Patrick O'Neill, and after that we'll have Mr. Baskin.

Good morning.

MR. O'NEILL: Good morning. My name is Pat O'Neill, and I'm the Organizing Director of the United Food and Commercial Workers International Union. The UFCW represents over one

million men and women who work in our nation's retail, food, food processing, and other industries. We welcome this opportunity to speak in support of the proposed election rule changes.

American workers are struggling to make ends meet during the worst economic downturn since the Great Depression. Workers in the grocery, retail, meat packing, and food processing industries are no exception. Union contracts offer the best opportunity for stable, middle class jobs. While the National Labor Relations Act gives workers the fundamental right to join a union and achieve the benefits of collective bargaining, the NLRB's current rules are seriously outdated, needlessly complex, and foster frivolous litigation.

The current process creates barriers to workers exercising their fundamental right to form a union.

It's time to return the process to its original intent, which is to give workers the clear path to make a choice when they want collective bargaining.

We view the proposed election rule changes as a modest but important first step toward modernizing and streamlining an outmoded process that encourages unnecessary, time-consuming, and wasteful litigation.

The proposal to defer resolution on most voter eligibility issues until after the election, including all

bargaining unit disputes affecting less than 20 percent of the unit, would make the current process more efficient and worker-friendly.

Just ask the employees at Home Market Foods in Norwood, Massachusetts who sought representation by the UFCW Local 1445. Workers petitioned for an election in a unit of all production, maintenance, shipping, receiving and housekeeping employees, including 11 quality assurance technicians, but excluding 9 quality assurance technologists who the technicians considered their supervisors. However, the company argued that none of the quality assurance workers should be in the unit, or if they were included, that the technologists were not supervisors and should vote in the election.

By disputing the quality assurance workers' status, the company delayed the election until 79 days after the petition was filed, and during this delay, management used the time to further threaten workers with job loss and plant closure if they won in the election.

The workers lost the election 104 to 114. If the quality assurance employees' eligibility to vote had been deferred until after the election, the election would have taken place before the employer's scare tactics had their intended effect. In that case, the workers would have won the election by a big enough margin that their votes would

not have affected the outcome.

Now -- say that I think you're almost guaranteed the first proposal out of the company if the union had prevailed would have been to remove the supervisors from the unit. That's usually what we see, they force people into a bargaining unit that don't want to be into it, and then if the union wins, the first proposal we see in bargaining is to remove those people from the unit.

This is exactly why the proposed changes are needed. Workers go to work to earn a living, not to get engaged in a protected, lawyer driver tug of war with their employer. When workers want to organize a union, they want to do it immediately.

The proposed rule changes will not interfere with the employer's free speech rights. Workers know the employer's views on unionization, and if workers are unclear of their employer's position, it doesn't take long for them to find out.

Not only will this rule change not lead to ambush elections as claimed by employer funded lawyers, almost all union election campaigns are well underway and well known to employers long before an election petition is filed. In virtually all instances, employers have ample time to communicate with their workers.

This fact is supported by a recent study by Professor

Kate Bronfenbrenner of Cornell and Dorian Warren of Columbia, both of whom will address this panel later today. Their research shows that 31 percent of serious unfair labor practice violations occurred 30 days before the petition was filed, and 47 percent of all serious allegations occurred before the petition was filed. The data supports their conclusion that employer opposition starts long before the filing of the petition. UFCW organizers have known and experienced this firsthand many times.

The UFCW is optimistic that the proposed rule changes will begin to restore the NLRB election process back to what it was intended to do, give workers a clear process to organize in a union.

We are, however, concerned about the possible elimination of the blocking charge policy. Strong employer opposition to union organizing campaigns is the rule rather than the exception. Workers and their unions would be faced with serious employer unfair labor practices during a critical period, may need temporary postponement of the election to try to counter the employer's illegal conduct. The blocking charge policy is needed to help attempt to prevent that from happening.

The UFCW will make a more detailed response to the Board's Notice of Proposed Rulemaking in written comments it plans to file. Again, thank you for this opportunity to

speak in support of this rule change.

CHAIRMAN LIEBMAN: Thank you, Mr. O'Neill. Do my colleagues have questions?

I'll throw out a question for you. Is there anything in this rule that you see as problematic or anything that you would propose that would be an improvement?

MR. O'NEILL: I can make a lot of suggestions for other improvements, but not in this particular --

CHAIRMAN LIEBMAN: Pick one.

MR. O'NEILL: Access.

CHAIRMAN LIEBMAN: Access. You mean union access to the property?

MR. O'NEILL: Yes, to the workers.

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

MR. O'NEILL: All right. Thank you.

CHAIRMAN LIEBMAN: We appreciate it.

Mr. Baskin, and after Mr. Baskin will be Mr. Brian Brennan.

Good morning.

MR. BASKIN: Good morning. My name is Maurice Baskin. I'm a partner in the Washington, D.C. office of the Venable Law Firm, and I'm appearing before you today on behalf of Associated Builders and Contractors, the national construction industry trade association for merit shop

contractors representing 23,000 contractors around the country employing an estimated 2 million workers. With me today is Karen Livingston, Director of Federal Policy for ABC.

ABC is strongly opposed to the Board's proposed amendments to the election rules, both as they impact the unique labor relations of the construction industry and also as they impact on small businesses generally because small businesses comprise the majority of ABC's members.

But from listening to the testimony you've heard so far, I'm not sure that you've been given a full appreciation of the sense of outrage in the business community, particularly small businesses we're hearing from, that in the midst of this terrible economy, the NLRB is proposing new and burdensome regulations that appear to have no purpose other than to promote union organizing. There's outrage over the haste with which you are moving ahead with these sweeping and radical proposals, hardly modest proposals; radical proposals, particularly without a full board of confirmed members, and with no credible showing of a need for changes in the Board's election rules in the first place.

Unions in the construction industry last year won 81 percent of their NLRB elections in a median time of a little over a month. It appears to many in the business community that the unions and the Board won't be satisfied until that

number hits 100 percent, and it looks to small businesses like the proposed amendments are simply an end run by the Board to achieve what the unions failed to get through Congress last year.

Regardless of the Board's motivations, the proposed amendments are unlawful on their face because they're based on two false premises: first, that faster elections are necessarily fairer elections, and second, that employers' rights to due process and free speech during the union election campaigns are somehow subordinate to the rights of unions to organize the employer's workplace.

I'm afraid we don't nearly have enough time today for us to cover everything that's wrong with the proposed amendments, but I want to try to focus on those parts that threaten particular harm to the construction industry who we're representing here today along with the small businesses generally.

We start with the proposed shortening of the period between filing of the union petition and then NLRB hearing. It's particularly offensive to small businesses in the construction industry. The new seven-day time limit, not enough time for most small construction contractors or other small businesses to get lawyers, as you've already heard, or learn what the NLRB election is or what the NLRB is frankly, let alone produce this new legally binding prehearing

statement of position on what the issues are. I should add that the Board's proposal is as different from the Federal Rules of Civil Procedure as night and day. It takes months to reach the point of disclosures and binding statements and definitions of hearings and what's permissible and what's not, what the Board is trying to achieve in seven days. It's just completely different. We'll give you chapter and verse on that in our written comments as I'm sure many others will, but really it was shocking to see that statement in the proposed rule discussion.

The Board's appropriate unit rules, just take those for the construction industry, they are particularly convoluted. I've yet to meet a contractor faced with their first union election who has any idea what those rules are or how they work, and I appreciate the nod to the concept, well, if the Board could just put out a little advance statement, that that would help.

Are you going to put out a treatise this thick? And just imagine if you're a small business employer and you get an envelope in the mail that says not only are your employees mad at you and they brought a union in, but here's this homework assignment. Go study up and get ready to go to law school to learn all the appropriate unit rules in the construction industry and, of course, for other industries, small businesses face the same problem.

It's crazy that they would be bound within seven days to figure out while they're trying to find lawyers, while they're trying to figure out who's actually in their group of employees, so they can produce this prehearing statement, to figure out the rules of disappearing units, of multi-craft versus single craft units, of single employer versus joint employers, of 8(f), not to mention in the construction industry which is unique, and 9(a) separation. These are just a few of the issues that arise in the construction industry that need to be addressed up front with sufficient time to get the facts and the law straight.

Not to mention that the Board has created a special rule of eligibility in the construction industry, the Daniel/Steiny formula, and we haven't had much talk about the Excelsior list change, knocking it down to two days. How construction employers are supposed to put that together, finding laid off employees, that's the Daniel/Steiny rule, unusual to construction. So it's not just a matter of pulling out your latest payroll and submitting that. No, you've got to go back and find the people who were laid off who worked a sufficient period of time to perform, to be included on the eligibility list. We submit that that's impossible. Frankly it's impractical for other industries as well and no justification for that shortened timetable.

Construction companies employ an unusually large number

of working foremen, and we've heard talk about the difficulties of trying to figure out whether lead men and foremen are supervisors or not, in the impact of the election. So I won't repeat that here, except to say that the construction industry faces that problem more than most other industries.

So these are just a few of the issues raised by the proposed amendments that are likely to have negative impacts. We're going to prove more details in our written comments, but we again implore you to slow down. We renew our request for additional time for all interested parties to file their written comments, and we urge you to rethink the wisdom of attempting to implement this radical new agenda that violates the Act.

Thanks for listening. I'm happy to answer any questions.

CHAIRMAN LIEBMAN: Thank you, Mr. Baskin. Are there questions?

MEMBER BECKER: I have a question about your view of the terminology that we adopted in establishing all the timeframes that have been proposed, not only the seven days, but the two days, both of which you mentioned specifically because we specifically asked for comments on the words that we have used to describe those timeframes, none of which are rigid because I'm sure you know in 2002, the Board, which

none of us were on, in Croft Metals, held the following, and I'll quote, "By providing parties with at least five working days' notice, that is between petition and hearing, we make certain that party representation cases avoid the Hobson's choice of either proceeding unprepared on short notice or refusing to proceed at all."

So however many years ago, nine years ago, the Board held that that period of time was the minimum period necessary.

What the proposal suggests is that period should be the standard but not rigidly, and we've suggested in all the timeframes, special circumstances or various language to accommodate the kinds of concerns you've described. If you have to go back and figure out who was working over periods of time, that may justify a longer period of time.

So my question is do you have any specific suggestions as to that terminology, that is if we're going to establish a norm, maybe it's 7 days, maybe it's 10 days, but terminology which would allow the kinds of special circumstances you've described as to those timeframes?

MR. BASKIN: First, there's been no need to make the change in the first place. So your established practices are working well, and you should continue them, and not change the norm which is going to invite litigation over every aspect of these rules including that one.

Second, what you describe as language that is not rigid seems inconsistent with the Board's own facts, statements, and summaries of the rules. When one looks at the chart that appears on your website, it doesn't emphasize the nonrigid nature. It says there's going to be this new rule, and it's going to be a shorter period of time.

But we'll take your question to heart, and we'll provide comments in our written statement as to whether there is any way that you could change the rules with a more open period, but frankly, we doubt it and we don't see why you need to do it.

CHAIRMAN LIEBMAN: Mr. Baskin, you mentioned the question of employer free speech, and I would ask you the question I asked just a little while ago. I assume most of the members are pretty small employers.

MR. BASKIN: Yes.

CHAIRMAN LIEBMAN: And I wonder if there is a standard practice that is employed in situations where unions file a petition, and what do employers routinely do to try to exercise their free speech and get their views across and how long does that take?

MR. BASKIN: Well, I'm very glad you asked that because there's been this myth created that employers are some monolithic group out there with this game plan in place to stop unions and to communicate. In fact, most employers,

especially smaller ones, don't give the slightest thought to this issue. Even though seminars are out there being given, they're not all that well attended until the employer has the union at the door. Then they wake up and they realize they should do something about this, only they don't have the slightest idea what to do, and there are various recommendations on what they should do. They have to get time to consider those possibilities.

There's also a language barrier in many construction workplaces because of the sizable representation of minorities. So they have to figure out how they're even going to communicate. It's one thing to say go here, put this together with people who already know how to do it. It's another thing to get into this very complicated subject of union rights and benefits and benefits of staying nonunion.

So there really is not a single standard. Many employers are not even members of the associations that try to educate, among the better educated ones are the ones who are members of ABC and similar groups, but to many others, they just are completely at sea when they get this and frankly they're more likely to commit violations because of the time pressures and the short -- the lack of education on what they should do in this situation.

CHAIRMAN LIEBMAN: I would assume that one of the

advantages of membership in the ABC is that you do provide some guidance and probably have model plans for how the employer gets it across. I'm just curious really what the timeframe is for a model campaign that the ABC would recommend --

MR. BASKIN: I think --

CHAIRMAN LIEBMAN: -- especially with a small --

MR. BASKIN: There is no standard recommendation because every workplace is different. The issues are different, but I would say that the median that the Board is currently at is about right. In fact, it's about the minimum because below that, it is not likely that the employer is going to be able to communicate.

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

MR. BASKIN: Thank you.

CHAIRMAN LIEBMAN: Our next speaker will be Brian Brennan, and next up after that will be Mr. Harold Weinrich.

Good morning.

MR. BRENNAN: Good morning. I'm very honored to appear in front of the Board. Thank you for this opportunity.

My name is Brian Brennan. I'm employed by the International Brotherhood of Electrical Workers as an international representative. Part of my duties as an employee of the IBEW is to assist workers who want to form a

union at the workplace.

From 2004 through 2006, I assisted employees of the Exelon Nuclear Corporation in their efforts to obtain union representation at two nuclear power plants in Philadelphia, the Limerick and Peach Bottom Plants. Unfortunately, Exelon Nuclear was able to use the Board's current rules on representation cases to delay the election vote for five months, and Exelon used these five months to commit unfair labor practices and engage in other conduct that rendered a free and fair election impossible as the Board ruled later.

When the Exelon Nuclear employees filed their petition in November 2004, they turned in authorization cards from 65 percent of the employees in the proposed bargaining unit. Five months later, the 655 employees who voted rejected union representation by two votes. The full scope of the employer's misconduct in those five months is set forth in the Board's decision ordering a rerun election at 347 NLRB 815, but I just want to mention a few examples here.

First, Exelon threatened employees for attending the hearings under subpoena from the union. Second, Exelon threatened at least one union supporter with the loss of his job, and third, the company used the services of one of yesterday's witnesses, the so-called impartial consultant, Oliver Bell, to tell employees they would not get a favorable contract even if they chose union representation.

The Board-ordered rerun election did not occur until two years after the election petition was filed. By that time, delay had done even further damage, and the gap widened to 43 votes.

So this is how Exelon Nuclear delayed the initial election of five months. Exelon got the initial hearing postponed to accommodate its attorney. Then the company showed up at the rescheduled hearing on December 8th without fixed positions on who was in or out of the proposed unit.

In the end, only two issues were litigated, the supervisory status of its control room operators and lead plant technicians, and the total number of employees at these issues, these two issues of classification was far less than 20 percent of the proposed unit.

No testimony was actually taken until January 3, 2005, a full six weeks after the election petition was filed. The hearing took only six actual days but was spread out on nonconsecutive days and did not end until January 18, 2005. Both parties filed briefs. The Regional Director issued her decision on March 31, 2005, and the election was held on May 5, 2005.

Under the Board's proposed rules, I believe the election would have been far more timely because, number one, the employer would have been held to stating its position at the opening of the hearing in early December. Number two, the

hearing, if it occurred at all, would have been run on six consecutive business days and, number three, the parties could have argued their positions on the last hearing date, and a decision would have been rendered more quickly.

In the alternative, because less than 20 percent of the unit was involved, the employees could have had their first election that argued about the supervisory issues afterwards.

In closing, I would like to say that in 25 years of trying to help employees exercise their right organize, it has been my experience that employers who don't want their employees to unionize always manipulate the Board's R case procedures to delay the vote. Then employers use the delay time to threaten employees and weaken support for union representation. Employers are not afraid of being found in violation of the law for election misconduct because they know that the only penalty is a rerun election which will not take place until many months or even years later.

Finally, the statistics on rerun election as borne out by this case are against the employees who want union representation. The proposed rule will result in a more free and fair election system. Thank you very much for your time.

CHAIRMAN LIEBMAN: Thank you for being here with us today. Are there any questions?

Thank you very much. It's been suggested that we take a break right now. So if you would all be back here in 15

minutes, we'll start promptly. Don't forget to take your badge and number with you, and we will see you back in 15 minutes.

(Off the record.)

CHAIRMAN LIEBMAN: We can go back on the record.

We'll begin with Mr. Harold Weinrich, and next up will be Elizabeth Bunn.

MR. WEINRICH: May it please the Board, by way of introduction, I am Harold Weinrich. I am a member of the firm of Jackson Lewis. We represent employers nationwide in labor and all aspects of workplace law. I began my career in Region 29. I learned labor law at the knee and too often over the knee of a labor law icon, Regional Director Sam Kaynard.

I appear for the Atlantic Legal Foundation, a nonprofit, nonpartisan public interest law firm. The Foundation's mission is to advance the rule of the law before courts and agencies advocating limited and efficient government, free enterprise, individual liberty, and the safeguarding of constitutional protections. ALF is concerned that the Board's proposed rules threaten to undermine these core values.

The Board's rulemaking authority is strictly circumscribed. The Board may only make such rules as may be necessary to carry out the provisions of the Act. The Board

may only adopt rules to implement the will of Congress, not as a means to further their own agenda. The Board exceeds its authority when it seeks to refashion the Act.

Here, the timing of the Board's proposed rules coming after Congress rejected statutory revisions, now encompassed by the proposed rules, underscores the fact that the Board may not seek to carry out the Act's provisions but may rather intend to enact the changes that Congress rejected.

The Board's proposed rules do not respect the constraints Section 6 places on the Board's rulemaking authority and therefore the Board is exceeding that authority.

Today, I address some areas where the Board deviates from its proper rulemaking authority.

First, the proposed rule disregards the language of Section 9. The rules preclude the holding of any pre-election hearing, no less an appropriate hearing, with respect to many disputed and material eligibility and unit inclusion issues. These issues may not be heard or decided until after employees vote and possibly will remain undecided. Ignoring Section 9's guarantee of an appropriate pre-election hearing does not carry out the provisions of the Act.

It also ignores Section 7. Employees when they vote are entitled to know who is to be the collective in any

collective bargaining. When individual or classification eligibility or unit inclusion issues relating to disputed supervisors remain undecided, not only is Section 7 and 9 ignored, but the employer cannot identify who is to communicate on its behalf and thus its Section 8(c) rights are abridged.

The Board does not carry out Section 7 by rushing to the ballot box. Employees are guaranteed the right to have the information necessary to make an informed choice. The fact that making an informed choice may take time is a necessary feature of a democratic process. It is a core Section 7 right. Free and robust debate is an essential element of employee free choice and a rule that infringes on that right is not sanctioned by Section 6.

The Board also does not carry out Section 8(c) by the proposed rules. That section gives employers the right to communicate with employees, non-coercibly, concerning the exercise of their Section 7 rights. Unless an employer has an adequate opportunity to fully utilize its free speech rights between the time a petition is filed and an election is held, employees' rights are destroyed, and the employer's free speech rights become meaningless. The Supreme Court in the recent Brown decision acknowledged this. An essential source of information and opinion, specifically protected by Section 8(c) since 1947, that is necessary to an informed

employee electorate must not be neutered by a rule or rules radically limiting the pre-election period.

The Board should not alter the statutory scheme by enacting this proposed rule. In order to safeguard employee free choice, to continue to provide a meaningful opportunity for the Agency to determine appropriate units, the Board is urged to withdraw its proposed rule.

Section 6 is not optional language. It is a demand. Its purpose is evident. It was intended to prevent the NLRB from changing the will of Congress.

Further, it is untimely for a Board majority, which will soon be composed of only two members, one whom sits by recess appointment, to propose and consider any rule, especially such a far-reaching rule that substantially and fundamentally changes the provisions of the Act. I quote the Chairman, "Recess appointments should be hesitant to overrule precedent because it could be seen as a rush to judgment and undermine public confidence. Recessed Boards should be caretakers and keep the railroad running and not make policy decisions."

The proposed rules, if made final, will be precisely the very rush to judgment that the Chairman predicted and will undermine public confidence in the Board. Thank you.

CHAIRMAN LIEBMAN: Thank you, Mr. Weinrich. Of course, my colleagues on the Board at that time who were recess appointments disagreed with me and made a lot of changes in

precedents. Isn't that correct?

MR. WEINRICH: Unfortunately, Ms. Chairman, it is, and I think they should have agreed with you. I do.

CHAIRMAN LIEBMAN: Are there other questions?

MR. WEINRICH: Thank you.

CHAIRMAN LIEBMAN: I want to ask you one other question. You talked about the legislation that didn't get through Congress and how many of those provisions of the legislation are encompassed by these proposed rules. Well, my understanding of the proposed legislation was that it had three major elements, improve remedies for certain unfair labor practices, mandatory remediation and binding arbitration of first contract disputes that didn't get settled, and provisions for certification upon proof of majority through card check.

I don't see any of those in these proposed rules. Do you?

MR. WEINRICH: No. However, Ms. Chairman, if we look at the legislation, if we look at the debate, if we look at the compromises offered and considered, the essence of the proposed legislation was to make sure that the election process moved forward more quickly and that the employer did not have sufficient time to speak, and that is certainly encompassed within the rule that this Board proposes.

CHAIRMAN LIEBMAN: Well, actually I think the

legislation was about providing for another alternative to the election process, and the outcry about the legislation was that it was superseding the secret ballot election process. It seems to me the essence of these proposed rules are to make the secret ballot election process work better. Wouldn't you agree?

MR. WEINRICH: The secret ballot election process can only work better if there is an informed electorate, and these rules take the time period which has been the same for decades, approximately give or take 40 days, and cuts that as Member Pearce suggested down to 10 or 14, and that abridges the rights of employees and the rights of employers. The union, as we might know, has no direct right under the Act with respect to communication. It only has a derivative right which makes me wonder how you suggest that they who do not have a right can waive the Excelsior list. Thank you.

CHAIRMAN LIEBMAN: That's another point. Thank you. Any other questions?

Thank you, Mr. Weinrich.

MR. WEINRICH: Thank you.

CHAIRMAN LIEBMAN: Good morning.

MS. BUNN: Good morning. Chairperson Liebman and Members of the Board, good morning again.

My name is Elizabeth Bunn, and I'm the Organizing Director of the AFL-CIO. I speak today on behalf of

President Richard Trumka, Secretary-Treasurer Liz Shuler, and Executive Vice President Arlene Holt Baker, as well as our 55 affiliates who represent over 12 million workers throughout the United States.

Prior to this position, my background includes working after law school in the Enforcement Litigation Division of the Board and for 25 years working as a staff person and then officer of the UAW. While there, I oversaw the union's organizing activities in non-manufacturing.

The AFL-CIO urges adoption of the Board's proposed rule. It will make a positive, albeit modest, difference in the workability and efficiency of the NLRB's election process.

The Act's purpose is to encourage collective bargaining and to protect workers' rights of full freedom of association. This is our national policy. It is also a right enshrined in the United Nations Universal Declaration of Human Rights. It is a metric that determines whether a political system falls on the side of democracy or tyranny.

There are benefits to fostering this statutory purpose. For one, as was said yesterday, individual workers, employers, and neighborhoods prosper. Let's not forget the road to the middle class was paved by strong unions.

Additionally, while we all have an economic stake, we are also stakeholders in upholding the principles of fairness and democracy.

Under the current rules, the Board is hamstrung from fulfilling its mission of protecting workers who seek an election to form a union, to exercise their full freedom of association. The truth is that employers are able to exercise too much control over the timing of the election.

One clear example is bargaining unit challenges. In his book, Confessions of a Union Buster, Martin Levitt states, and I quote, "The beauty of such legal tactics is that they are effective and damaging the union effort no matter which side prevails." He goes on to cite a challenge on unit size which was "filed two weeks into the campaign and the case took at least three weeks to resolve. That kind of delay steals momentum from a union organizing drive."

Being able to influence timing and delay, all too often the employer is able to implement its own campaign timetable. All too often employers illegally discipline workers, hire unscrupulous consultants, force employees to attend group and one-on-one meetings, and sometimes even threaten to close the plant. The goal is not to inform. The goal is to harass, delay, confuse, and intimidate.

The toll taken on individuals is immeasurable. You've heard workers' stories during this hearing. There are thousands of others. Here is one more.

One of the workers in a drive among table games dealers at an Atlantic City casino was an immigrant from China. He

became disillusioned by the Communist Party, in part because it had denied him permission to marry the girl he loved. Courageously he left the country and emigrated to the United States. He fell in love with our hopes, our ideals, and most importantly, our commitment to liberty and democracy.

When he and a majority of his coworkers decided to file for a union election, he was confident that his government would protect his right to vote through a fair process. Instead, he and his colleagues suffered through delays, frivolous litigation, countless mandatory meetings. The workers showed amazing resilience voting 2 to 1 in favor of the union. Workers won, but it should not have been so hard.

He expresses disappointment and sadness by the unfairness of the process. He feels that his government, our government, failed him, and it did. When the government holds out the promise of a fair election, it should deliver on that promise.

We know the Board's proposed rule is not going to fix all the problems and abuses faced by workers in the representation process, but the proposed rule does take a small step in addressing some of them. It puts a check on unproductive litigation, thereby making the process more efficient. It enhances the ability of workers and their unions to communicate timely with one another through the means modern technology has created, fostering the democratic

tradition of robust debate.

It modernizes the way we do business. It creates greater certainty and uniformity in the election process, better enabling the Board to prevent gamesmanship. It enfranchises voters by removing the Hobson's choice unions current face in stipulating to elections.

Under the status quo, the employer is able to hang a sword of delay over the union. The employer can insist on a bargaining unit to its liking, in my experience defined as one in which it thinks it can win, union supporters must stipulate to that unit or face delays. When unions choose to stipulate against their legal judgment, workers are included who should be excluded and vice versa. Appropriate voters are disenfranchised.

Under the proposed rule, at least some eligibility questions are deferred until after the election, just as in political elections by the way. Other disputes are resolved more efficiently. May I have a minute?

CHAIRMAN LIEBMAN: Yes, please.

MS. BUNN: Consequently, that Hobson's choice is avoided.

The AFL-CIO and our members will continue to press for more holistic and comprehensive solutions to the problems that plague the NLRA. Today, we support the Board's proposed rule and urge prompt adoption of these modest reforms. Thank

you.

CHAIRMAN LIEBMAN: Thank you for being here with us today. Anyone have questions? I have a question for you.

As the prior speaker, Mr. Weinrich mentioned, unions are treated under the law as having only the derivative rights, not the direct rights that employees have. So therefore unions don't have a right of access to the employer's property. What is the way that you typically communicate with workers, and would the provision for adding e-mail addresses or telephone numbers help, or what is the way that you find most useful for communicating with workers, and does that vary according to the type of industry or the type of worker?

MS. BUNN: Right. It obviously varies to some extent depending on the access to the employer's property, but the imbalance between the ability to communicate by union supporters with one another and by employers to their employees is one of the great imbalances of the process and one that the Board specifically does not address by its rules. But the way in which workers wanting a union overcome this is to talk with one another off work time, off work property typically, and the problem with that was discussed yesterday to some extent, that means driving to workers' homes, trying to get people to come to a coffee house or what have you, and all of that information about addresses is just

compiled from one worker to another worker.

Allowing for e-mail addresses and phone numbers obviously brings the Board into the 21st century because that is the way in which people communicate more and more, as you know, but it also provides an ability for union supporters to communicate with one another more easily.

CHAIRMAN LIEBMAN: I don't know if you heard some of the complaints yesterday about providing e-mail addresses that would raise privacy concerns; that some employees say that they're unaware of the fact that their names and addresses could be given out to the union and would be upset to learn that their e-mail addresses or phone numbers were given out; and that maybe there should be some consent procedure. What do you find or what is your view about that argument?

MS. BUNN: Yeah, that's not been my experience doing a lot of organizing drives over the years. Typically we find that workers actually prefer to talk to union supporters and their union representatives off work because it's in an environment where the fear at least is taken out of the communication. So we've not experienced that anger and irateness that was discussed yesterday. To the extent that workers feel anger, I think they feel much more so about being hauled into captive audience meetings and one-on-one meetings where their voices are silent and where they're not allowed even to state an opinion on threat of discharge.

CHAIRMAN LIEBMAN: Yes, Member Pearce.

MEMBER PEARCE: There have been statistics mentioned by several during the presentations yesterday regarding -- well, 90 percent stipulations on petitions and over 60 percent win rate with respect to cases that have gone to election. Have you experienced the negotiation of stipulations and, if so, what kind of considerations do you find have to be made?

MS. BUNN: In my own personal experience, that mirrors the experience that John Brady talked about yesterday with respect to the Backus Hospital which is that the employer comes in and sits on a certain bargaining unit, one in which it believes it can win, and literally holds the sword of delay over the union's head and threatens to litigate up to and including the Supreme Court is generally the phrase, and so unions are again faced with this Hobson's choice of stipulating or face lengthy delays and oftentimes unions choose to accordingly stipulate even if the unit really does not in its opinion meet the test of appropriateness, and I think one of the beauties of the rule, and I probably didn't say this very well, so let me try again, I think one of the beauties of the rule is by delaying some voter eligibility questions to after the election where those workers will vote under challenge, but also making it to the extent that there are issues that need to have a hearing pre-election making that process more efficient, I think puts a much better face

for both parties on whether to stipulate or not.

CHAIRMAN LIEBMAN: Can I ask one more question? You probably heard a number of people express concern that these rules might decrease the number of stipulated elections because the employers wouldn't have time to figure out their legal position and would then just put all the issues down and litigate much more. Do you have any reaction to that? Do you have any thoughts? Do you have any fears that that would happen?

MS. BUNN: I don't have any fears it would happen. It is sadly accurate, I think, to believe that there will be anti-union consultants who will attempt to manipulate the new process, but the beauty of the new process is that it keeps control over the process much more in the hands of the Board's decision makers.

CHAIRMAN LIEBMAN: Any other concerns about the rules that might have unintended consequences?

MS. BUNN: I just, you know, I didn't answer Member Pearce's second part of his question about elections. Those statistics about win rates, and I've heard different numbers throughout the last day and a half, but those are petitions that go to election. There are a number of petitions that are withdrawn prior to the election because of the abuses in the current system that have been discussed through the last day and a half. So I don't think that just looking at that

one slice of the data pie gives a full picture.

MEMBER PEARCE: Thank you.

MEMBER HAYES: I just have one question, and that is of the options with respect to blocking charges that are suggested in the notice, are there any of those options which you believe to be preferable?

MS. BUNN: I'm not familiar with the precise options, but let me say more generally, and we will be submitting by the way written comments.

With respect generally to blocking charges, I think one of the earlier spokespeople said it best. We're trying to effect here a fair election, and by definition, blocking charges suggest that there cannot be a fair election. So the idea that they would not be permitted and you'd have an election, where the laboratory conditions had been by definition destroyed, doesn't make any sense to us.

MEMBER HAYES: That, of course, presumes that the charge itself had merit?

MS. BUNN: That's true.

CHAIRMAN LIEBMAN: Thank you.

MS. BUNN: We don't file non-meritorious charges, sir.

CHAIRMAN LIEBMAN: Thank you, Ms. Bunn, for being here with us today and sharing your thoughts.

MS. BUNN: Thank you.

CHAIRMAN LIEBMAN: Our next speaker will be Kimberly

Brown, and then next up will be Tom Coleman.

Good morning.

MS. BROWN: Good morning, Members of the Board. My name is Kimberly Freeman Brown, and I'm Executive Director of American Rights at Work. American Rights at Work is a national advocacy organization dedicated to promoting the rights of workers to form unions and bargain collectively for decent pay, safe working conditions, and fair treatment on the job. Since its creation, we have monitored and publicized decisions and actions of the Board and the impact of its actions on workers' abilities to form unions and address serious issues in their workplaces.

As an advocate for the rights of working people, I can attest that the issue addressed by this hearing is not solely a concern of unions or employers. And sharing a fair process to form a union is in the interest of broader civil society.

When workers have a voice on the job and are treated fairly, the goods we buy are better made and safer, the services we utilize and rely upon are better rendered, and our economy is stimulated by workers with families sustaining jobs.

It is for these reasons that I stand in support of the current proposed rule as an important step towards fixing an antiquated system that leaves workers without a fair chance to freely decide whether or not to form a union.

Without doubt, there is a problem here that needs to be fixed. Just ask Tricia Mayher from Nazareth, Pennsylvania. In 2007, Tricia and her coworkers at HCR Manor care were hopeful that with a voice on the job through a union, they could provide better service to their patients and a better life for their families, but the company took advantage of the endless opportunities for delay in the current union election process, and four years later, Tricia and her coworkers still haven't had a chance to vote. Unfortunately Tricia's story is not one of a kind.

Currently, when employees ask for an election on whether to form a union, they encounter significant obstacles in the form of needless bureaucratic delays and costly taxpayer funded litigation. It can take months and even years before they cast a vote. Some never get to vote at all.

Meanwhile, the process rewards unscrupulous employers who game the system by pursuing claims that are often irrelevant or found to be without merit in order to stall the election date. These tactics work.

According to a University of California at Berkeley study, when employers pursue litigation, elections occur an average of 124 days after the petition was filed. The longer the election is delayed, the more likely employers are to be charged with illegal misconduct. These unnecessary and drawn-out legal maneuverings damage employment relations,

hurt productivity, impair safety, and disrupt commerce.

The proposed rule is a step in the right direction. By cutting back on needless bureaucracy and delays, the proposed rule modernizes the union election process so workers can vote on whether to form a union if they want to, while still giving employers ample opportunity to make their case. Providing a clear, fair election process and reducing needless litigation will also improve stability and reduce conflict in the workplace so that everyone can get back to business. That's good for workers. That's good for employers, and it's good for the economy.

As responsible employers can attest, when workers do choose to form a union, it can make the workplace safer and more productive. Unions lift productivity on average by 19 percent to 24 percent in manufacturing, 16 percent in hospitals, and up to 38 percent in the construction sector.

At a time when millions of everyday Americans are struggling just to get by, any measure that helps give workers a real chance to protect their safety and economic interest, and have a voice in how best to perform their jobs, can't come soon enough.

In conclusion, at the very heart of this matter, this proposed rule is about one thing. When employees want to vote, they should have a fair chance to do so. As the countless workers who have seen their hopes for a better life

deferred again and again know all too well, justice delayed is truly justice denied. Thank you for your time.

CHAIRMAN LIEBMAN: Thank you very much for your comments. Questions?

I wonder if you could respond to a number of the speakers who have said that because we are in an economic crisis, this is the wrong time to change our rules.

MS. BROWN: I couldn't disagree more, Madam Chairman. I think in a time like this, workers need to be able to have whatever they so choose to really be able to protect their economic interest, and when they choose to form a union, they should have the right to do so freely and fairly.

CHAIRMAN LIEBMAN: Do you think that changing the Board's representation case rules is going to be destructive to the economy?

MS. BROWN: I think it will do just the opposite. I think workers will have the opportunity to voice their interest, and oftentimes workers want to do the best job that they can and know often as much as their employer about how to do that efficiently and effectively. And a rule such as this would give them the opportunity to form a union and be able to bargain over the terms and conditions of their workplace, which would enable them to be better employees and work harder and ultimately to share in the rewards of the labor that they produce.

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

MS. BROWN: Thank you so much.

CHAIRMAN LIEBMAN: Our next speaker is Tom Coleman, and next up after that will be Sarita Gupta.

Good morning, Mr. Coleman.

MR. COLEMAN: Good morning. Thank you for allowing me to speak here this morning.

CHAIRMAN LIEBMAN: A pleasure to have you.

MR. COLEMAN: I am a labor and employment attorney of many years standing and have represented management clients over the years and been involved in any number of NLRB elections.

I'm here this morning representing the Printing Industries of America, and with me is Jim Kyger, their VP for HR. The Printing Industries is the largest trade association representing commercial printers in the United States, and over 80 percent of these are directly involved in commercial printing. The rest of the membership is involved in ancillary responsibilities in the printing industry.

The point I'd like to emphasize is that the great majority of the members of PIA are small employers, and that's what I'm going to focus my remarks on this morning.

And before I get started, I would like to endorse the comments of my former colleague, Maury Baskin, who was here

earlier this morning. I agree wholeheartedly with his remarks.

But as I mentioned earlier, I'm going to confine my remarks to the election timeframes which have been referred to as the quickie election timeframes, and indeed Senator Enzi referred to it as election by ambush, and I think that's a pretty accurate description as I will comment on a little later.

In this regard, there was a witness who testified before the House Committee just recently, John Carew, a small businessman from Appleton, Wisconsin, and I think his remarks are apropos here, and I'd like to endorse them. Basically he said in discussing the impact of the NLRB proposal would have on small business employers, he said, "Already unions have the advantage of subtly influencing workers behind the scenes for months without an employer's knowledge to persuade employees to unionize. It is only fair that the employer be allowed the current timeframe to accurately communicate with employees. Employers are already at a disadvantage and under the new rule would be disadvantaged even further."

I think Mr. Carew was really speaking for the printing industry when he made those remarks. I don't think it's any secret, and I know other speakers have addressed this issue yesterday and today and undoubtedly this afternoon. The union's technique in organizing, particularly small

employers, is what I refer to as the run silent, run deep technique. They develop in-plant organizers, union supporters, and their advice is make sure that your manager or supervisor doesn't know what we're up to. Let's keep this a secret so we can surprise the employer, that when they get the petition, they're going to be knocked completely off guard. That is their strategy, and under these new rules, it will be even more effective.

Madam Chairman, you asked this morning, what does an employer do when they receive a petition? Well, first of all, when they recover, assuming they weren't aware of the union activity beforehand, when they recover in the printing industry, in many cases, they'll call Mr. Kyger and try and say, what do we do? Who do we contact? Is there a lawyer that can help us? And to try and do that in seven days before this pre-election hearing, that's almost impossible, certainly difficult but almost impossible to locate a busy attorney or consultant to get some advice as to what they can and cannot do, what the issues are, how they're going to defend themselves, how they're going to get their message across. All of those myriad things, that advice, that employers need, it's going to be almost impossible for them to do that in seven days.

The other thing is that I'm at a loss quite honestly to understand why these major changes are being made in the

election procedures.

My experience over the years, frequently I'll say the one good thing the NLRB does is run elections. They run them well. They know how to do them. The median timeframe by your own statistics for an election is 38 days, and over 95 percent of the elections have occurred within 56 or 58 days. This is not an unreasonable period of time in which to conduct an election. I'm not sure why we need these changes.

Let me just conclude by saying I think the Board should give some thought to the maxim, if it ain't broke, don't fix it.

We've got a good procedure now. Let's stick with it. The new rules are going to particularly penalize small employers and make it even more difficult for them to effectively communicate with their employees. Thank you.

CHAIRMAN LIEBMAN: Thank you. Questions?

MEMBER BECKER: I've got one question relating to the small employers that you work with. I assume that one serious consideration in participating in representation case proceedings is just the cost of the litigation. Is that accurate for a small employer say in the printing business?

MR. COLEMAN: That's certainly a factor, yes, that is a factor.

MEMBER BECKER: And then because one aspect of the rule is an attempt to limit those expenses. So, for example, you

have a concern about the scope of the unit, you litigate it before the Regional Director, and it comes out in a way that you're not happy with. You're the small employer. Currently if you don't file a request for review pre-election, you're out of luck. Under the proposal, you don't have to file that request for review. You can wait, and if the union loses the election, you've saved the expense of having to do that, or you can combine it, even if the union wins the election, and you have objections or challenges, you combine it with that. Isn't that efficiency a good thing for small employers?

MR. COLEMAN: I don't think so. I'm sure other speakers have addressed that very issue. I think employers like to have some certainty when they go into an election as to who is going to be eligible to vote rather than sweeping these issues under the rug and down the road. They're going to have to pay, these small employers and employers, generally either sooner or later, but the cost is still going to be there.

And let me just add one other comment here. During an election campaign, there are many, I don't have to tell the Board this, there are many complex rules as to what employers can do or can't do, and if they break those rules, there could be a rerun election or a bargaining order. So there's very significant consequences for violating the rules.

Employers, particularly small employers, who do not have

a lawyer on their staff, who do not have legal counsel or labor counsel available to them, need to get this guidance, and the Board is saying we're going to have a pre-election conference in 5 days or 7 days rather and an election possibly in 10, 12, 2 weeks. The employer is going to need all the help and assistance he or she can get, and it's going to be, as I said earlier, difficult, if not impossible, to obtain that kind of advice within the timeframe these new rules are seeking to establish.

MEMBER PEARCE: Does the printing industry that you're representing give seminars or training with respect to NLRB processes?

MR. COLEMAN: They do, but it is fairly limited because again the printing industry, like so many other industries, has been hurt by these difficult economic times, and Mr. Kyger that I mentioned earlier is like a one man band. He has to handle all sorts of labor relations and employment relations issues, doesn't have the resources or the time to go around the country putting on seminars to educate its members, particularly smaller members, and the smaller members don't have time to attend such programs. So if they're caught completely off guard as these new rules would allow, they're really at a loss and they're behind the eight ball. They don't have access to good sound advice and counsel as to how to live within the rules, and they don't

have an opportunity to get guidance on how they can communicate with their employees.

So I think it's extremely unfair to employers generally, but particularly the small employers.

CHAIRMAN LIEBMAN: Thank you very much for being with us today --

MR. COLEMAN: Thank you.

CHAIRMAN LIEBMAN: -- and sharing your thoughts. We appreciate it.

Our next speaker will be Sarita Gupta, and next up will be Mr. Stephen Jones. Good morning.

MS. GUPTA: Good morning. Thank you to the Board. My name is Sarita Gupta, and I'm the Executive Director of Jobs With Justice. Jobs With Justice is a national campaign for workers' rights. We mobilize workers and allies in the faith community and communities across the country on campaigns to win justice in workplaces and in communities where working families live. We work with 47 coalitions in 26 states across the United States.

For many years now, we've worked to ensure that workers have a fair chance to vote whether to form a union if they want to. In 2010, Jobs With Justice local affiliates worked on over 137 workplace justice campaigns affecting 197,000 workers. In many of these campaigns, we've witnessed the negative impact of an outdated and broken process that stalls

and stymies workers' choices through delays, bureaucracy, and wasteful litigation.

I'm offering testimony this morning in favor of the procedural changes to the NLRB representation process. These proposed changes remove some of the unfair obstacles that we've witnessed in union elections.

Under the current process, workers encounter delays of months and even years. Some never get to vote at all. During these delays, employers run anti-union campaigns that prevent the workers from having a fair election process. These delays are often unnecessary, over extraneous or secondary issues that shouldn't prevent workers from getting a vote. An extra couple of weeks or three or four may not seem like much to a casual observer, but for a worker who is going through the daily captive audience meetings, one-on-ones and other anti-union tactics, it's really intense and serves to intimidate workers from exercising their right to vote on whether to form a union if they want to.

I'd like to just share a few examples. In Missouri, 18 employees at ESI Express Scripts petitioned for an election. In fact, within one hour, 80 percent of authorization cards were signed. As a result of unnecessary delays, the workers were subjected to weekly anti-union luncheons and daily one-on-ones to determine weaknesses in the unit. A number of employees quit because of the intense pressure to vote no

daily.

This is simply unacceptable. Workers should not experience such fear and intimidation that they choose to leave their jobs versus exercise their right to vote.

Excessive delays subject workers to intense anti-union campaigns waged by employers. We see this in all types of workplaces.

At MEMC Electronics in St. Peters, Missouri, the production unit filed for an election. During this campaign, the company hired two attorneys, took every issue they could think of to a hearing, was found guilty of 17 ULP charges the union filed against the company and appealed every decision made by Region 14 of the NLRB. After two years of stalling tactics, the union won almost every charge filed against the company as well as all hearings and appeals, but in the end, the union lost the election by a narrow margin, again due to the delays and the company's tactics.

And, finally, as a final example, at Sisters of Jesus Crucified in Brockton, which is nursing home in Massachusetts, the workers filed for an election. It took 70 days for the election to take place. During that time, the company intimidated workers to the point of fear to be seen with fellow union supporters. The last round of intimidation included leaflets that said, that workers would be going against the church if they voted. As a result, 80 percent of

workers signed cards; yet, only a small percentage actually voted. That is serious intimidation, and no worker should be subjected to that.

All of these examples demonstrate that the current system does not ensure that workers have the freedom to exercise their basic right to vote.

The proposed rules would provide stability and a level playing field for workers. These are modest changes, but much needed ones.

In closing, communities are really suffering right now as millions of Americans are out of work and struggling to get by. Wall Street reaps record profits while our neighbors are losing their jobs and their homes. Now more than ever workers need good jobs that can support a family. We believe that giving workers a chance to vote is essential to bringing stability to communities and to rebuilding our middle class.

Any bit of help for workers in this economy is a good thing. A voice on the job is critical to restoring balance in our economy. These proposed rule changes are a step towards helping us to restore this much-needed balance.

Thank you for the opportunity to testify.

CHAIRMAN LIEBMAN: Thank you very much for being here and providing your perspective. Any questions?

MEMBER PEARCE: You've heard the statistic about over 60 percent win rate for petitions that are filed. Has that been

your experience?

MS. GUPTA: Well, again I think I'll go back to the answer that one of the former testifiers offered which is that's a very small slice of cases to look at. I've actually experienced more of workers file a petition, and then the petitions are withdrawn because of the delay tactics and the intimidation and fear that workers are experiencing. When it does finally get to an election process, from my perspective, the work we have to do in the community to engage faith leaders, community leaders, to let workers know that there's support for them in the community, that they have support to exercise their right to vote is critical. We've become a critical part of communities helping to educate workers about their right to vote.

So I have mixed experiences with this, but will just offer that I think the proposed rule changes are important. They're modest steps. They certainly don't fix the problem overall that we see from our perspective, but I again want to affirm that I think it's an important step forward.

MEMBER PEARCE: Do you have the sense of the percentage of petitions that get withdrawn versus those that have gone to election?

MS. GUPTA: I don't have the numbers off the top of my head. I'd be happy to submit them as part of written comments for sure. I mean from our experience, we do track

the campaigns we work on and what we experience, I'd be happy to enclose that in written comments.

CHAIRMAN LIEBMAN: I wanted to ask the question I asked Elizabeth Bunn a little earlier about how you communicate with workers during these campaigns. Is it by visiting their homes, by phone or e-mail, or what means do you use?

MS. GUPTA: Well, in our case, you know, we're not a union, right, so for us the way that we communicate with workers is in their churches or temples or synagogues. Often we have a church leader who will say to us, you know, I have workers who came and said that they're trying to figure out how to form a union at their worksite, and they need a safe haven, a safe place to really talk to one another, their peers, and they open up their doors to make that possible.

Often we -- it's really through meetings like creating community spaces where people can come and share their perspectives and talk about the issues in their worksites, and what they need in order to have better working conditions to be able to support themselves and their families, and really be able to participate in the community in the way that they want to.

CHAIRMAN LIEBMAN: Thank you for your comments today.

MS. GUPTA: Thank you.

CHAIRMAN LIEBMAN: We appreciate it. Our next speaker is Stephen Jones, and then our last speaker for the morning

will be Professor Warren. Good morning.

MR. JONES: Good morning. Good morning, Madam Chair and Board Members. I just want to say it's a privilege and an honor to address the Board.

As an introduction, my name is Steve Jones, and I'm the Director of Human Resources for Chandler Concrete Company in Burlington, North Carolina, which by definition is a small business. Unlike most of the speakers that have been up here before you today and yesterday, I'm not here as a designated or official representative of any specific or particular group. I'm not an expert. I'm not an attorney. I guess you could say my interest and purpose is to offer the perspective of the impact of the proposed changes on the individuals who will be most affected, the employees.

I'm just a regular human resources practitioner who is in the trenches every day. I've worked as a HR professional for almost 30 years as an employee advocate, and I've supported employees at every level of an organization from entry level to the most highly skilled to include manufacturing plants, distribution centers, healthcare facilities and office environments. They've included union and union free workplaces.

I've spoken to my colleagues and have felt strongly to come before the Board.

Let me begin by saying that regardless of the company or

environment where I've worked, the day-to-day focus of the employees in these organizations has been on producing the product or service to meet the needs of their customers. The time is not spent on discussing the pros and cons or impact of collective bargaining or the legal aspects of an organizing campaign.

Similarly, the focus of the management teams in every company where I've worked has been on ensuring that the business remains competitive with the products and services it provides to its customers, both short and long term.

The time is not spent discussing how to define bargaining units or discussing behavioral or verbal nuances that might constitute unfair labor practices.

That being said, based on my experience and in conversation with many of my HR colleagues, the Board's proposed rule to accelerate the representation process will, in fact, create an undue hardship on both employees and employers similarly and should not be adopted in its recommended form.

In this age of technology, there's a propensity to try to do things quicker and faster, but we all know that quicker and faster does not always mean better. Unnecessarily rushing or accelerating the process will create a significant disadvantage for the employees who will be affected by the ultimate outcome. It may result in a loss of information, to

make the informed and educated decision about the work future and also would increase the likelihood and probability of error by employers, both of which would be bad for employees.

While there might be some opportunity for administrative changes to reflect the use and availability of technology, expediting the initial hearing and ultimately the secret ballot election will be disservice and disadvantage for every employee who might be affected by the outcome.

This does not mean that there's not other ways to do it. It just appears that there's no compelling data to support the proposed changes.

The organizing of the representation process has significant implications for very party involved, be it labor, employer, or the affected employees. All of these stakeholders should have a reasonable amount of time to gather, present, assess, and analyze information. The current process and timeframe seem to provide that level of reasonability, and there does not seem to be any data or outcomes that suggest the current timeframes are not working.

I've heard repeated concerns and accusations that the current timeframe allows for intimidation of employees which would be reduced or eliminated. This type of illegal behavior is already addressed through ULP sanctions. If that's the case, address the penalties, address the bad actors, and consider increasing the sanctions for those

offenses. Deal with the bad apples. Don't replace or go in and replant the orchard.

My concerns with the proposed changes are not because of a pro or con anti-labor or company sentiment. My concerns are more importantly focused on the detrimental impact it will likely have on employees who are involved in making a decision on collective bargaining.

Regardless of the size of the company that I've worked for, from a Fortune 100 to family owned and operated, the day-to-day focus has always been on making or producing the product or service the company offers to the market. This has become increasingly more so in the past years as the challenges of a difficult economy have required companies and employees to be efficient and effective as ever to remain competitive and viable. There's little extra time to spend on issues or topics that are not time current or value added for the customer, including the subject of collective bargaining or the representation process.

Given that over 90 percent of the private sector workforce is not covered by a collective bargaining agreement, it's reasonable to conclude that the average employee is unfamiliar not only with the representation process, but also with the pros and cons of a work environment where a collective bargaining agreement exists.

Reducing the amount of time to provide this information

to employees is a disservice to them and puts them at a disadvantage when they make their decision whether or not to support the idea of collective bargaining. They should be entitled to make an informed decision that includes giving consideration to all parties, labor as well as the company.

It's reasonable to conclude that the employees have been given a plethora of information regarding the pros of collective bargaining from the labor organization prior to the filing of the petition with Board. This sharing of information is not subject to any similar time restriction prior to the filing of the petition.

I think the notion or the belief that employees are regularly being given information by companies about the pros and cons of collective bargaining as a standard course of doing business is unfounded assumption. The typical small company employee's wearing a number of hats on any given day and is, as I stated earlier, focused on doing his or her job to their best of their ability to help to keep the competitive and viable.

Ongoing training and education on the representation process and the accompanying legalities is not one of those regular activities.

The typical response by an employer upon receipt of a petition includes developing a schedule in the plant to meet with employees to begin the education process.

In my world, the production and distribution of ready mix concrete, the logistics of this can be daunting given the nature of our business, the geographic distribution of our facilities and the lean staffing that we have. Condensing the timeframe to get this done is not only fair to each employee, it would most certainly disrupt the business such that customer service will be adversely affected which will lead to lost contracts, lost revenue, and possibly lost jobs. None of these is in the best interest of employees.

This lack of information also extends to the average employer. Many large corporations have ready or convenient access to labor attorneys or experienced HR professionals either on staff or retainer, the average small business owner is not afforded this same luxury. The receipt of a petition for representation will set in motion an immediate search for an available and experienced resource and labor lawyer to help understand the requirements of the petition and to adequately prepare for the hearing.

Likewise, most do not have an experienced HR professional as an additional resource. As a result, when they receive the petition, the availability of a labor attorney to assist them in the process may take several days or longer to secure.

May I have more time?

CHAIRMAN LIEBMAN: Yes.

MR. JONES: Meanwhile, with the clock ticking, perfect timing, and the legal wrangling that goes into high gear, the affected employees are not given adequate or sufficient information or attention as the focus is on responding to the petition and preparing a response for the hearing, and as a HR professional, I can tell you that the focus on responding to the petition also reduces the amount of quality time and focus that a company gives to educating and training its managers on their legal responsibilities during the representation process.

This alone can and in most cases likely will result in increased unfair labor practice charges which will ultimately end up taking more time on the part of the Board, and the ultimate impact of these will be on the employees of the company, the stakeholders who should benefit from the proposed changes.

The current representation process enables all stakeholders to provide information, review, assess, and analyze this information before a final decision is made through a secret ballot election by employees. It supports giving employees the opportunity to make an informed decision, not one that is rushed or hurried. I think all of us agree that we need time to gather and evaluate information when we make significant decisions that will affect and impact our lives such as getting married, buying a home, as

well as anything that has to do with our jobs and our careers.

Why should we rush the representation process when there seems to be no basis either in fact or reality that such change will ultimately benefit the overwhelming majority of employees who might be affected by the outcome of a representation election?

In closing, I encourage the Board to give serious consideration to who specifically will ultimately benefit from the proposed changes. It's my strong belief that none of the proposed changes will result in a more positive process for the employees affected.

Based on this, and this alone, I encourage the Board not to pursue the proposed changes as they will ultimately affect those it is intended to help, the employees affected in this process. At the end of the day, we should all want a fair process, not just a fast one. Thank you for your time and attention.

CHAIRMAN LIEBMAN: Thank you very much for your comments. Are there questions?

MEMBER BECKER: How many employees does Chandler Concrete have now?

MR. JONES: 425.

MEMBER BECKER: And are they currently organized, unorganized? What's their status?

MR. JONES: We're not organized, no, sir.

MEMBER BECKER: And have there been petitions in the recent past since --

MR. JONES: We have not had any, not since I've been working there, no, sir.

MEMBER BECKER: Thank you.

MEMBER PEARCE: Does Chandler Concrete have an employee handbook that talks about unions?

MR. JONES: Do we have a handbook that talks about unions?

MEMBER PEARCE: Yeah.

MR. JONES: We have a handbook, and we have a simple statement that we believe in direct contact with our employees.

MEMBER PEARCE: Okay. And organizing or unions are not mentioned in the handbook?

MR. JONES: It's a union-free statement.

MEMBER PEARCE: I see.

CHAIRMAN LIEBMAN: I'm curious. Based on your experience doing this work, for sometime I guess?

MR. JONES: Yes, ma'am.

CHAIRMAN LIEBMAN: I some years ago once asked an attorney representing management what he thought was a fair time for an employer to conduct a campaign. What do you need? He said, well, to be frank, I need a week. He said

that there's sort of a standard routine campaign that's four weeks - one week to talk about this, second week to talk about this, third week this, fourth week, but he said I can communicate it in one week.

I've heard union people, union organizers say that even from their own campaigns, that the longer it goes on, there comes to be a point after which it becomes maybe counterproductive. That's not the right word, but it's kind of meaningless. It doesn't add that much to informing people, and I've heard management people say the same thing.

I'm curious from your perspective, what it fairly takes for an employer, and let's take the median size bargaining unit which is, what, 24. Your place of business right now is larger, but what do you think it would take to be able to inform your employees fairly of your views on unionization?

MR. JONES: I think the current timeframe is sufficient to a point. I think the, you know, the comments that were made earlier by one of the speakers in a small business, a truly small business, a 24-employee type operation, I think that there's a tremendous burden that's put on probably one or two or three individuals that are wearing so many different hats that in order for that person to digest and understand the implications of the process, I think that the current timeframe is at a minimum at best in terms of communicating.

I think there can be too short a period because, again, we have to remember that we're trying to run businesses and we're trying to service customers, and in today's economy, I will tell you, that once the attention is taken off of making or producing whatever it is that you do, and it is taken away from that customer, you have somebody standing right behind you that's ready to take those customers away from you, and anything that serves as a distraction and a shortened timeframe is going to create an even greater "distraction," if you would, time not spent on the reason that everyone is there.

So I don't know if I answered your question directly. I can't give you a certain time. I think again, 30 days, 45 days probably is on the short side. Even in a small organization because that person has so many different hats to wear.

CHAIRMAN LIEBMAN: Even in an organization that is having captive audience meetings once a week or talking to its employees one-on-one even in short periods of time? You need to do this week after week after week?

MR. JONES: Well, and again, very hypothetically speaking, I can't imagine many employers taking a tremendous amount of time away again from their day-to-day business, spending, you know, eight hours in a meeting or two hours in a meeting day after day or week after week, because staffing

is so lean now and the focus right now is on servicing customers. I guess I haven't seen that. I don't know anyone in my world of contact that would be able to do, you know, kind of what you're saying. That's why I think that that 30 to 45 day window is probably a minimum.

CHAIRMAN LIEBMAN: Thank you for your comments. Anything else?

MEMBER PEARCE: As a HR director, part of your responsibility would be to orient your managers into labor relations issues.

MR. JONES: Yes, sir.

MEMBER PEARCE: So that would include organizing drives and how to respond to them and so forth. Wouldn't that be the case?

MR. JONES: We don't get to that level of detail. We do have obviously, you know, some conversation and training about basic fundamental communications. If, in fact, you know, talking about the dos and don'ts I guess, the TIPS, et cetera, that's the basic training that we provide because anything beyond that is so hypothetical and speculative, and they have so many things on their plate that the chances of that kind of sticking so to speak is really not very bright, and we do not go to that level of detail.

MEMBER PEARCE: Thank you.

MR. JONES: Does that answer your question?

MEMBER PEARCE: Yeah.

CHAIRMAN LIEBMAN: Thank you very much --

MR. JONES: Thank you.

CHAIRMAN LIEBMAN: -- for being with us today and sharing your thoughts.

Our last speaker for the morning will be Professor Dorian Warren. Good morning.

PROF. WARREN: Good morning. Chairman Liebman, Members of the Board, thank you for allowing me the opportunity to present my research findings to you this morning.

My name is Dorian Warren, and I'm an Assistant Professor of Political Science and Public Affairs at Columbia University where for five years my research and teaching has focused on labor politics, labor policy, and social science methodology. Before my present employ, I taught for two years at the University of Chicago, and I completed my doctoral work in political science at Yale University.

Now, several weeks ago, Columbia University released the study I coauthored with Professor Kate Bronfenbrenner of Cornell University entitled, "The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence."

Our research is directly relevant to the proposed rule changes to streamlining representation election procedures. Simply put, our findings, using a unique dataset of unfair

labor practices and representation elections, indicate the need for streamlining and modernizing the NLRB certification process. Our data shows that employer opposition or what's been called communication on these hearings begins much earlier than expected and continues every day all the way through to the election.

Let me first briefly explain our research methodology because I think it's important and interpreting our findings, and then second, I want to share just some of the most significant findings from our research, and again, these findings have direct relevance to the proposed rule changes and they also refute many of the arguments presented yesterday and this morning.

So first on methodology, the data for analysis originate from a thorough review of primary NLRB documents, starting from a random sample of 1,000 NLRB elections that took place between 1999 and 2003. Using the Freedom of Information Act process, we requested all unfair labor practice documents for every case in our sample from the Board with a response rate of 99 percent.

Our method of measurement for this study is the time between the date of occurrence of serious unfair labor practice allegations, the date of the petition filed, as well as the date the election was actually held. We read through the entire ULP document files, including employer responses,

settlement agreements, complaints, dismissals, withdrawals, testimony, affidavits, and Board and Court decisions until we located the specific date for each serious violation and the charge that was found. Now, this was time-consuming data to collect, and for this reason, the data I'm presenting today is only for the last year of our sample of 2003.

Now, by the standards of rigorous social science research, not simply a few select unrepresentative cases, we have systematic and not anecdotal evidence about when the employer campaign begins and from this evidence, we can make valid and generalizable claims about the NLRB election process.

So to the findings, we have heard hyperbolic claims from those opposing the proposed rule changes that employers do not have the opportunity to express their views to workers. They're ambushed suddenly when workers file a petition for an election, and that the proposed rule changes would eviscerate workers' ability to make an informed choice. And, in fact, one witness even claimed yesterday that employers do not know about a union campaign until petitioners present their cards. All of these claims are empirically false.

Our ULP documents show that some of the most egregious employer opposition starts long before employees have even filed a petition. So some numbers, 47 percent of serious allegations are filed before the petition, and 86 percent are

filed before the election. Sixty-seven percent of all serious allegations are filed within two weeks after the petition is filed. Forty-seven percent of all serious allegations won by employees, through Board or court decisions or settlements, occurred before the petition was filed. And 89 percent are won before the election. Sixty percent of allegations of interrogation and harassment are filed before the petition. Fifty-four percent of allegations of coercive statements and threats are filed before the petition. And finally 39 percent of allegations for discharges for union activity are filed before the petition, while 76 percent of these are filed before the election.

The punch line is this. Contrary to previous witnesses who claim that employers have little or no ability to communicate effectively with employees, the voicing of employer opposition to union representation begins from the moment employees begin talking about the union and continues day after day, week after week, leading up to the election.

Our study reveals the pervasiveness, consistency, and intensity of employer opposition to workers' exercising their rights to union representation, and we'll submit the full study as part of our written testimony.

CHAIRMAN LIEBMAN: Thank you for your comments. Questions?

MEMBER BECKER: I've got a question about the data and

how you categorize it. So you said, I think I heard, that 47 percent in this sample, particularly in the year 2003, in election cases that occurred, within that year, that 47 percent of the charges that were filed relating to employer conduct, employers who are involved in those elections, occurred prior to petitions. How did you determine or did you determine the nature of the conduct? That is, how do we know that that was campaign-related conduct which led to the charge?

PROF. WARREN: This is, they're reading one by one every bit of evidence in the file. So the testimony, the affidavits, the decisions by the Board itself, complaints, settlement agreements, withdrawals. So we went through every single file and determined based on the evidence in those files that these were campaign-related serious allegations.

MEMBER BECKER: And campaign-related in the sense that the charge resulted from active employer conduct, that is, for example, we see charges where organizing begins and in the course of organizing, the union reviews the employer's handbook and finds rule and files a charge based on the rules. So that seems to be different than a charge which results from active employer campaigning. Did you sort in that respect?

PROF. WARREN: Yes, we have charts that are very explicit in terms of which charges we identify as serious

campaign-related unfair labor practices versus non-serious allegations. So that's very clear in our report, in our tables.

MEMBER BECKER: Well, this is not so much a question of serious versus non-serious, but whether the conduct which formed the basis of the charge is properly categorized as campaign conduct. Do you feel like your sifting is sensitive to that question?

PROF. WARREN: Yes, and we also, of course, in the peer review process as well as invite others to follow our tracks in terms of also doing this kind of analysis. It's all public information, but we're very competent in our typology of the description of the charges as being campaign-related.

MEMBER BECKER: And you indicated that a preliminary version has been published, and what's the plan for the rest of the study?

PROF. WARREN: So because it's so labor and time intensive, we were only able to do that one year in our sample. We're continuing to do the analysis for the other four years in our sample. At that point, we'll submit variations of this to peer review journals.

MEMBER BECKER: Thank you.

CHAIRMAN LIEBMAN: Questions?

Thank you very much.

PROF. WARREN: Thank you.

CHAIRMAN LIEBMAN: We appreciate your being here with us today. We thank all the witnesses from this morning for your comments and for being with us. I hope you will join us for the afternoon session.

We're going to break now. We will resume promptly at 1:00 p.m. I will remind you once again to take your badges and numbers with you, and we have escorts to take you down to the lobby.

And we stand in recess. Thanks very much.

(Whereupon, at 11:55 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: Welcome everyone back to our afternoon session. And we're going to get started. Our first witness this afternoon will be Lexer Quamie, and after that will be Steve Maritas.

So, good afternoon.

MS. QUAMIE: Good afternoon, Chairman Liebman and Members of the Board. I'm Lexer Quamie, counsel with the Leadership Conference on Civil and Human Rights. The Leadership Conference is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. Through advocacy and outreach to targeted constituencies, the Leadership Conference works toward the goal of a more open and just society and America as good as its ideals.

The Leadership was formed largely by civil rights and labor organizations under the able and visionary leadership of labor and civil rights giants, A. Philip Randolph, founder of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council.

In the 61 years since its founding, the Leadership Conference has worked closely with members and partners in the labor movement to fight for equal opportunity and social justice. Together, we have worked to pass civil rights laws banning discrimination in employment, voting, and housing; to outlaw job discrimination; to win employment and other rights for people with disabilities; and to extend family and medical leave protections to millions of American workers.

To the Leadership Conference, workers' rights, including the right to organize unions and engage in collective bargaining, have always been civil and human rights. As a civil rights organization, we are deeply troubled by the systemic problems workers face in the exercise of these rights. It is some of these problems, including the delays in the election process, that the Board is seeking to address in its proposed rule changes.

Currently, if employees petition to have an election on whether to form a union, they encounter significant uncertainty and obstacles that render the process unfair. Because of litigation and other delays, it can take months or even years before workers get to cast a vote. Some never get to vote at all. But by eliminating unnecessary delays and modernizing an outdated system, the proposed rule changes would remove unfair hurdles to workers choosing whether to form a union. It helps ensure a clear, standardized process that both employers and workers deserve.

The Leadership Conference supports the proposed rule changes as a modest step forward in removing roadblocks for workers who wish to decide for themselves whether or not to form a union at their workplace to bargain with employers. The ability of workers to have fair representation in elections is important to allow them full participation in the workplace.

As a civil rights organization, one of our core missions is to protect the right to vote and ensure a fair elections process. Full participation in elections is part of the democratic process. In the workplace context, the proposed rule changes by the NLRB would help to ensure that workers have a right that is central to our democracy, a fair chance to vote.

We share the belief that employees should be afforded a free and fair process by which to choose workplace representation. As such, we urge adoption of the proposed rule changes. Thank you for the opportunity to share comments on behalf of the Leadership Conference on Civil and Human Rights with you today. Thank you.

CHAIRMAN LIEBMAN: Thank you very much for your comments.

Are there any questions?

Thank you for being here.

Mr. Steve Maritas, did I get it right?

MR. MARITAS: Maritas, yes. Good afternoon, Chairman Liebman.

CHAIRMAN LIEBMAN: Good afternoon. Welcome.

MR. MARITAS: Members of the Board, my name is Steve Maritas, and I am the organizing director of the International Union, Security, Police and Fire Professionals of America, SPFPA, the largest, oldest, and fastest growing

9(b)(3) security police union in the country today. I bring greetings from our International president, David L. Hickey, and our executive board. I thank you for allowing me the opportunity to speak, not only on behalf of the SPFPA, but on behalf of the organized labor and workers everywhere who wish to join a union.

To give you a little background about myself, for over 30 years I've been at the forefront of the labor movement as well as a union organizer working with many unions in various industries and issues, including Employee Free Choice Act. I've learned all about the benefits of belonging to a union at a very young age, whereby my father, Teddy Maritas, former president of the New York District Council of Carpenters back in the late '70s, taught me the importance of belonging to a union. Unionization was in my blood, and I was determined to become a union organizer walking in my father's footsteps. This was evident by the fact that my mother told me my first words out of my mouth was not mommy or daddy but union.

On September 11th all of our lives changed. For me, these change of events brought me to Michigan. Over the last 10 years, as organizing director of the SPFPA, our union has filed hundreds of representation petitions, averaging about 100 campaign elections per year. Statistically, our union has been listed by BNA year after year as one of the top 15 most active organizing unions in the United States today.

BNA has also recognized us as being one of the top five unions in the country in regards to the number of campaigns run and the number of workers successfully organized, averaging about 3,000 to 4,000 members per year.

In addition to these achievements, the SPFPA organizing department, which consists of three full-time organizers, Mr. Joseph McCray, Dwayne Phillips, and myself, have the highest win rate amongst all unions, a 78 percent win rate, a record I am proud of.

As I stand here today, I continue to fight for the rights of workers everywhere. And in doing so, I'm in support of the proposal that streamlines the process and limits the union-busting tactics used by employers in these union campaigns. Over the last two days, you've heard over and over again by high-priced union-busting attorneys and consultants that they are concerned about workers' rights and the effects it would have if this proposal was enacted. This is a lie.

You have heard that the average election takes place within 36 days of filing a petition. This is a lie. It's 42 days or longer, and that's if you get an election. You've heard that management first becomes aware of union organizing drives only after a petition is filed. This is a lie. The truth of the matter is management is not concerned about workers' rights, but, in turn, they're more concerned with

keeping 100 percent control of their business to do whatever they want whenever they want at all cost.

Martin J. Levitt, author of Confessions of a Union Buster, defines union busting as a practice that is undertaken by an employer or their agents to prevent employees from joining a union or to disempower, subvert, or destroy unions that already exist. Union busting is a field populated by bullies and built on deceit. A campaign against a union is an assault on individuals and a war on the truth. As such, it is a war without honor. The only way to bust a union is to lie, distort, manipulate, threaten, and always, always attack.

While the National Labor Relations Act under Section 7 writes or states that employees shall have the right to self-organization to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or mutual aid and protection or to refrain from such, the truth is this can only happen if workers trying to form a union can withstand the psychological warfare that they're going to experience by management and their anti-union busting attorneys, consultants, and persuaders over the next 42 days preceding their union election.

Psychological warfare is defined as the planned use of

propaganda and other psychological actions having the primary purpose of influencing opinions, emotions, attitudes, and behavior of hostile foreign groups which are union supporters in such a way as to support the achievement of national objective, which is the company. This is what management calls free speech.

Over the last 70 years, labor law has always been a friend to the employer and an enemy to the worker. As this Board sets the course to make history, I commend all of you for taking the initiative and making the right decision. However, there are two parts to this problem.

The first is being addressed today before this Board. The second part which needs to be addressed is to establish a time table that shortens the election process from 42 days to 21 days, making it illegal to hold mandatory union-busting meetings without allowing equal access so that both sides can be heard. This will allow employees to ask questions without fear, without coercion, without intimidation. Authorizing civil penalties up to $20,000 per violation on an NLRB finding of willful and repeated violation of employees' statutory rights by an employer or union during a union campaign. Authorizing the NLRB to order back pay without reduction for mitigation when an employee is unlawfully fired. Requiring both the union and management to begin negotiations within 21 days after a union is certified. If

there is no agreement after 120 days from the first meeting, either party may call for mediation by the Federal Mediation and Consolidation Service and binding arbitration thereafter if need be. On finding that a party is not negotiating in good faith, an order may be issued establishing a schedule for negotiation and imposing costs and attorney fees. Broaden the provisions for injunctive relief with reasonable attorney fees on a finding that either party is not acting in good faith. The list goes on and on, and I will put it in writing for you.

In conclusion, I want to thank Chairman Liebman and the Board for this opportunity to present my views and to leave you with this final thought. Unions don't organize workers; management does it for us. Thank you.

CHAIRMAN LIEBMAN: Thank you for your comments today.

Anybody have questions?

MEMBER PEARCE: You say you've got a 78 percent win rate. What accounts for that?

MR. MARITAS: Counting on how we do it?

MEMBER PEARCE: Yeah, what accounts for it?

MR. MARITAS: Knowing what they're going to do before they do it. It's education. Union busting is an art. One thing that management does with these consultants is that they have a handwritten book that they just do over and over and over again. So, when you pretty much, if you know what

they're going to do, you educate the employees prior to a union-busting campaign exactly what's going to happen. So, as soon as management goes in and handles a union-busting meeting or starts telling them some of the propaganda, we have a checklist. And all of a sudden, they start checking off one by one by one, and they say oh, I must be the smartest guy in the world because I told them this is exactly what's going to happen. So, primarily it's education.

MEMBER PEARCE: Now, there's been testimony about management not knowing about the union campaign until the petition is filed, and you said that that's inaccurate. What's been your experience?

MR. MARITAS: Well, my experience is, first of all, if management doesn't know what's going on with their business, they've got a problem. So, I mean, when you start organizing, workers are disgruntled. First-line supervisors that are there, there's got to be a communication gap within. One of the speakers prior to me testified that with the unfair labor charges that took place prior to an election even being filed. They're aware of it.

They know who the key people are. My experience is when our key guy goes in, a number of things happen. Number one, we identify who the lead organizers are. And the reason why we do that is for their protection, because we have a documentation showing exactly that they are the organizer.

And if they should be fired in the interim, that they would be protected. We would have a backup document. And I tell you, my experience by doing that has protected them from being fired in most of my campaigns. Whereas you don't identify the particular organizer, you know, and then all of the sudden they're fired for one reason or another, and then you have to prove that it was because of the union activity.

MEMBER PEARCE: So, these organizers are identified before the petition is even filed?

MR. MARITAS: That's correct. Once we get started, we will send a letter to management identifying the organizing committee, letting them know what their rights are as an employee, and not to retaliate against them. And if they do, then we'll take the appropriate action.

MEMBER PEARCE: Do you do all the representation procedures yourself, or do you hire attorneys?

MR. MARITAS: Well, we have an attorney, but I work very closely with my attorney, and we both strategize if we have a hearing and so forth, so depending on the issues.

MEMBER PEARCE: Thank you.

MR. MARITAS: Thank you.

CHAIRMAN LIEBMAN: Thank you very much for your testimony here today.

Next is William Messenger, and up next will be Joseph Paller.

Good afternoon.

MR. MESSENGER: Thank you, Chairman, Board Members for the opportunity to speak before you today. My name is William Messenger, and I'm with the National Right to Work Legal Defense Foundation. And also with me today is our legal director, Ray LaJeunesse.

Now, the Foundation is somewhat unique in that we don't represent employers or unions. But rather, since 1968, we've been providing free legal representation solely to individual employees, and this includes in decertification and organizing campaigns. And, of course, the very purpose of the National Labor Relations Act is to effectuate and protect the rights of employees and not to effectuate the self-interests of unions or employers. And the Foundation largely opposes the proposed rules today because they invert the Act's purposes by putting a union's interest in obtaining certification before the interest of employees in learning about the pros and cons of unionization before being required to vote on it and before their interests in privacy.

Now, foremost, the Supreme Court in Chamber v. Brown recently recognized that employees enjoy an implicit right to receive information opposing unionization. The proposal to shorten the timeframe for elections will impair the ability of employees who may not even have an opinion on unionization to learn about the pros and cons before being required to

vote on it. And, moreover, it will also impair the ability of employees who are opposed to unionization to exercise their Section 7 rights to engage in concerted activity in opposition to the union. Obviously, a union will be fully prepared to campaign before an election occurs, as the union controls when a representation election will happen. By contrast, employees could be caught flatfooted and unable to organize themselves before the vote actually occurs. And for this reason, the shortened timeframe tilts the playing field against employees and in favor of unions.

And, second, the proposed rules contemplate a serious invasion of employees' personal privacy, namely, of course, the disclosure of their personal phone numbers, e-mail addresses, and work times to unions and thus to union supporters. The 93 percent of private sector workers who have chosen not to associate with the union, or the tens of millions of people who sign up for the FTC's no-call solicitation list would likely be appalled to learn that a government agency is contemplating handing out their personal information to a third-party special interest group without their consent, or even potentially over their objection.

And perhaps even worse, the contemplated disclosures place employees in danger from what union supporters may do with the information. Unions will inevitably share the personal information they've been given about employees with

their supporters, to include some of the employees' own coworkers for the purposes of supporting their campaign. And, in fact, that's the very purpose for the disclosures.

Once this information is given to a union supporter, it is quite foreseeable that union supporters can and will misuse this information in a variety of manners, including potentially without the knowledge of the union. For example, a union supporter could use the information not only to harass an individual who opposes the union, such as by late night phone calls or signing them up for spam, but it could also do the same to someone against whom they have a personal grudge.

The information could be used by an individual to make unwanted contact and sexual advances on coworkers. I believe that many women in the workplace would not be comfortable with knowing that any of their coworkers who happen to support the union campaign could potentially learn her e-mail address, her phone number, where she lives, and what time she gets off work.

The disclosure of the information will naturally facilitate identity theft. A recent and prime example is that of Patricia Pelletier, whom CWA supporters signed up for hundreds of unwanted magazine subscriptions and other advertisements in retaliation for her leading a decertification campaign against the union after obtaining

her personal information.

And, finally, disclosures could even lead to home burglary and theft of property because they reveal exactly when people work. If someone knows when you're at work, they obviously know when you're not at home. And the problem is there's no rule or restriction this Board can impose upon a union to alleviate these harms or fully protect against them rather because they're the inevitable consequence of unions sharing this information with their supporters. And once a union or anyone else shares information with someone, it can't fully control how it will be used. It can't fully control who they may share that information with, and it can never actually retrieve that information back, as it can obviously be easily copied. The cat is out of the proverbial bag. And for this reason, to protect employees' privacy and to protect them from threats of harm by union supporters, I urge the Board to not enact the contemplated disclosure rule. Thank you.

CHAIRMAN LIEBMAN: Thank you for being here and sharing your thoughts.

Are there questions?

MEMBER PEARCE: You recited one example of an employee who was subjected to unwanted subscriptions because she led a decertification campaign. Do you have any kind of statistics on how prevalent union abuse of employees through information

is?

MR. MESSENGER: No, Your Honor. I'm sorry, force of habit. No, Board Member. I do not at least at my fingertips. The Foundation will be submitting much more detail and written comments before the August 22nd cutoff, and so those might have more details. But again here, one of the bigger fears isn't necessarily what the union does with it, but once it gets out.

MEMBER PEARCE: I see. Now, I've got another question. You realize that those petitioners who file decertification petitions would be privy to this same information under the proposed rule. So, an individual filing a decertification petition who wants access to information regarding the other employees would be entitled to get phone numbers and addresses and e-mails as well.

MR. MESSENGER: Yes.

MEMBER PEARCE: Would you have an objection to that?

MR. MESSENGER: Yes, the same objection. Once that information is given, and here it's just to an individual. What rule or restriction can be imposed upon an individual employee who does a decertification election to safeguard that information? If that employee gives it to some of his supporters who also want decertification, the information can spread. And eventually, that information can find its way into the hands of someone who will misuse it. For example,

one of the supporters of the campaign may be a fine man, but his son might not be. And all of a sudden, he has a list of everyone's phone numbers, e-mail addresses, when they're not at home. There's a lot of damage that can be done with that.

MEMBER PEARCE: Now, there's been prior testimony with regard to the insufficiency of certain Excelsior list information that petitioners have experienced, you know, outdated addresses, inability to contact people just by virtue of what is currently supplied in the Excelsior requirements. Do you think that those are valid considerations?

MR. MESSENGER: Only representing employees, I can't necessarily say of how accurate Excelsior list information is based on my own experience. Obviously, if there is outdated information on the Excelsior list, requiring more information won't solve that. Arguably, you'll just get more invalid e-mail addresses. People change them all the time. Cellular phone numbers are also changed with probably more frequency than a home address. So, as far as Excelsior lists being inadequate because they're inaccurate or outdated, the contemplated additional disclosures don't solve that.

MEMBER PEARCE: But you would agree that all parties, all the stakeholders should have equal access to each other relative to an election campaign, wouldn't you?

MR. MESSENGER: Not necessarily. I believe that

employees' personal privacy should trump over the ability of a union to contact them.

MEMBER PEARCE: Okay, now, employees usually have to supply this personal information to the employer. Wouldn't that give the employer the decided advantage in terms of communication?

MR. MESSENGER: Well, not necessarily because, first, how can the employer actually use it? For example, it's my understanding employers cannot conduct home visits. So, having their personal address isn't an advantage there. How much can they actually use employees' personal e-mail addresses to do things, even if it was allowed? But even more importantly, the interest of the Act is not balancing the rights of employers against the rights of unions. It's all about what is best for the rights and interests of employees, and I believe the threat to employees' personal privacy outweighs any kind of attempt to balance the electoral campaign between unions and employers.

MEMBER PEARCE: So, in that regard, you would -- it would be your position that unions should not have access to employee e-mail addresses?

MR. MESSENGER: Yes.

MEMBER PEARCE: And by the same token, you would not want employers to have access to employees' e-mail addresses as well?

MR. MESSENGER: No, I didn't -- for an employer, as I said, they may already have it. They can use that realm of communication. And the fact that an employer can use certain communications or have certain information the union doesn't strike me as being particularly problematic.

MEMBER PEARCE: I see. Thank you.

MEMBER BECKER: Just following up, if the Board were to conclude, for some of the reasons that Member Pearce was describing, that it's important to have equal access to voters for purposes of communication, we invited comments on exactly the concern that you have, that is what would be an appropriate sanction. The proposed rules bar the misuse you describe. That is, they require that the information only be used for the representation case proceeding, and we invited comments on what might be an appropriate sanction. Do you have any thoughts about that?

MR. MESSENGER: My concern is that since the purpose of the information is to allow union supporters to contact their coworkers, or in the case of non-coworkers, people in the bargaining unit, and the problem is once the information is given out, what kind of control can the union have? So, even if you have a union that intends to do nothing wrong, once the information is given, it's out there. And then, therefore, it can be misused.

Now, of course, one could restrict the union so tightly

on how it could use the information, but then that defeats the purpose. If the union has to keep it in lock and key in the union president's office, there's no point in the disclosures anyways. The only point of the disclosure, at least under the contemplated rules, is for the union to give it to their supporters to contact others. Once they do that, the union doesn't control it. It's out there.

MEMBER BECKER: Well, one could imagine a range of potential sanctions which would at least create an incentive to impose controls which would address your concerns. For example, if there was such a misuse, you could bar disclosure in a subsequent petition.

MR. MESSENGER: But even with that, let's say the union in that example though didn't do anything wrong. Say the union, you know, if there's four campaign supporters that said we want to volunteer to help, and the union hands them the list, and then without the union's knowledge, one of them misuses it, or their son uses it or whatever happens. It's out there. And once it's out there, you can't control the spread, and that's the problem. I don't see an appropriate sanction to alleviate that problem, other than not allowing the union to give it out to anybody. But in that case, it's useless.

MEMBER BECKER: Thank you.

CHAIRMAN LIEBMAN: I'm curious, just sitting here

listening. This is not part of this proposal, but I guess our last speaker ran off a list of proposals that he thought we should be considering, and one of them was equal access into the workplace. I mean, as I said, it's not part of this proposal, but I listened to you, and you seem to be interested in employees hearing both sides. Is that a way of avoiding these problems of giving out employees' phone numbers and e-mail addresses and raising privacy concerns, to have a forum in the workplace where the employer and the union both can talk to employees? Is that a better solution?

MR. MESSENGER: It potentially could be, but, of course, it would require an amendment of the Act under Lechmere due to employer, you know, property rights. And it also creates the problem of the impression created of an employer conducting a meeting, you know, with the union. You know, is this an employer sanction? How do you -- how does the Board even run such a thing, even if it was given statutory authority. It would be very troublesome.

CHAIRMAN LIEBMAN: Thank you for your comments.

MR. MESSENGER: Thank you.

CHAIRMAN LIEBMAN: Next speaker is Joseph Paller, and after that will be Mr. Russ Brown.

MR. PALLER: Thank you, Chairman Liebman, and thank you members of the committee. My name is Joe Paller. I work for Gilbert & Sackman in Los Angeles where I represent labor

unions and employees. I'm not here representing any particular group. I came because of the opportunity to participate in what I see as a historic and great process, the first open public meeting of this kind I can remember. I see it as a real advance in the rulemaking process because it gives everyone who has an interest an opportunity to meet and interact with the Members of the Board and to share their views and see the rulemaking process in action. So, thank you for giving me the opportunity to be here.

I came here today to talk about two somewhat technical aspects of the rules that are proposed, and I think they're important. One was just addressed by the last speaker, and that has to do with the proposed revisions of the Excelsior list rules. The second I wanted to talk about if I have time is the proposed revisions to Section 102.66(d), which would entitle a hearing officer to close a representation hearing if fewer than 20 percent of the members are involved in an eligibility issue. And the idea is you would conduct the election and then later on, if necessary, you would have the hearing to determine whether or not someone should be excluded or included within the unit as a supervisor or as a bargaining unit member.

Well, turning to the first issue, the Excelsior list issue, as the last speaker alluded to, for decades the Board policy has required employers, after a direction of election,

to give the union a list of the names and addresses of all the employees in the proposed unit or in the unit that's been ordered for the election. And the purpose is to give the union and the union adherents an opportunity to interact with their coworkers and to discuss the merits of unionization.

That kind of list omits the important information that people need in order to communicate. It gives people home addresses, but it doesn't give e-mail addresses or telephone numbers. And so, it puts the union in the uncomfortable position sometimes of having to go to people's homes. Now, most people find that in this day and age a little bit annoying. They would much rather be contacted by phone or by e-mail. And in areas like Southern California, it becomes almost impossible to reach all of the parties by just planning on visiting them at their homes or even visiting them at the workplace.

And let me give you a real world example. This is a representation case that took place in January of 2011. It was a fair and square election all the way. Everything was done right. There were no unfair labor practice charges filed, no petitions for review. But the union lost the election. Now, this was a clinic that employed nurse practitioners in a large drugstore chain in Southern California and employed a small unit of about 30 people in Southern California area. Well, they were scattered. This

is Southern California. Some people lived in Diamond Bar. Some people lived in Ventura. Some people lived in Long Beach. Some people lived in San Dimas. You had an area that was a 100-mile radius where these employees worked. Under those circumstances, it really became truly impossible for the union to visit everyone at their home. Making matters worse, the nurse practitioners would go from store to store, sometimes three or four different stores in a day, and the union could not show up at a particular work location and expect the employees to be there. So, what happened was the union was in a situation where they never were able to effectively communicate the message. And this is what unionization and the whole process is about, giving people the opportunity to communicate, to speak with people about the merits of unionization, and that was lacking. And for that reason, I believe the union lost the election.

So, I think if giving people the opportunity to communicate with e-mail and by telephone is a much better procedure, and I think it will be welcomed more by the employees and certainly by the unions.

The second thing I wanted to talk about is the 20 percent rule that's proposed under Section 102.66(d). I think this rule should go a long way toward ending a long-standing practice that hasn't been much publicized, a long-standing practice in RC cases. Unions and employees don't

like long hearings. Everyone knows that. For that reason, they often propose a stipulated election agreement very early in the process. They get with the employer, and they try and determine whether they can come up with an agreed-upon list of employees who are eligible to vote and who may be in the unit and who may be excluded from the unit because they're supervisors or managerial employees and they just don't belong.

Now, the problem under the current rule is that the employers and unions both are tempted to do something which goes against the purposes of the Act in my view. And that is they may try to horse trade, to include certain people in the unit or certain people out of the unit for all purposes. And the union, in an attempt to get an election agreement, may be tempted to simply say that certain people are supervisors, because the employer is willing to give the election agreement if that is done.

This can work the other way around. Employees who are true, genuine employees can be excluded for one reason, just because there's one or two, and maybe you just don't want to hold up the election. Well, the proposed revision to Rule 102.66(d) will solve this problem. If there are fewer than 20 percent of the unit that are in issue as far as their eligibility to vote, you can get the election done with. You don't have to make this kind of a devil's bargain, either for

the employer or the union in order to get the election over with. And then I think once the election is over with, it will conserve the time and resources of the agency because most of these issues are likely to fall away once the election has taken place and the employer and the union have an opportunity to sit down and talk.

Well, that's all I have. I'd like to thank you for the opportunity to be here today. I think this is a historic occasion, and I'm so glad to be able to be here the first time you've done it, and I hope you do it again.

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

Other questions?

MR. PALLER: Well, thank you.

CHAIRMAN LIEBMAN: Well, I have a question related to the 20 percent rule. You've probably heard some of the speakers say that they thought it was problematic that employers would not have certainty about who was a supervisor before the election was held, and the risk of certain people committing unfair labor practices or even the flip side, that Harborside problem for unions. Could you comment on that?

MR. PALLER: You know, I think this is worth a try. I think this worth trying to do and just seeing how it operates. One of the beauties of the rulemaking process is that by, you know, putting a rule like this in place, you can

look at it. You can examine it and see how it works. I personally think it's going to cut out a lot of the problems that exist, and it's going to save time and money for the agency and the parties as well. Many times I've gone through lengthy, lengthy hearings over supervisory status when it's been absolutely clear to everyone in the room what the status of a particular individual was. That's not true in all cases, but it's true in the majority of cases.

The Board law on supervisory status is pretty well settled at this point. So, oftentimes I think that the issue is used as a delaying tactic, I'm sorry to say, by some employers, certainly not all employers. But some employers have used it as an opportunity to delay the election and to up the cost for the parties, and that's what I think needs to be avoided. The other problem, of course, is that it becomes kind of an -- it can create desire, as I said, on the part of the parties to try and cut things short. And so, the union and the employer can try and make deals to include certain people and exclude certain people from the unit.

You know what, the fair way to do it is conduct the election. If the votes of the purported supervisors are not outcome-determinative in any way, then just certify the results. And if there's a real dispute later on, then you can litigate it. But why waste the time and money of the parties and the agency going through this process, which is

often a charade, when it's not really necessary. That's my view.

CHAIRMAN LIEBMAN: Thank you. I appreciate you being here.

MR. PALLER: Thank you.

MEMBER HAYES: If I could, I just had one question relating to actually the previous speaker. I was just thinking in terms of the privacy considerations with respect to the expanded Excelsior material, should we think about whether there is some way to empower individual employees to indicate whether and to what extent they wish material to be given over to any third parties with respect to their e-mail addresses or their personal telephone numbers. You know, we do have things like a do not call list. Is there some kind of mechanism that we might want to consider that would balance the interests of individuals' privacy?

MR. PALLER: Well, certainly, giving people e-mail addresses and phone numbers is not a huge invasion of privacy anymore. Let's face it, most people know how to use a spam filter and put something in their spam filter. If they don't want an e-mail, if they see who it's from, they can delete the e-mail. They can answer the phone and say that they're just not interested in talking about it.

Look, as far as I'm concerned, the most effective union member is the one who actually talks one on one with their

coworkers during break time or at the worksite when that's possible. That's the most effective way of going. And by the way, most employees have one on one relationships with all the people in the bargaining unit if it's a single location. So, honestly, I don't believe that there's really a justification for the fear that giving e-mail addresses and phone information is going to create some kind of invasions of privacy. I don't see it happening. But you know what, you can put the rule in place, and if it turns out, it turns out that there's a problem with it, you can fix it later on.

MEMBER HAYES: I guess just one last thing, I was wondering if you had any views with respect to the different alternatives that were proposed in the rule with respect to blocking charges?

MR. PALLER: No, I don't have a view on that. I'm not prepared to speak on that today.

MEMBER HAYES: Okay, thank you. Thank you very much.

CHAIRMAN LIEBMAN: Thanks very much for being here.

And our next speaker is Mr. Russ Brown, and next up will be Dr. Dean Baker.

Good afternoon.

MR. BROWN: Madam Chairwoman, Members of the Board, my name is Russ Brown. I'm with the Labor Relations Institute, and I truly appreciate the opportunity to contribute our views to this proposed rule.

Before getting to the substance of the proposed rule, I think it's important to address the need for it. Historically, the Board election process has been very efficient. In 2010, more than 95 percent of the elections were closed within 56 days, well above your current target. Compare this to the Board's experience with resolving unfair labor practices, where in 2010 the Board resolved these cases nearly 14 percent slower than in 2009. It is also important to point out that the Board processes over 7,000 unfair labor practice charges per year while handling less then 2,000 election cases.

While we agree that seeking efficiency is a worthy goal, it is curious that the Board would start with the election process. Focusing on efficiently resolving unfair labor practices has nearly four times more leverage and is where the Board's own data shows that it is moving in the wrong direction. Instead, the Board is focusing its limited agency resources on the election process where the targets are being met and exceeded.

The proposed rule seeks special comments on electronic signatures and blocking charges. Allowing electronic signatures is a terrible idea. There are plenty of examples and situations where employees were tricked into signing physical authorization cards by being told they were something else. The likelihood of confusion and even abuse

is much greater with electronic signatures. Checking a box on a website is done as an afterthought today. Ask yourself when was the last time you actually read the software license before you updated Microsoft Word?

Reforming the process around blocking charges is an excellent idea. The current process is abused and frustrates and disenfranchises voters. In 2010, less than five percent of elections required the Board resolutions of objections. Casting the ballots, even if they are impounded, is far superior than delaying elections on the off chance that the charges might have enough merit to warrant other actions. Fast tracking investigations and resolutions of the blocking charges is also a great idea. As discussed above, this should be the focus of the Board's rulemaking if the true goal is to improve efficiency of the process.

Next, I'd like to address the aggressive time targets and the proposed rulemaking. The Board's proposal wants all pre-election unit issues resolved within five business days or else hold a hearing to resolve them. Let me relate a story about my own personal experience to help you understand the tremendous burden you are putting on employers. Several years ago, I was the head of a small transportation company. My business was spread across 16 western states, and I did not have a true HR department or a labor lawyer.

At one point, I had an extended trip planned away from

the office. After spending an entire day in transit, I found out that the TWU had filed a petition to represent the workers in one remote location. My travel plans were well known, and I don't think it is a coincidence that the petition was filed on the day I left. I had no idea what this petition meant, and I had no choice but to cut my trip short. It took me four business days to just get home and hire a lawyer. It would have been impossible for me to present the evidence at a hearing about an appropriate unit the next day. Our unit issues were complex. The proposed time targets are so aggressive that they will lead to mistakes, poor judgments, and are likely to complicate rather than simplify unit issues.

The requirements to furnish the list of voters, including phone numbers and e-mail addresses, in two days after the direction of election is simply not enough time. Just consider my personal experience. We did not have a centralized human resource system, and we were spread out among many states. We had questions about who was in and who was out of the unit. Whether talking about small organizations or even a big company, it can often take more than a day just to get a list to review. Getting this list right is too important to rush. If it is wrong, it can overturn an election. The current seven days is a good balance between getting the list quick and getting it right.

The Board should provide some type of opt-out process for employees who wish to protect their private contact information from unions and other allied groups. In every campaign I have been involved in, I have had workers express to me that they don't like having their personal information given to unions without their permission. The CAN-SPAM Act and the national Do Not Call list require organizations to provide opportunities for citizens to opt out of solicitations. The NLRB rules should provide a similar opportunity for employees.

The core change in the proposed rulemaking is shifting many of the unit decisions until after the election. This is the cure in search of a disease, since the vast majority of elections today occur around a month after the petition is filed, even deciding all of the unit issues in advance. The proposed rule says that 20 percent of the voters in the unit may be undecided at the time that the ballots are cast. That is like saying that we don't know whether the votes in Texas and California will count in the next presidential election. Some employees may decide not to vote because they don't want to be included with others who may not be in the final unit. Workers have the right to know who will be in their bargaining unit on the day they vote.

Increasing efficiency is a worthy goal, but not for the sole purpose of reducing the time of the election. Pushing

most unit decisions until after the election disenfranchises voters and is counter to the purpose of the Act. Any rule change needs to be about what is best for the workers and not what is best for unions. The Board should not implement these dramatic rule changes.

CHAIRMAN LIEBMAN: Thank you, sir, for your comments.

Questions?

MEMBER BECKER: I've got two diverse questions about your comments, which were helpful. One is you describe your own situation of being out of town when the petition is filed. It seems to me that's special circumstances, and the rule provides that the hearing will ordinarily commence within seven days, except for special circumstances. So, I guess I wonder if you have any thoughts. We specifically invited comments on the question of how we phrase precisely the exceptions to standard practice if we go forward with these proposals. Do you have any thoughts about that? What would be an appropriate way to account for the kind of situation you describe, which is somewhat exceptional and to make sure that you are accommodated in that situation?

MR. BROWN: Well, I'm glad to know that those years ago that you would have thought that that was a special circumstance and given me a break. I'm not sure your Regional Director would say the same though under the way that you've got the proposed rules. And, of course, at the

time that you are looking into what implements a special circumstance, there will be many different reasons for many different organizations. I think that a company like mine that was as spread out as it was and with no true HR department, no centralized department, in my particular case, I had to not only get back from the trip to the home offices to get things together, which took four days, I also had to get to the state that this situation was taking place in. So, you know, as I stated, under the proposed circumstances, I couldn't have made it. It just wouldn't have happened. Seven days seems to be the perfect balance that we currently have in place.

CHAIRMAN LIEBMAN: You had another question?

MEMBER BECKER: Again, a little bit outside the scope of our proposal, but your concern about employees receiving unwanted communications and your suggestion that we adopt kind of a no-call concept, would you extend that to the captive audience context? That is, do you think employees have a similar right not to hear unwanted messages from the employer?

MR. BROWN: And you probably know that I am a persuader at this point in my life, and I go into these meetings a lot. And although you call them captive audience meetings, I've never held an employee in a meeting. The employer has a right, you know, under 8(c) of the Act to have his freedom of

speech. And even at that, his freedom of speech is greatly reduced. And in many cases, the way it is, that is the only place that the employer can have those conversations. By and large, my experience says that unions, and my personal situation says that unions have a stealth campaign taking place long before the companies ever know what's going on. So, they've had their access to employees, and they've got their means as well. And just like in any other election, if somebody comes up to your door, you don't have to let them in unless you want to.

MEMBER BECKER: Thank you.

MEMBER PEARCE: This transportation company that you had that spanned several states, what was your principal way of communicating with your employees?

MR. BROWN: Well, I had several. Of course, my company predates a lot of the technology today, but a lot of things that I did, specific things, I would use safety memos as paycheck stuffers. I would send out written memos via fax, later via the computer, things like that. And I had regular conference calls with managers where I asked them to have meetings with employees and convey employment-related messages.

MEMBER PEARCE: So, when you say later via computer, you're talking about e-mail or intranet?

MR. BROWN: Well, I did not have an intranet, so, yes, I

would e-mail managers, you know, bulletins to put up or something along those lines.

MEMBER PEARCE: Okay, did this transportation company have an employee handbook that discussed --

MR. BROWN: Yes, it did.

MEMBER PEARCE: Did it discuss unions in that handbook?

MR. BROWN: Oh, no, no, there's no discussion of unions in my employee handbook. In fact, my employee handbook was like two pages, so it was very, very lean.

MEMBER PEARCE: Okay, and did you go about training your managers as to labor relations?

MR. BROWN: There was -- we had an ongoing positive labor relations training to where, you know, we trained our managers on how to be good, efficient leaders for their people and to be an advocate for their people and service our customers. As far as labor relations as it pertains to a union campaign, only once I had that petition filed did I give any managers any training in, you know, what they call the TIPS rules and things like that that we do, that you see so much of today.

MEMBER PEARCE: Okay, how many petitions would you say you experienced while you had this company?

MR. BROWN: While I had the transportation company?

MEMBER PEARCE: Yeah.

MR. BROWN: I had the one petition, that's it.

MEMBER PEARCE: Okay, and what happened with that? Was there an election?

MR. BROWN: Yes, there was.

MEMBER PEARCE: How did that come out?

MR. BROWN: The employees voted against unionization.

MEMBER PEARCE: I see. Thank you.

CHAIRMAN LIEBMAN: Could I just ask you one question because I don't think you told us at the beginning. What is the Labor Relations Institute?

MR. BROWN: I'm sorry. The Labor Relations Institute is positive employee relations firm. We actually work both with unionized and non-unionized companies. We're probably best known for our work in union avoidance during campaigns.

CHAIRMAN LIEBMAN: You give advice to companies in how to --

MR. BROWN: We give advice. We have persuaders. We have over 100 former union -- we have 84 former union organizers that will go to a company and say, you know, give the side of the union as well and, you know, how things work. Kind of like Mr. Maritas was stating, he knows the playbook. So do my guys.

CHAIRMAN LIEBMAN: So, you have your playbook?

MR. BROWN: Those guys have a playbook, yes.

CHAIRMAN LIEBMAN: Thank you for your --

Do you have another question?

MEMBER PEARCE: One more question on that. Part of your company's routine or a routine part of your company's business would be to go to the Regional Offices to see what petitions were filed, wouldn't it?

MR. BROWN: Well, you guys have become so good with putting things on the internet, we don't have people that go into the Regional Offices any longer. But, you know, we do get -- in fact, LRI Online is probably one of the leading sources of keeping up with just about every scrap of paper you guys push.

MEMBER PEARCE: Okay, and so, from that, you can solicit business?

MR. BROWN: We have individuals that solicit business from that, yes.

MEMBER PEARCE: Okay, thank you.

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

Our next witness will be Dr. Dean Baker, and after that will be Yona Rozen.

Good afternoon and welcome.

DR. BAKER: Good afternoon. Thank you, Chairwoman Liebman and Members of the Board. I appreciate the opportunity to address the Board about these issues. Let me just say I'm Dean Baker. I'm co-director of the Center for Economic and Policy Research, which I'll also point out we do

not get any funding from organized labor. We've been misrepresented that way in many cases. So, just to be clear on that.

What I want to talk about today are the findings from two studies done by my colleague, Dr. John Schmitt, along with research associate Ben Zipper. Dr. Schmitt is currently out of the country, which is the reason why he's not here to talk about these today. I'll do my best to try to explain the findings as clearly as possible.

The two studies involve updates of research that looked at the probability of workers, pro-union workers, being dismissed in the course of an organizing campaign. This line of research dates back to a paper done by Harvard Law School Professor Paul Weiler in 1983 where he looked at the number of workers who had been reinstated by the NLRB and compared that to the number of people who had voted for a union, for union representation in NLRB certified elections. And he came to the conclusion that 1 in 20 workers who supported a union had been fired and subsequently reinstated by the NLRB.

His work was criticized by a 1981 paper by University of Chicago economist Robert LaLonde and law professor Bernard Meltzer who looked over the data and looked at it and assessed that many of the workers that had been reinstated were not, in fact, involved in organizing campaigns. They did their own analysis of the data and came up with the

conclusion that roughly 1 in 60 pro-union workers had been reinstated by the NLRB. So, the probability of being fired if you were a union supporter by their calculation was 1 in 60. I should also point out that this was the same methodology that the Dunlop Commission adopted in looking at this issue back in the early '90s.

Schmitt and Zipper thought to update this, again using the same methodology as LaLonde and Meltzer, the more conservative methodology, and they looked at NLRB data through the year 2005. And what they found was that through the period 1996 to 2000, roughly there was a 1.2 percent probability of someone being fired for being involved in an organizing drive. And for the most recent period, the last period they looked at 2000 to 2005, it was 1.9 percent.

Now, this may have been somewhat of an understatement because it had become increasingly common at that point for unions to use majority sign-up as a route for representation rather than going through an NLRB certified election, so they sought to adjust their data for the number of workers who were involve in organizing campaigns that went through the process of majority sign-up or card check rather than union election, NLRB election. And they calculated based on two different data sources that ratio, the total number of people recognized. Those recognized through NLRB elections was roughly 1.3. So, if they made an adjustment for that and, in

fact, increased the number of people who supported unions by a factor of 1.3, they calculated that roughly one percent of workers involved in -- pro-union workers in the period '96 to 2000 had been fired and reinstated by the NLRB, and 1.4 percent in the period 2000 and 2004.

I'll just quickly mention a couple of issues here that have been raised as to why it might be higher and lower. One is there have been some issues raised that the percentage of workers who were reinstated who were involved in organizing campaigns actually might be somewhat lower than LaLonde and Meltzer had estimated back in the early '90s. Insofar as that's the case, that would mean that they've overstated the probability. There are two reasons why they may have understated the probability. One is simply that many cases may get settled if an employer knows that they're likely to lose a case before the NLRB. They may voluntarily reinstate the worker. That person would not be counted in this data. The second reason, of course, is that many workers may choose voluntarily not to pursue a case to the NLRB because it can be a time-consuming process, and the sanctions are, that the sanctions are that the reward for doing so is relatively small. I mean, I --

(Off the record.)

DR. BAKER: Okay, so I'll pick that up. Okay, so, I was saying two reasons why this might understate the probability

of dismissal is first off that in many cases it may end up being the case that there's a settlement. If the employer knows that they'll likely lose the case, they'll voluntarily reinstate the worker. The second issue is that many workers may choose not to pursue it because they don't care that much about getting their former job back.

So, a question is how do we think about this 1.4 to 1.9 percent probability of workers being wrongfully fired. I would just make the point that may not seem that great, but it's reasonable to assume that employers tend to target union organizers, the most active workers. If we say 1 in 10 workers are union organizers, then we can say that there's roughly a 14 to 19 percent probability of dismissal, which we might think would very importantly influence campaigns.

Just briefly pointing out that in the second paper by Schmitt and Zipper, they did look at the probability of a campaign -- an organizer being fired in the course of a campaign, and they concluded that in roughly 26 percent of organizing campaigns, there was at least one case where a worker was fired and subsequently reinstated by the NLRB. So, I would suggest that the risk of firing is an important factor as it stands now in union elections, union organizing campaigns. Thank you.

CHAIRMAN LIEBMAN: Thank you for being here today.

Any comments?

MEMBER HAYES: I guess just one. Is there any empirical study that correlates the risk of being subject to an unfair labor practice by an employer with the length of the campaign period?

DR. BAKER: None that I know of. If one has taken place, I just have to say I don't know of it.

CHAIRMAN LIEBMAN: Can I ask you a question? You are an economist, am I correct?

DR. BAKER: Yes, yes.

CHAIRMAN LIEBMAN: This may be an unfair question to put upon you, but I don't know if you've heard some of our speakers have cautioned us against engaging in this rulemaking or changing rules as we had proposed at this time of economic crisis. They've cautioned that this is the wrong time to be changing the rules, that it will end up being detrimental to the economy. Do you care to engage in that discussion?

DR. BAKER: Well, I would say it's hard to see directly how it would have a negative impact on the economy. I mean, it's -- you know, you have to see exactly how this was implemented and what the full ramifications would be. But it's important to understand the main reason that we're in this economic downturn is we don't have enough purchasing power. We have a very unbalanced economy. There's been huge upward redistribution income from the bulk of the working

population and those at the top end who tend to spend less of their income. So, insofar as we do measure unionization, it's important for us towards equalizing wages, as this is very well documented. So, insofar as there are measures that result in more income going to those at the middle and bottom of the distribution rather than those at the top, there's no doubt that would be a plus in our current economic situation. So, you know, if you end up with a real mess of an organizing process, and if work places are all tied up, one can imagine a very bad situation. But I'd have to say I don't think that's the likely outcome of this story.

CHAIRMAN LIEBMAN: Thank you.

Any other questions?

Thanks very much for giving us your perspective.

Our next speaker is Yona Rozen, and then I guess we'll take one more, Brian Bixby and Karla Kozak, before our break.

Good afternoon. Welcome.

MS. ROZEN: Good afternoon. Thank you. Chairman Liebman, Board Members, I appreciate the opportunity to be here today to speak to you. My name is Yona Rozen. I am with the law firm of Gillespie, Rozen & Watsky in Dallas, Texas. I have been there since the fall of 1983 representing primarily employees and local unions. Before that, I worked for the National Labor Relations Board for three years in the Buffalo Regional Office and then for two years at

Headquarters in the Division of Advice.

And so, I come to you, obviously, my perspective at this point is representing unions. But my practice, and I think I want to spend a minute saying this, is that I have -- I really believe in the power of unions and the opportunity for employees to find their voice and find a way to address issues at their workplace through unions, and that it's a much more effective way than the other people that I deal with and represent who are individual employees who have legal issues that are addressed through private litigation and through employment arbitration. And I think the employees that I work with, the workers I work with who are represented by unions have much more satisfaction and much more success in dealing with workplace issues with their employers than do individuals who are put to the situation of having to proceed with a lawsuit. And even when they are successful, it's not a very satisfactory process.

So, for that reason, I come to speak in support of anything that can be done that will improve the process for employees to be able to vote to determine whether or not they wish to be represented by a labor organization. I think I've been rather surprised by the reaction to the proposed rules because, frankly, I don't see them as being in most respects tremendously huge changes. I think they're fairly modest suggestions that will be effective in addressing some of the

issues to some extent that are presently presented by the process. And so, I come to speak in support of these rules, although I could also think of other things that might be done further.

But I do want to speak in support of the rules. And I thought in doing that, the most effective way, I thought back over my -- I've probably handled hundreds and hundreds of election petitions over the years in my various positions, and I thought of several that I wanted to focus on today that I think would have been helped by the process that's proposed in these rules.

And when I say they're fairly modest, one of the things that struck me particularly about the proposals is that, in many respects, they are putting forth in more specifics things that are frequently done by the Regions on more of an informal basis although perhaps not across the board because different Regions have different practices. And so, I will address those as I reach them.

The two cases that I wanted to focus on particularly today and how these proposed rules would have assisted in moving the process forward and in saving time and cost, the first one goes back to my very parting days of leaving Region 3 in Buffalo when I was assigned, probably because I was no longer going to be on Tom Seiler's payroll, and so the time would not affect the Region and would be stuck on

advice, but I was assigned to be the hearing officer in a hearing on objections for a 13-person unit that overwhelmingly voted in Detroit to be represented by the Teamsters. The management then filed 113 objections to that election, none of which ultimately were upheld in my Hearing Officer's Report and Recommendation and ultimately by the Regional Director.

The process of -- I think informally a lot of Regions do require some sense of what your objections are, what evidence you have to support your objections, but formalizing that would have greatly assisted in this particular case because the quality of the objections in this case, for example, were there were 10 or 15 objections. There was a single person in this 13 person unit who was deaf. And many of the -- a number of objections related to trying to sort of hop on the back of the failing to translate into Vietnamese or failing to translate into Spanish type objection. The failure to provide someone to translate into sign language the pre-election conference and the ballot. There was absolutely no evidence whatsoever that this individual could not read and understand everything that was presented in writing. And, of course, the directions were presented in writing as well.

So, we had two separate periods of hearing, approximately six days to address this. I'll remember it very well, because it was during the air traffic controllers'

strike. I had to get special permission to take a motor pool car across the border to drive to Detroit. The reason I was assigned from Buffalo for a hearing in Detroit was because there were allegations again, without any support and any substance, of Board agent alleged misconduct. This is a -- when I think back about that case, and the case dragged on forever, I actually eventually lost track of what happened in the case ultimately. But that was a case where having the pre -- the requirement that is proposed where not only are the objections filed, but the evidence and a proffer of proof as to what would be provided in support of those objections would be very helpful. Also, I think the fact that there not be an automatic right to review by the Board would be helpful in that case.

The second case that I wanted to address is a case that I was involved in much more recently, and I think it raises a lot of -- it would have been helped and assisted by a lot of the rules that are being proposed with respect to both pre-election hearings and also post-election. This was an election that occurred back in 2009. The petition was filed. It was for a 220-person unit representing Sears service techs who -- and it's a very large unit. They worked out of several facilities. They covered -- they were in a particular district in the Dallas, Oklahoma, northern Texas region. It was very difficult to communicate with these.

The campaign had gone on for over two years, addressing the issue of whether employers have an opportunity to understand and know that the campaign is going on.

My clients primarily, consistent with what was stated by an earlier speaker, well in advance of filing a petition sent out notification of the organizing drive and notification of who specifically is on the organizing committee. Similarly as to what was stated, to give protection to those who are coming forward and supporting the union. But the other impact of that is that clearly the employer is well aware long before the petition is filed. In this case, the employer knew for two years there was an ongoing campaign and was well aware, as is demonstrated from how they acted during the process, they had plenty of time to talk to their employees long before the petition was filed.

As we come up on the hearing --

CHAIRMAN LIEBMAN: I'm going to ask you to try to start wrapping up.

MS. ROZEN: I will. Thank you. I'm sorry.

CHAIRMAN LIEBMAN: You're about three minutes over already.

MS. ROZEN: Oh, I'm sorry. I didn't realize. I'm very sorry.

CHAIRMAN LIEBMAN: That's okay.

MS. ROZEN: I didn't know what that meant. In any case,

the hearing was -- we were going to agree to add 12 people to the unit, and at the very last minute, the evening before the hearing, the employer added 53 additional people from another location from an entirely different district. Clearly, and we ended up spending two days litigating that. And it was an example where if the employer had been required to put forth what their position was and to put forth the proffer of proof to support that, that could have been addressed. So, thank you very much.

CHAIRMAN LIEBMAN: Thank you.

Any questions?

MEMBER HAYES: Just one quick question about the first example that you mentioned, the objections case. How would the proposed rules change the experience you had in that case? I mean, don't our rules and procedures currently require that objections be filed in a timely fashion and that they be accompanied by sufficient information to enable the Region to determine whether or not a hearing should be held?

MS. ROZEN: In the first case, yes, I think some Regions have that procedure. It's less formal. That was my point in that I think some of these proposed rules are not really major changes but are simply standardizing the process that is followed in some Regions. So, yes, I think -- but I do think the more emphasis on you actually have to make a proffer of proof as to what evidence you're going to present

to support these would be helpful in giving the Region an opportunity to determine whether or not to proceed in that case, and also the fact that there would not be -- under the new rules, there would not be a right of appeal to the Board in every case.

MEMBER PEARCE: In your experience having been involved with campaigns, have you also experienced your clients having to withdraw petitions?

MS. ROZEN: Yes.

MEMBER PEARCE: What circumstances would prompt the withdrawal of petitions in your experience?

MS. ROZEN: Well, a number of circumstances. I mean, I've had circumstances where we had a lot of support initially. The campaign was going well. People get terminated. People get scared. The support is dissipating, and therefore, the union would withdraw the petition.

MEMBER PEARCE: Okay.

MS. ROZEN: And I guess the other thing about that, in the case that I was talking about, my clients -- we had some pretty good objections, I thought, post-election in that case, the Sears case. And my clients asked me not to proceed with those once -- to request review on those. They brought some interesting issues that I would have liked to have proceeded, but they preferred rather than have the delay to just start the time rolling, so that they could go back in in

12 months with another petition.

MEMBER PEARCE: I see.

MS. ROZEN: And they also lost a lot of support in the objections because people were scared.

MEMBER PEARCE: Thank you.

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

MS. ROZEN: Thank you. Thank you for your time.

CHAIRMAN LIEBMAN: We'll take the next -- is it one or two speakers?

MR. BIXBY: One.

CHAIRMAN LIEBMAN: One, Mr. Brian Bixby?

MR. BIXBY: Yes.

CHAIRMAN LIEBMAN: Welcome.

MR. BIXBY: May I get a drink, please? My throat is all dry.

CHAIRMAN LIEBMAN: Good afternoon.

MR. BIXBY: Good afternoon, Madam Chair and Members of the Board. My name is Brian Bixby. On behalf of all of the working class in America, I thank you for giving me this opportunity to share with you my story from the trenches of an organizing campaign. In my job, I've met many famous people, but the four of you hold more power in my life than any of these famous people I've ever met. I'm a casino dealer, table dealer at Caesars Palace in Las Vegas, Nevada.

I've been at Caesars Palace for nearly 25 years. During our organizing campaign, I was a lead in-house organizer. I was a shop steward. I'm a current member of the contract negotiating team for the dealers at Caesars Palace. I was also elected as the inaugural president of TWU Local 721 with nearly 1,200 members.

Leading up to the filing for election at Caesars Palace, we placed fliers and business cards in our break areas in August of 2007. Our supervisors had access to the material as soon as we put it out because we shared similar break rooms. On the business cards, it directed our fellow workers to go to a website that was specific to our campaign to organize with the TWU before we filed for an election. The in-house organizers were identified by the union to the company in October of 2007. The employer acknowledged their awareness of our organizing efforts prior to our petition for an election when they issued "No TWU" buttons for the supervisors to wear. Ironically, those same buttons are the same buttons that we use for longevity, 20 years, 15 years. They replaced the years with "No TWU."

We filed our election in the first week of November with the NLRB. After we filed our election, although there are nearly -- we have nearly 5,000 employees at Caesars Palace in Las Vegas with almost 75 percent of them already being organized, the employer still held captive audience meetings

which began two weeks after we filed for our representation election, although certain in-house organizers weren't allowed to attend these meetings. The dealers had to actually pay to attend these meetings out of their pocket in ways that I can explain later. These meetings were held three times a day, twice a week from the time that we filed to the time that we had our election on December 22nd, 2007.

Letters were sent to the employees' homes criticizing the TWU, along with inaccurate statements and promises made by the company. The employer stated certain issues would never be an issue, but those issues are exactly the elephant in the room in our contract negotiations today. Over three years in contract negotiations with one impasse declared by the employer, only to be recanted in several months by the employer with the claim that a new status quo had been set because of the impasse. With that impasse, I lost my 401(k). I lost 13 days of vacation per year.

The company characterized the TWU as a communist organization during their anti-union campaign. Our immediate supervisors asked dealers in one-on-one conversations while they were at their workstations how they were going to vote in the upcoming elections. Our supervisors continually attempted to get the in-house organizers in heated arguments in the break areas in front of our other employees and our other members.

Many employees from foreign countries, who were at that time legal and/or now legal citizens of the United States, were pulled into a manager's office and told and threatened that if they voted for a union, that they would either lose their green card or be deported from the United States. And management used translators for all the different countries that these people originated from.

The employer had -- before our election, the employer provided financial benefits that were never before provided to us, immediately before our election, just days before the election. The employer threatened the union with charges of copyright infringement whenever we used their name in any fliers, websites. Originally, our election was scheduled for mid-December but was moved to December 22nd, three days before Christmas, even though the union had agreed to every issue that the company brought up to avoid a delay a hearing might cause.

We are quickly approaching four years since the NLRB certified the union, yet we are still without a contract and have no future contract negotiations scheduled to date. I hear about the e-mails as I've been sitting here for two days. The employer has equal opportunity.

May I have 30 seconds?

CHAIRMAN LIEBMAN: Yes, you may.

MR. BIXBY: The employer may have -- has equal

opportunity to -- I've been at Caesars Palace for 25 years. They can inform me -- they've had 25 years to inform me about a union. They don't need the filing of a petition. The small employers, the scattered employers, put up a website. That's how we organized. We put our authorization cards on the website, although you couldn't file them electronically. But what our members would do would be read the authorization card, print it, fill it out, mail it in, just like we handed them an authorization card.

Where I work there's 10,000 cameras. From the time I go onto the property to the time I leave, I'm on camera. So, people didn't want to be seen handing an authorization card or accepting an authorization card. Our organizing campaign was done on the internet. The employer was very aware of it. We had 3,500 hits per week out of 550 employees. So, the employer was hitting it. Our employees were hitting it.

And I just want to thank you for the opportunity, and that's my story.

CHAIRMAN LIEBMAN: Thank you for being here with us today. I hope you brought us good luck.

MR. BIXBY: I hope so.

CHAIRMAN LIEBMAN: Anybody have any questions? Anybody have any questions?

Thank you very much.

MR. BIXBY: Thank you.

CHAIRMAN LIEBMAN: I think now is probably a good opportunity for everyone to stretch their legs. Why don't we be back by 2:30, and we'll start off with Jay Krupin?

(Off the record.)

CHAIRMAN LIEBMAN: I guess we're ready to go back on the record. Everybody accounted for?

We'll start this afternoon with Mr. Jay Krupin, who will be followed by David Madland.

Good afternoon.

MR. KRUPIN: Good afternoon.

CHAIRMAN LIEBMAN: Welcome.

MR. KRUPIN: Thank you very much, Madam Chairwoman and distinguished Members of the Board, for this opportunity to speak on the significant changes that you have proposed and the certain impact it would have on the American workforce and the American businesses throughout the nation. My name is Jay Krupin, and I have practiced traditional labor law for more than 30 years. And I am the chair of Epstein Becker & Green's national labor practice. I also serve as outside labor counsel to the National Grocers Association, which is the national trade group representing more than 1,500 independent retail and wholesale grocers. Most of its membership is comprised of family-owned and employee-owned businesses operating in communities across America. Nearly half of the NGA's members are single-store operators, and

another quarter operate less than five stores, in addition to the large regional multi-store operations and wholesalers.

Grocery stores and wholesalers operate on very tight margins. Many independent grocers' budgets do not allow for human resource specialists, compliance departments, and labor relations professionals. In short, the small business owner and even the large retail operators have no or very limited expertise in the maze of rules and procedures governing the NLRB elections.

Although there are numerous objectionable aspects to the Board's proposals, I will focus here on the dramatic reduction in time that an employer would have to respond to the union's campaign, most of which has been ongoing for months without the employer's knowledge by the time that the union petition is filed. In representing employers in over many campaigns, it is clear that unions do not generally broadcast that an organizing drive is ongoing. Under your proposal, the union -- under your proposal, the current median timeframe under which an election is generally held within 42 days is cut to less than half that time and could be held in as little as 10 to 21 days.

Under such a system, employees will be rushed into making a decision without the benefit of an opportunity to receive and digest information, contemplate the consequences of their ballot, and review and question information. It

cannot be maintained that less information before voting is a laudable goal. Rather, your proposal transparently precludes sufficient time for employees to receive and consider information which dramatically affects their workplace and their lives. It makes the election process for employers to be an away game.

Under Section 7 of the Act, employees have the right to form, join, or assist labor organizations as well as the right to refrain from any and all of such activities. Under Section 8(c) of the Act, it specifically protects an employer's expression and dissemination of views, arguments, and opinions. Your proposal’s stringent time limits on a campaign period before an election undercuts the goal underlying these twin pillars that uphold and give full meaning to the secret ballot, namely the free and full exchange of information.

Both provisions assume an employee's right to receive information, to hear and express views of others informing their conclusions regarding whether to join a union. By restricting the employer's statutory right to express and disseminate its opinion, the proposal to the same degree restricts employees' rights to receive and evaluate that same information and to weigh it against competing claims prior to casting a ballot. In striking down a statute which restricted a union organizer's rights to disseminate his

views to employees, the Supreme Court long ago decided that the statutory right protecting an employee's choice of a representative further protects an employee's full and free right to discuss and be informed concerning his choice and to hear the views of others.

A secret ballot does not a fair election make. And the right of free speech is meaningless if there is no time granted to speak. An election is a process. It is a means, not an end. A fair election is not simply the marking of a ballot. The right to vote by secret ballot necessarily assumes the opportunity for the electorate to have freely and fully exchanged information and ideas and to debate and test the veracity of claims made, which itself assumes sufficient time to engage in debate, to receive information, and to review all aspects of the contemplated decision. In short, the secret ballot is a culmination of a process, not the process itself. The Board's proposed rules ignore this reality. It eats out the substance of a secret ballot. There is an inseparable bond between a fair election and the right to be informed. The link between employees and any representative they elect can only be validated if it's forged by free and full participation of the employees. Frankly, the proposal's shotgun time limits tramples on all of the elements that make the election legitimate.

Discussing the Board's proposal, the NLRB website notes

that the proposed amendments are designed to fix flaws in the Board's current procedures that build in unnecessary delays, and that an important result has been to reduce the typical time between the filing of the election petition and the actual election. Only in the mind of a union partisan can the few short weeks between a petition and the election be referred to as an unnecessary delay. The proposed rule leaves no doubt which side it supports, and it is not on the side of a neutral, balanced, and fair approach which protects and holds sacred the employees' right to choose.

Viewed through the lens of the Board's legitimate role as the protector of an employer's First Amendment and statutory right to express and disseminate its opinions and views, and the employees' right to receive such information and cast a fully informed secret ballot, the Board's proposal is exposed for what it is, a process of pure form with the intent to stifle the contemplation of substance and of free speech.

The NGA is hopeful that you will have heard these expressed views, that you will fully consider these remarks and comments, and through your deliberations you can strike an appropriate balance to protect those who are most affected and harmed by your proposal, both the employees of America and America's business owners. Thank you very much.

CHAIRMAN LIEBMAN: Thank you, Mr. Krupin, for your

comments.

Anybody have questions?

MEMBER BECKER: The current system in terms of the value which you so eloquently articulate, and which we take very seriously, and which is embedded in the Act, the ability to communicate freely -- the time period over which that right can be exercised seems to hinge on something, which at least in my view is completely irrelevant, which is the degree of litigation. That is, you may have a very short period, or you may have a very long period under the current system depending on how much the parties litigate, which seems to me to be completely irrelevant to the values which you articulate.

Then if you look at the Board's previous statements concerning what that time period would be, you find, for example, Mod Interiors, 324 NLRB 164, a case decided in 1997, and it's then codified in the Casehandling Manual. And it says that the union must have the Excelsior list for a minimum of 10 days. So, that seems to be a statement of a prior Board that in terms of the union's ability to communicate with the entire workforce, which it doesn't have until it gets the Excelsior list, that 10 days is a sufficient period.

But I guess my question is how do you make that judgment? You certainly have to agree that it can't hinge on

the amount of litigation. That doesn't make any sense. So, how should we make that judgment? Should we look at that case? What should be our criteria?

MR. KRUPIN: I'd rather we be very practical. The union has had an opportunity to speak to employees. We shouldn't be under the misconception that the first time the process began is when a petition is filed. As you well know, they've had to have gotten a showing of interest. At least 30 percent of the employees in the unit or the appropriate unit that they determine should have decided that they wish to be represented by a union for purposes of engaging in bargaining for terms and conditions of employment. Most unions will tell you that they won't even file the petition until they've received cards signed by 70 percent of the employees for the possibility of attrition.

So, let's not start by assuming that the day that the activity occurs with the union is when their petition is filed. Now, I've heard before, and I'll tell you I've had many elections and many campaigns, most employers do not know what's happening. Unions don't broadcast the possibility of telling employers that there's a petition going around or cards going around, that there's a campaign for organizing. So, when the employer now hears about it, they basically are in the third quarter of the game. The union has already gained momentum. And, therefore, the issue of the Excelsior

list is not as important, frankly, as I think this Board is making it. The union knows the employees. They know the people in the unit. They know who signed cards. They're not just becoming unique to this process.

And so, what really happens is if it's going to be a fair process, when the employer now knows about it, and this is irrelevant to whether employers win or lose the election, or whether unions win or lose the election. It's a matter of having a fairness to the process of being able to know the information. The union has been on the field for a while. Now, the employer hears about it. Now, the employer gets on the field. And, frankly, 42 days, which is the present process, sometimes is not enough and sometimes is too much. But the very fact is, it's a reasonable time period for the parties to trade information, and it's not just the employer information. As you well know, there's misstatements of fact. There's issues that have to be reviewed. Look at our system now in our civil elections. We don't just have elections in 10 days. We have back and forth. We have to digest the information. That's why your proposal to reduce it to a 10-day period possibly is abhorrent to what we think is a democratic process.

MEMBER PEARCE: Well, I think your assumption that the reduction will --

MR. KRUPIN: I'm sorry? I couldn't hear.

MEMBER PEARCE: The reduction will be 10 days is speculative, because each case is going to produce different things. Certainly, if a case goes to hearing, an election is not going to be held in 10 days. Now, with regard to the part of the proposal that deals with the elimination of that 25-day period after the Decision and Direction of Election before an election can be held, when statistics and experience show that that period of time is wasted time. The Board does not grant stays of elections before it grants reviews in any more than one percent of the cases. Are you saying that the elimination of that is denying the employer a particular right when that process itself did not contemplate party campaigns at all when it was put into place?

MR. KRUPIN: Yes. I'll tell you why I believe it is an infringement on the right. Because once a Decision and Direction of Election is issued, whether by a Regional Director or through a stipulation to have an election in your 25-day period, that's when the terms of the election are set. That's when you know the rules of the game. That's when you know the field is 100 yards long, and you have 11 players on each side. Before that time, we don't know. The union doesn't know. The employer doesn't know what is the -- what are the rules of the game, the appropriateness of the unit, who can make certain statements during campaigns. Remember, employers do not want to commit unfair labor practices. I've

heard all of this discussion about coercion and intimidation. Employers don't want to commit unfair labor practices. In fact, there are dire consequences if you do.

So, we're talking about less than a month period once the rules are set to be able to go forward and to now determine whether or not this union should or should not represent the employees. Note, my issue here is not a determining factor of being partisan to try to say employers should be always positioned to win elections, or unions should be positioned to lose elections. But we have to have a sense of fairness to the process. And timing is most very important here. We're not saying -- I remember when I first started practicing 30 years ago, there was an election that took three months to happen. And, frankly, everybody, including the employer and the union and the employees, got tired of it. We wanted the process to be over. And but that was another time, another Board, another economy.

We're talking here less than a month. You know, I don't understand the reason for the rush to do this. In our society, it takes a period of time to get a driver's license, to get a marriage license, to basically to change a Verizon account. It takes time to do these things. We're asking for, in the first circumstance, a period of time, 42 days, in order to have an election. Very fair. I think it works well. We don't have to go through the statistics. This is

one of those situations where everything has been said but hasn't been said by everybody, where the numbers are known.

But they have a 25-day period. That gives time once the rules are set for both sides. It doesn't benefit either side. For both sides to now determine and express information to employees and determine whether or not --

MEMBER PEARCE: But where in the current regs is that contemplated? The current regs, when they talk about this 25 days, doesn’t say so it gives the parties enough time to play the fourth quarter, to have the opportunity to campaign with full knowledge of how the game is to be played. None of that is in the regs. The regs talk about a process that is set forth for particular reasons, reasons that we submit are not functional any longer. There's no need for that. There is some value to the parties not having to have protracted litigation. Don't you agree?

MR. KRUPIN: I don't think it's a matter of litigation. I think it's a matter of information. See, you and I may be looking at this differently. You may be looking at this as a litigation matter. I'm looking at a fairness matter for dissemination of information and free speech rights. I come from a position, and I represent my clients from a position, that more knowledge is better than less knowledge. Knowledge is fuel. Now, information is important. Information may not always satisfy or to be to my advantage. But yet, let's lay

out the cards. Let's lay out all of the information.

We're going through a presidential election process now. There's debate after debate. You could decide to listen to which side you want, but at least the information is there. Whether you want to listen to MSNBC or FOX or CNN, that's up to you. But the information is there. And to restrict that information is not the way we've built our democracy, the way we've operated under the Board.

And I know you've had the experience, probably as long as I have and maybe longer, 30 years of dealing with these rules. When you mention the issues, there are certain mores of how the process works. If there are things to be changed, and you tweak -- you have to tweak litigation, then let's tweak the litigation issues. Let's tweak the issues about litigation, of how to litigate cases and unfair labor practices. But that's when if an employer violates the law, then let the employer go through the process of dealing with unfair labor practices, but not on the basis of an election. An election an employer has not been -- an election the employees have not chosen, yet can take away the free right of an employee to understand from both sides. And that's what I believe your proposal does.

CHAIRMAN LIEBMAN: Anything further?

Thank you very much for taking the time to talk with us and answer the questions.

MR. KRUPIN: Thank you very much. I appreciate the opportunity.

CHAIRMAN LIEBMAN: Our next speaker will be David Madland and then Michael Avakian.

Good afternoon.

MR. MADLAND: Good afternoon. Thank you very much for your time. I appreciate it.

CHAIRMAN LIEBMAN: Thank you for being here.

MR. MADLAND: I'm David Madland. I'm the director of the American Worker Project at the Center for American Progress Action Fund. The American Worker Project conducts research to increase the wages, benefits, and security of American workers and promote their rights at work. The Center for American Progress Action Fund strongly supports the NLRB's proposed rules to reform an election process that far too often resembles Lucy pulling the football away from Charlie Brown just as he's about ready to kick it, where workers are left flat on their back with scheduled elections frequently delayed or canceled. This common sense proposal would reform an inconsistent election process, and it's a small but important step towards giving workers a fairer way to choose whether or not to join a union. As you all know, the proposed rule doesn't specify a timeline, a specific timeline, but rather recommends a number of changes that are geared towards ending delay tactics and to create a more

level playing field.

In short, the rules' aim, and what we most strongly support, is that when workers petition for an election, they should get an election. As you all know, and there's been numbers sort of bandied about, many elections already occur relatively smoothly, median election, you know, half of all elections occurring within 38 days according to your data in 2010.

But as we also all know, long delays can and do happen in large part because the current process allows for manipulation of the timing of elections, and these delays at their extreme can cause elections to never happen. There's no limit on employers' or unions' ability to demand a pre-election hearing on virtually or most any issue, eligibility of employees to vote, scope of the bargaining unit, et cetera. All of these can be used to delay an election, as we've heard from many, many people here. We've also heard evidence that they do delay. Nearly one in seven elections occurred over 51 days after workers submitted a petition in 2009. Seven percent over 71 days, and three percent occurred after 151 days. This is according to research presented by Dorian Warren and Kate Bronfenbrenner.

Many elections don't have hearings, but when a hearing, a pre-election hearing is demanded, elections are delayed by 124 days on average, according to research from U.C. Berkley.

Now, the previous speaker was just talking about elections and the process and fairness. Imagine if political parties could manipulate the timing of presidential elections the same way that the NLRB process can be manipulated. We would think it's crazy. Part of what makes the American democracy work is that we know we can count on, for example, voting for President, you know, every four years the first Tuesday in November.

And perhaps even more damning of the current system is that, according to a study by John-Paul Ferguson of Stanford Business School, elections frequently don't happen. Thirty-five percent of the time that workers file a petition, the election does not happen, with workers withdrawing their petition, sometimes after very, very long delays when they were trying to set up an election and just get frustrated and give up.

Now, we've also heard that by some people claiming that this standardized process will prevent employers from communicating with their workers. We've also heard, and we're going to hear more evidence that the NLRB election process gives ample opportunity. It's got multiple steps and stages that give both employers and unions an opportunity to communicate. You know, research demonstrates conclusively that employers already communicate with their workers about unions well before elections happen. They're incorporated

into new hire orientations, for example. And even when employers don't start their campaigns directly when they first hire someone, they often start well before the filing of a petition.

Professors Bronfenbrenner and Warren found that much of this communication even crosses the line into illegal activity. You know, half of all serious violations, such as illegal harassment and coercion, occur before the petition is filed. That, I think, indicates just how modest this proposal really is. It doesn't address stiffening penalties or otherwise limit illegal action against workers. It just standardizes the election process and ensures that some of the obstacles that prevent workers from exercising their right to vote are removed. All workers deserve a fair and consistent process that enables them to make their own choice about whether to form a union. The NLRB's proposed rule is a modest but important step to make that election fairer. And for that reason, we strongly support it. Thank you for your consideration. I appreciate it.

CHAIRMAN LIEBMAN: Thank you for coming here and sharing your thoughts with us.

Anybody have any questions?

Thank you very much.

Mr. Avakian, good afternoon.

MR. AVAKIAN: Good afternoon, Chairman Liebman. Members

of the Board, thank you for the opportunity to speak to you today about some very important issues that are before the country now. I represent the Center on National Labor Policy in this proceeding, and it is a national nonprofit legal foundation that is concerned with protecting the individual rights of small employers, employees, and consumers. Founded in 1975, the Center has a long and significant history of experience under the National Labor Relations Act from defending employees in litigation, upholding employees' Section 7 rights, enforcing Section 7 rights, protecting employer rights, and presenting the public interests to the courts and Board.

Through these years, the Center has supported the Board and opposed it. Because it has represented individual employees and small employers, it brings a unique experience that the Board should consider. These points and others will be presented in written comments next month; however, today I would address three different items. One, the impact of an accelerated election procedure, due process, and the need for all parties to understand the ramification of the petition process and the blocking charge rule.

First, within the congressional declaration or policy of the Act, there's nothing in there that specifically says speed and accelerated process is -- to get an election accomplished as soon as possible is a policy of the United

States. Rather, it's one that establishes an appropriate procedure and an opportunity for employees to understand the process before them and make the important choice under Section 7, which is the right to either refrain or engage in collective activities.

As much as the Board and the country is excited about the internet and the access of persons and people and employees and workers to e-mail, it overlooks the fact that many employees, especially smaller ones in this country, still have no access to the internet or use it in their business plan or in their business process. You can take the construction industry for an example, and I'll make a point about that in a moment. But the availability of smart phones, computer programs, even to submit forms and written statements to the Board by electronic process is not something that small employers with two or three people that are electrical contractors and/or plumbers, or you can name the small business, use in their daily business.

In many service and construction industries, employees are prohibited from using e-mail during their working time for both productivity and safety reasons. Productivity reasons for the fact that e-mail is entirely personal in nature and distracts workers from performing their paid duties. Safety because workers can be injured in the distraction by communicating and texting while on the job,

especially in the construction industry. OSHA might even forbid it on certain type of machinery.

And most important, because small employers don't even use or need these programs to communicate with their employees. They see them at the beginning of the day, maybe the end of the day, or on payday, and that's when they're going to see their people, and they're going to talk to them. It's not an instantaneous communication on a daily basis on what it is that they do and their labor or employment policies.

This leads to what I call a due process objection to mandating that a party submit a statement of position on the Board's jurisdiction, unit appropriateness, proposed unit exclusions, and any bars to the election time, date, and place within seven days of the union's filing a petition. Of course, that date on filing a petition is one that's utmost opportunistic for the labor organization or the representative that files that petition.

And then, of course, the failure to submit an objection, which one might have had, within the seven day period precludes a party under the current proposed rule from ever stating it again within litigation. And that suggestion is modeled under Rule 26 of the Federal Rules of Civil Procedure. But, usually, the mandated disclosures that are coming out of a federal court proceeding won't happen any

earlier than 20 days when an answered is required, and usually it's not required for months under the local rules or, I believe, the 26(f) case-management plan that most federal courts utilize. But the Board's procedures don't provide for that pre-hearing type of mechanism.

However, my experience has been that most of these hearings happen within two weeks. Fourteen days is a general time that the Regional Directors establish the hearing upon the filing of a petition. In that period of time, the Board agent or the Field Examiner, whoever may be handling the case for the Region, contacts the employer and the labor organization and asks them for their position on time, date, and place for the election, who might be in, who might be out of the unit, you know, a description of the unit. And that's generally -- that's a non-adversarial procedure. And in my experience, and I've represented small employers and petitioners in elections, those processes usually get to a stipulation in the election, or you're going to have an issue on the appropriateness of the unit or the supervisory status.

My time is getting short. I want to talk about the impact on small employers. Although the Regulatory Flexibility Act statement of the Board says the impact is insubstantial, we do know from the Board's own statistics in the proposed rule that the median number of employees which the Board has had in the elections is about 25 people. So,

we're talking about small employers, and you're accomplishing those elections within approximately mostly in 37 days. So, they're happening actually quickly.

What happens in that timeframe? Once the election positions are established, which is usually through stipulation -- that's what the Board's rules and the statistics show -- the election goes forward. But the employer, especially the small one, is now on his toes and looking at what type of information it has or needs to present its position because it may never have formulated one, never considered an election petition might even come to it, because most employers are not unionized in the country. I've had to represent small employers as far away as San Angelo, Texas from the Washington area who can't find a labor lawyer within 500 miles of their location because there simply aren't -- people don't know the extent of the Act. Now, within 7 or 14 days they can find somebody and make calls, and they'll get representation. So, that's the good -- that's kind of the good news of the ability of the 14 days to allow for somebody to get a representative, especially in the specialized area of labor relations.

The Act, as the Supreme Court describes it in Linn v. Plant Guard Workers, talks about having a robust, even a caustic debate. But that is what the policy of the United States is to give the employees the opportunity to get the

free flow of ideas, full information to make the informed choice, and other speakers today have talked about the need for that happening.

If I could just take a minute, I'll talk about the blocking charge?

CHAIRMAN LIEBMAN: Please.

MR. AVAKIAN: I've had a lot of experience in the blocking charge area, especially what could be when that's really going to come out is representing decertification petitioners. And in that particular case, one can from the get-go know that some sort of blocking charge is going to be thrown at the case or at the employer, just to establish a problem and to hold up the election. I think part of the Board's suggestion that most of this activity which would be considered unfair labor practices or objections to the election should be held in post-election procedures.

There are remedies that the Board has for unfair labor practices, and it can provide those remedies in post-election activities and handle those. In fact, after an election, it may be that the ULP might get withdrawn. If the union prevails, there's no -- all the objection did was probably delay the election by a few days. But if it prevails, it can withdraw the election and the parties move on. Otherwise, the blocking charge does provide a paternalistic type of view of employees in this country which I think is outmoded. And

there's some studies by Mr. Gatman and Saranoff back in the '60s and '70s which talk about the voter in an NLRB election is no different than the voter in a federal election. It is the same type of person, and in their studies they show that in about 80 percent of the cases, and since nobody is moved by any aggressive action in the election process.

Thank you for your time, and I'll be submitting more further comments later.

CHAIRMAN LIEBMAN: Thank you for your comments.

Are there questions?

MEMBER BECKER: I've just got a question about your first point. Just to isolate what you see as a critical differences between what's been proposed and the current practice, so you describe the current practice, that the norm being a hearing begins 14 days after petition, and there's an informal inquiry usually by the hearing officer into what's your position on this; what's your position on that.

The proposal is that there be a norm of seven days, absent special circumstances, but that informal process is formalized right up front, so that as soon as a petition is filed, it's also served. And with it is served a description of the process and a written document which explains exactly what you're going to have to take positions on. So, as opposed to getting called by the hearing officer informally later, you know right away what you may have to take a

position on if you so choose.

What do you see as the nub of the differences, given that seven days is not rigid? Special circumstances can extend that, a variety of special circumstances. What do you see as the nub of the difference between those two?

MR. AVAKIAN: Well, it depends on how broad special circumstances would be. But I would say that that might even swallow the entire rule because the small employer, who I've had the most experience with, doesn't have an HR staff. It doesn't have -- it may have a bookkeeper, but that's about it.

It looks at the pile of papers that comes from the Regional Office. It's going to be a document, come in a letter about 10 or 11 pages, and it's going to have a copy of the petition, a two-page cover letter, who is the Board agent that's going to handle it, a description of the Board's procedures, all single spaced, and they can't make -- they have no experience with the Federal system, with the Board's procedures. And they need to have somebody explain it. One, not only so that they can decide what to do, but secondly, how to do it and not commit unfair labor practices. Because as far as they know, they've been running their companies; they can tell their employees what to do perhaps. Nothing nefarious about that. But there are things in terms of the promises and the prospects of why vote for a union or not

which take time to explain to an individual of a small employer. And if he has any foreman or supervisors, they need to be or have this information communicated to them.

So, there's this built-in -- one is a communication problem that the organization needs to deal with, and then come to a position to provide to the Board on how this election process should go forward. And it's a process that works directly all the way up to the date of the proposed hearing. And with the help of the hearing officer or the specialized agent, these generally can be worked out between the union and the employer to get to that point. But if you fix the employer or both parties at seven days with irretrievable rights, then you have a problem. I mean, they have a problem even to do it.

I'm sure what would happen is somebody will develop a list, a 1,000-page list of objections to the election and just post them, because otherwise, they're going to waive all their rights. It's like the back end of a complaint. When one files an answer, you layer up all of your statutory defenses and whatever you may have, equitable defenses. You're going to have to do that up front. I think that the process of the Board is much more collegial between all the parties if it's done as collegial as possible until you get to the hearing. And then it's -- the hearings, when they do occur, as the speakers and I mentioned are we'll call them

mundane subjects, but they're the subjects that make a difference in election. For a small employer, knowing and thinking that his key supervisor is now a member of the bargaining unit is a big issue for him, and there's going to be disagreements. So, that's why the time is important. It gives the small employer the opportunity to understand what his responsibilities are, get them explained and be able to take a position and work with the Board and union to figure out to do an election. Seven days, and he's locked into a position. I don't think that's a policy of the Board or should be. Thank you.

CHAIRMAN LIEBMAN: Thank you.

Anything further?

Thank you, Mr. Avakian.

Our next speaker will be Peter Leff and then David Kadela.

Welcome. Good afternoon.

MR. LEFF: Good afternoon. My name is Peter Leff of O'Donnell, Schwartz, and Anderson, P.C., general counsel for the Graphic Communications Conference of the International Brotherhood of Teamsters. We represent over 60,000 employees in the printing and publishing industry in America, and we are part of the International Brotherhood of Teamsters which represents 1.4 million hard working men and women across the United States, Canada, and Puerto Rico.

The Graphic Communications Conference of the International Brotherhood of Teamsters commends the members of the National Labor Relations Board for bringing the National Labor Relations Act into the 21st century and for proposing reasonable, predictable, and uniform rules for the conduct of representation elections. It is undeniable that the current system fosters uncertainty and chaos. The parties are left in the dark as to what issues will be raised at a pre-election hearing, when those issues will be resolved, and most importantly, when an election will be held to determine the desires of employees for union representation.

It is in the interest of both unions and employers to know the date of an election as soon as possible. The Board's attempt to take the uncertainty of scheduling a date for a representation election out of the equation is laudable and will provide unions, employers, and employees with much needed guidance and predictability as to what will occur from the filing of a petition for an election to the counting of the ballots.

As recognized by the Board, the biggest roadblock to predictability in the scheduling of a date for a representation election is the unnecessary and often unwarranted pre-election litigation that bogs down the system and prevents the scheduling of an election. Once a petition

has been filed, most if not all eligibility and unit inclusion disputes can be resolved after the unit employees have cast their ballots. The Board's proposed rule deferring the resolution of all disputes concerning the eligibility or inclusion of individuals who constitute less than 20 percent of the proposed unit until after the ballots have been cast is an important step in the right direction to prevent disputes from delaying an election. Nevertheless, the 20 percent rule does not go far enough. Because delaying elections with pre-election litigation injects uncertainty and delay into the process, once a legitimate question concerning representation has been presented, no issues involving eligibility to vote or inclusion in the unit should be litigated before the election, regardless of the percentage of employees involved.

Let me give you an example from my experience. On November 18, 2003, Local 527S of the Graphic Communications International Union filed a petition to represent the 69 employees who bagged and delivered the Atlanta Journal-Constitution newspaper at the employer's Cumming, Georgia facility.

The employer challenged the appropriateness of the single-facility unit, asserting that the only appropriate unit was all 3,800 plus employees in the Atlanta Journal-Constitution circulation department located in 70 facilities,

covering an area of 58,000 square miles. Despite the Board's single-facility presumption and the fact that the Board had never -- has never denied the appropriateness of a single-facility unit in favor of an integrated unit covering so many facilities over such a vast area of land, a six-day hearing was conducted over nonconsecutive days.

On January 23rd, 2004, the Regional Director directed an election at the single-facility Cumming location. And, finally, on February 6th, 2004, a representation election was scheduled for February 17th, 2004, 91 days after the petition had been filed. There was no reason to delay this election while we litigated the appropriateness of the petition for a single-facility unit. There was no compelling reason why the appropriateness of the petition for the unit could not be adjudicated after the election. The ballots at the employer's Cumming, Georgia facility could have been impounded while the parties litigated the appropriateness of the unit. If the employer's challenge was denied, the ballots would have been opened and counted. If the challenge was upheld, the union would have walked away because it has nowhere near the required 30 percent of petition signatures from all 3,800 circulation department employees.

There would have been no harm in deferring resolution of this unit dispute until after the election. However, as a result of pre-election litigation, almost three months of

uncertainty elapsed before the election was scheduled. Thus, the 20 percent rule is a good start but does not go far enough to avoid delay over issues that could be deferred until after the election. I fear that employers will take advantage of the loophole inherent in the 20 percent rule by arguing, legitimately or otherwise, that additional employees that compromise more than 20 percent of the petitioned for unit should be included in the petitioned-for unit. An employer should not be able to delay an election merely by asserting that employees of other facilities and other departments should be included in the petitioned-for unit. These eligibility and inclusion issues can and should be decided after the ballots have been cast.

Therefore, I propose that the Board drop the proposed requirement that eligibility or inclusion disputes be deferred only if they involve less than 20 percent of the petitioned for unit. Instead, I suggest that the Board revise its proposal so that once a question concerning representation is presented, all disputes concerning eligibility or inclusion of the individuals into the unit be deferred until after the election has occurred, regardless of the impact on the unit.

Can I make one more comment, please?

CHAIRMAN LIEBMAN: Yes.

MR. LEFF: Finally, none of this has anything to do with

the employer's free speech. These rules in no way limit an employer's free speech or its right to challenge the appropriateness of a petition. At the present time, if no issues are raised at the pre-election hearing and the parties agree to a stipulated election agreement, the election is set within a certain timeframe. Nobody has ever claimed that this timeframe is so short that it deprives an employer of its free speech rights.

All that these proposed rules seek is to ensure that all petitions are scheduled for an election within a reasonable timeframe. By instituting these rules, employers, unions, and employees will know from the beginning when a hearing will occur and when an election will be held. All issues challenging the petition will be dealt with in due course after the balloting. The predictability, uniformity, and certainties of these rules will benefit everyone involved in these elections. Thank you.

CHAIRMAN LIEBMAN: Thank you, Mr. Leff.

Questions?

MEMBER BECKER: I've got a question about your example, a statutory question and then a practical question. The statutory question is it seems to me that there is at least a statutory argument that we could not do what you've proposed. That is, the statute says that if a petition is filed, and there's probable cause to believe that there's a question

concerning representation, we need to have a hearing to determine if there is a question concerning representation. And that suggests that you have to determine that there's a question in an appropriate unit. I take it the employer's argument in your case was a single facility is not an appropriate unit?

MR. LEFF: That's correct.

MEMBER BECKER: I wonder if there's a practical solution, which is the one proposed, and whether it would have worked in your scenario. That is, you have a presumptively appropriate unit. The rules propose that if a party argues that presumptively appropriate unit is not appropriate, that they have to make an offer or proof. So, prior to your six nonconsecutive days of hearing under the proposal, you have an offer of proof, and the hearing officer would say this is a single-facility, presumptively appropriate unit. You said this and that, but even if you could prove it, that's not going to be sufficient. So, we're going to close the hearing. Would that have been a practical solution in your situation?

MR. LEFF: If it could go that way. I mean, again, our main goal is certainty in the election and not allowing anything to delay the date for election. I think that the employers may argue look, we want a full and fair hearing on that, and I don't have a problem with that, so long as it

doesn't delay the election date. If you want to do it after, fine, and the union takes a risk by, you know, petitioning only for that small unit. If the employer turns out to be right, there's no, no representation rights. You know, if there are issues that the hearing officer can decide beforehand that are very clear cut, if the union tries to put a general manager into the unit, and that person is so clearly a supervisor, the hearing officer at a pre-election hearing can summarily deny the request. I don't have a problem with that, so long as we don't have to have a full-blown hearing and a 25- to 30-day wait period which pushes off even the scheduling if not the date of the election.

So, I don't -- I leave it to you all to determine the best way to resolve these disputes, whether some can be resolved before, or if they all have to be resolved after. What I think the goal is is the setting of the election date as early as possible, whatever timeframe is adequate to allow employers and unions to give their free speech, and then doing, except in the most exceptional circumstances, not messing with that election date.

CHAIRMAN LIEBMAN: Anything further?

Thank you very much.

MR. LEFF: Thank you.

CHAIRMAN LIEBMAN: Appreciate it.

Mr. Kadela, and then we'll finish up with Professor

Bronfenbrenner.

MR. KADELA: Chairman Liebman and Members of the Board, good afternoon. My name is David Kadela. I'm a shareholder in the Columbus, Ohio office of Littler Mendelson. And it's my privilege to appear before you today on behalf of the firm to share with you our views on the proposed amendments. With over 800 attorneys, Littler is the largest firm in the country representing management exclusively in labor and employment matters. We have represented countless clients from Fortune 100 companies to family-owned enterprises in representation matters in every Region of the Board.

Today, I cannot capture in my comments the views of all of my colleagues regarding these proposed changes. Collectively, however, we do share the view that the changes would, first, unduly and severely cut into the time that employers have to communicate with employees during an election campaign, when their right to do that is at its greatest and most important. And, secondly, that it would establish unnecessary procedural requirements that would stack the deck against and increase the burdens upon employers.

We believe that in the main, the proposed changes are unnecessary and would have so sweeping an effect on the processing of elections that if they are to be considered, it should only be by Congress, like the Employee Free Choice

Act, and going back much further, like the Labor Reform Act of 1977, which also included a provision that did not get through Congress, of course, providing for quickie elections.

With this background, I'd like to turn now to some of the specific concerns, and given that my time is brief, I realize I may not get through all of them. So, I'm going to start with the expedited election process. It's been reported that the proposed changes would result in elections between 10 and 21 days compared to the 38-day median that exists today. You all have heard many on the union side champion that change, arguing that the action is necessary to curb the opportunities that employers have to coerce and intimidate employees in election campaigns. The facts, at least in my experience and my colleagues' experience and, I think, virtually everyone you've heard from here on the management side, don't bear that argument out.

I'm sure that that dispute is not going to be resolved during the course of these proceedings, but I would submit to you that the reality is that unions can only pin a very small number of their losses and can only pin the delay upon the conduct of very few employers. In our experience, the vast majority of employers are vigilant and steadfast in complying with the law during organizing drives. Do some individual supervisors slip up and commit minor violations? That happens from time to time. But primarily, my experience is

that employers are vigilant in complying with the law and that their focus is on communicating accurate, factual information to employees on what union representation would mean.

In our view, the communication of that measure in large measure explains the poor showing by unions in organizing new workers. As we see it, it's no wonder that the union side would throw their support behind changes that would serve to muzzle employers' exercise of their rights under Section 8(c). The Board, however, has an obligation to ensure that those rights are protected.

In its notice, the Board said that the purpose of the proposed changes was to streamline and modernize representation procedures to foster the objective of resolving questions of representation quickly, fairly, and accurately. That's a lofty goal, but the changes, in fact, really only go to the speed of the process. While promoting speed, they would undermine employer free speech rights and put at risk the fairness and accuracy of elections. The Act mandates that the perceived need for speed must yield to these other considerations. Fairness and accuracy are of paramount importance. Individually and collectively, they trump speed as a factor.

To ensure that they are conducted fairly and that they accurately reflect employee sentiment, elections necessarily

cannot be timed so that employees mainly, if not exclusively, hear only the union's message. Again, the debate between our employer's bad actors and are they responsible for intimidating and coercing employees, is that a cause of the poor showing by unions? You know, is that the issue, or is the experience, as others have said, that employers typically do not learn about a campaign until the election petition is filed? You've heard totally different polar views on all of these subjects during the course of this proceeding, that we don't think that you'll be able to resolve.

But there are certain things that you can say. And Section 8(c) is interpreted as the Supreme Court has said Congress intended, employers must be afforded ample time to communicate their views on unionization to their employees. Ten to 21 days doesn't cut it. Denial of a fair opportunity to exercise a right is a denial of the right. On this particular topic, I'd like to address one other thing too. It has been said, but it hasn't necessarily -- it's been linked to Section 7 but not otherwise, that employees must be afforded sufficient time to consider the views of both management and labor and to study the issues on their own before they vote.

Besides Section 7, that right can be gleaned from Section 1 of the Act, which provides that a central purpose of the Act, really one of two, is to protect the exercise by

workers of full freedom of association, self-organization, and designation of representatives of their own choosing. Full freedom means freedom to consider all views and opinions. The current system provides employees with such freedom. If the amount of time employees have to consider information is cut by as much as or more than half, as the proposed amendments would do, it will create a very real risk that when employees enter the voting booth, they will not have been provided with all of the information they need to cast an informed ballot. Speed for the sake of speed doesn't warrant taking that risk.

I see the red light is flashing already, but --

CHAIRMAN LIEBMAN: Well, let me see if my colleagues have any questions.

MEMBER HAYES: I do. I know that you've been involved with the American Bar Association with the Bar Association's Practice and Procedure Committee. My question is that when the Board typically contemplates changing even minor rules or regulations for practitioners before the Board, is that typically something that is discussed with the Practice and Procedure Committee before the rule changes are proposed?

MR. KADELA: There have been occasions where there have been initiatives that have been presented to us as a committee. Then we as a committee meet internally. And the way those issues come out of our committee would only be if

the management side and the union side reached a consensus. And then in that event, we would report our consensus view to the Board. Otherwise, certainly individual members of the committee are free to express their own views to the Board.

MEMBER HAYES: Is this proposal one that perhaps would have benefited from a referral to your committee to at least elicit the views of your members before a rule was proposed?

MR. KADELA: I certainly think that it would have. Given the divergent views that we've heard on this subject, it's a virtual certainty that we would not have reached a consensus. But it may well have resulted in our members forming views and information that individually they could have shared with the Board by providing comment.

MEMBER HAYES: And just finally, wouldn't the activity of soliciting the views of labor and management practitioners in that forum have been in accord with President Obama's Executive Order with respect to rulemaking by both Federal agencies and independent boards?

MR. KADELA: Whether or not it would have complied with the letter, it certainly would have complied with the spirit.

MEMBER HAYES: Thank you.

CHAIRMAN LIEBMAN: I wanted to follow up. I actually was going to ask some similar questions, particularly because of your comment about -- I think you used the phrase polar views. I think it's been obvious to most of us here over the

last few days the wide divergence of viewpoints, and I know it's been suggested that we should have conferred more, say with the Practice and Procedure Committee. And you just said you think the likelihood of having reached a consensus wasn't great. But let me ask you another question. Do you know whether had we conferred with you on this, we would have been in violation of the Federal Advisory Committee Act?

MR. KADELA: I do not know the answer to that off hand.

CHAIRMAN LIEBMAN: Yes, because I think we would have. That's number one. But on many occasions, issues are brought too. For example, I think the possibility of electronic voting, there was a presentation and a lively discussion of that; is that not correct?

MR. KADELA: No question about it. But I would say with respect to the advisory committee issue, our committee is not an advisory committee. And so, that would have -- the presentation to them would have presented us with -- the first challenge we would have met in a meeting had we been presented with these proposed changes would have been to say whether we can touch them as a committee because it would -- we would be serving in an advisory capacity. And it may be very likely that we would have never gotten past that hurdle. That said, we certainly as a committee appreciate it on every occasion that the Board comes to us with information and solicits our views. Whether or not we can move forward and

provide the feedback for which the Board is looking is another matter. It's a very helpful process nonetheless.

CHAIRMAN LIEBMAN: We did have a discussion at one of the meetings about Professor Estreicher's article and his suggestion for reforming the election process and other suggestions, didn't we?

MR. KADELA: Yes.

CHAIRMAN LIEBMAN: We had a long, quite lively discussion of his proposals; am I not correct?

MR. KADELA: That is true.

CHAIRMAN LIEBMAN: So, in fact, we have on numerous occasions come and discussed issues that are relevant to this proposal; isn't that right?

MR. KADELA: Well, I would say that the context in which the issues have been discussed will vary from a presentation by a speaker that is known to be that speaker's own views when people go back and forth knowing that our objective is not to reach a consensus on an issue or provide advice on an issue, but to get the issues on the table and express our views and have a free exchange. To what end, it's difficult to say, but it's no different than any other type of seminar situation in my view.

CHAIRMAN LIEBMAN: I guess my point is that it may not have been presented as “this is the Board's proposal to change its rules,” but many of the substantive areas have

been discussed quite freely at a variety of practice and procedure committee meetings?

MR. KADELA: That is very true.

CHAIRMAN LIEBMAN: Thank you.

Anything else?

Thank you for coming and giving us your input.

MR. KADELA: Thank you very much again. I appreciate the opportunity.

CHAIRMAN LIEBMAN: And our last speaker of the day is Professor Bronfenbrenner.

PROF. BRONFENBRENNER: Thank you, Chairman Liebman, Members Becker, Hayes, and Pearce, for giving me the privilege of testifying here today and for the fair and dignified manner in which you've conducted this hearing. My name is Kate Bronfenbrenner. I'm from Cornell University where I am the Director of Labor Education Research. I've spent the last 23 years engaged in scholarly research in the area of labor and management behavior in certification elections in the private and public sector.

For the last two years -- for the last two days, we've heard many voices, some coming from the employer's side who are outraged that you would tamper with a system that has served them so well for so many decades. Unions are winning, they say, in NLRB elections. But as the workers who testified here made clear, those numbers only include the

fewer than 50,000 workers a year who manage to survive the gauntlets of threats, harassment, intimidation, coercion, retaliation they have to endure first to even get to a petition, much less get to an election or win.

We have heard multiple employer representatives state that employers first learn of campaigns after the petition is filed, and if the campaign process were streamlined, they wouldn't have enough time to prepare for their campaign and communicate with their employees. And this lack of communication would have an impact on election turnout that would bias in favor of unions.

Last, they repeatedly mentioned that the streamlining proposals, such as giving the union the e-mail addresses, are an unprecedented invasion of privacy. But my past research along with the NLRB's own documents as summarized in the study I conducted with my co-author Dorian Warren say otherwise.

As Professor Warren explained earlier, before our research, no one knew exactly when employer campaigns began because they were using the only variable at their disposal, the date unfair labor practices were filed. But by going through the painstaking process of searching through FOIA NLRB documents for each unfair labor practice allegation in our sample, and since I've personally reviewed every single case and document, I can assure you how painstaking that

research was.

We were able to develop and add a new variable to our already unique dataset of ULP allegations occurred. This allowed us to examine the relationship between petition date, election date, and when the most serious allegations of employer opposition actually occurred during the representation campaign. It also allowed me to, in answer to your earlier question, to make sure that the allegations were indeed election-related allegations and were tied to the specific election that occurred.

Our data not only show that nearly half of all serious allegations occur before the petition, but the percentage is the same for serious ULP allegations won. And that many occur many, many months before the petition and for most continue straight up through the elections and beyond. Thus, contrary to employer testimony, for a significant number of employers, opposition starts long before the filing of the petition and continues on after the petition, while workers wait for the election to be certified and persist still after that.

This mission is accomplished through multiple tactics at the employer's disposal. They're the building blocks of employer campaigns that I've seen in my research for the last 20 years. These include threats, interrogations, surveillance, fear, coercion, violence, retaliation,

harassment for union activity, promises and bribes, and interference with the election process itself.

It is notable that threats, interrogation, and surveillance are especially concentrated before the petition is filed. For example, with 72 percent of surveillance allegations occurring before the petition filed, it is difficult to take employer concerns about privacy seriously. As for their ability to communicate with employees, they have a host of legal means of communicating with employees, such as captive audience meeting, supervisor one-on-ones, letters, leaflets, videos, and e-mails that our data show they use early in campaigns. Ninety percent of campaigns that did weekly supervisor meetings, 67 percent that did 5 or more captive audience meetings, and 57 percent that did 5 or more letters had at least one serious allegation occur 150 days before the election took place. If they can communicate that well before the petition, they should have no trouble communicating afterwards.

Nor will lessening the delay impact turnout. Turnout is averaged above 85 percent in NLRB elections regardless of delay because both employers and unions know that every vote matters, and they work very hard to get their voters to turn out.

But the finding that is most relevant to the issue of timing of elections is this. Employer opposition to unions

is constant and cumulative. I stand here at the close of the hearing process to reassure you that the streamlining of the election process matters. Timing matters. Not in the way that scholars have usually plugged it into longitudinal elections, longitudinal equations with outcomes that dependent variable with very mixed results. But the time between when the employer campaign starts, when the petition is filed, and when the election is held matters very much to whether workers are able to withstand the intense opposition that the majority of employers routinely engage in today, long enough to file a petition, stay through the election, through the challenges, and then certification.

The proposed rule change will be a step closer in ending the process of having workers winnowed out at each stage for no other reason than delay and the employer opposition to continue one day longer than the workers could bear. Thank you for your patience.

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

Are there questions?

MEMBER BECKER: I just want to get a sense of the universe. So, the numbers that you were giving us today and that your co-author gave us were from the last year of your study; is that correct? So, for example, a 72 percent surveillance finding is pre-petition?

PROF. BRONFENBRENNER: Yes.

MEMBER BECKER: And how many elections were studied in that last year?

PROF. BRONFENBRENNER: In the last year, there were 154 elections and 236 ULP allegations out of our full sample of 1,000 elections, of which there were 49 percent had ULP allegations.

MEMBER BECKER: And then the 50 percent of serious allegations pre-petition and 72 percent of surveillance pre-petition, those percentages are when the conduct occurred, which eventually led to a finding, or when the conduct occurred which eventually led to a charge?

PROF. BRONFENBRENNER: Those are of -- those are 47 percent of -- well, it's both. Forty-seven percent of where charges were -- 47 percent of charges that were filed, but we also found 47 percent of charges that were won either with a settlement or a Board or court win.

MEMBER BECKER: Thank you.

CHAIRMAN LIEBMAN: Anything else?

Well, we thank you very much for sharing your research with us.

PROF. BRONFENBRENNER: Thank you.

CHAIRMAN LIEBMAN: And that, I suppose, concludes our second day. We thank all of you who have stayed with us until the end for being here. We thank all of the speakers

for your thoughtful contributions. As I said at the beginning, we take this meeting very seriously. We have open minds. It has been most interesting, I think, for all of us to hear the diversity of viewpoint, the diversity of experience. I think you have made this rulemaking much richer.

We look forward to seeing all of your written comments. As I said at the beginning, my colleagues, once they read any written testimony that you may submit with us today, may have some further follow-up questions. We'll endeavor to have those to you if we have any within a week. You have until August 27 to file any responses. But we do thank you very, very much for being here with us.

Do my colleagues have any closing comments? No, well then, I guess we are adjourned. And, again, thank you for being with us. I know a lot of you came a long way.

(Whereupon, at 3:42 p.m., the public hearing in the above-entitled matter was concluded.)

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 19, 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