American Council on Education
Leadership and Advocacy

Office of the President

August 22, 2011

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

RE: 3142-AA08
Comments Submitted in Response to National Labor Relations Board Notice of Proposed Rulemaking (76 FR 36812) to Amend Representation-Case Procedures

Dear Mr. Heltzer:

On behalf of American Council on Education ("ACE") and the other higher education associations identified below, I submit the following comments in response to the National Labor Relations Board's ("NLRB" or "Board") Notice of Proposed Rulemaking Regarding Representation-Case Procedures ("proposed rule" or "NPRM"). Because there is no compelling reason for the proposed rule and because it will lead to lengthier elections and adversely affect the substantive and procedural rights of the involved parties, the Board should withdraw the NPRM.

I. STATEMENT OF INTEREST

A. Overview

Founded in 1918, ACE is the major coordinating body for all the nation's higher education institutions, representing more than 1,600 college and university presidents, and more than 200 related associations, nationwide. It provides leadership on key higher education issues and influences public policy through advocacy.

B. Higher Education's Interests in Commenting on the NPRM

While we appreciate the Board's efforts to reevaluate and streamline its representation-case procedures, aspects of the proposed rule will result in a lengthier process which is overly burdensome for employers, specifically educational institutions. Due to their decentralized structure and the great variety of schools and programs, colleges and universities face unique

challenges as employers, in particular with regard to bargaining unit determination issues and the identification and collection of data related to employees. Furthermore, although the NPRM purports to streamline representation-case procedures, several provisions will likely result in a lengthier, more complicated, and more contentious process. Such contentiousness is disruptive to academic institutions due to the unique intermingling of college and university "customers" and employees that occurs on campus together with the nature of the campus environment.

II. COMMENTS ON THE PROPOSED REGULATION

The NPRM proposes to modify 29 C.F.R. §§ 102.60-102.114.[1] The NLRB has a statutory responsibility to evaluate its practices and procedures to ensure that they continue to serve the purposes of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, as amended ("NLRA" or "Act") and to rectify legitimate problems with the administration of the Act. However, in carrying out this responsibility, the NLRB should not change existing rules in the absence of a compelling justification, especially in light of the evidence that the NLRB currently meets or exceeds its time targets for representation elections and otherwise manages the process efficiently. According to the NLRB, the primary purpose of the proposed amendments is to "gain the efficiency and savings that would result from the streamlining of its procedures." (76 Fed. Reg. 36829). Although some of the proposed revisions are clearly designed to capitalize on technological advancements in the workplace and at the Board, which we understand and generally support, others may have the unfortunate effect of curtailing the scope of hearings and limiting the availability of review by the full NLRB. Further, many of the proposed modifications may weaken the procedural and due process rights of employers and the rights of employees to hear the employer's position in representation elections.

More specifically, the proposed regulations would likely convert representation cases from investigatory to adversarial proceedings, with the Board abdicating many of its important investigatory functions in favor of a quasi-judicial role. Many of the proposed amendments would place substantial burdens on non-petitioning parties, including employers; limit the ability of employers to exercise their statutorily protected right to communicate with their employees regarding union issues; erode due process rights; stifle the parties' ability to create a necessary hearing record; and reduce opportunities for meaningful review on appeal. In addition, the proposed amendments authorizing a Regional Director to direct an election without first resolving disputes regarding the appropriateness of a petitioned-for unit and /or unit placement issues could create confusion, adversely impact free speech rights of employers and other interested parties, and may result in increased unfair labor practice litigation. Absent any

[1] The NPRM also proposes to remove and reserve 29 C.F.R. §§ 101.17-101.30, 103.20 and to merge certain subject matter set forth in those sections into the revised 29 C.F.R. §§ 102.60-102.114. We express no position on those items.

compelling need to reduce the length of representation cases, a rule with such an impact could be found by a court to be arbitrary and capricious, and therefore unlawful.[2]

In its background comments to the NPRM, the NLRB notes that "the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." *NLRB v. A.J. Tower Co*., 329 U.S. 324, 330–31 (1946). We agree completely, but we believe that the current representation-case procedures achieve that end.

A. There Is No Compelling Need for Revisions to Existing Representation-Case Procedures.

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

1. The NLRB has not offered sufficient justification for the substantial revisions contemplated by the NPRM.

The Board's own performance statistics do not support the expedited representation procedures contemplated by the NPRM. The NLRB's objective in representation cases is to complete elections within 42 days of the filing of a petition. (NLRB GENERAL COUNSEL, SUMMARY OF OPERATIONS (Fiscal Year 2010), GC. Mem. 11-03, at 5 (January 10, 2011)). In 2010, the Regions exceeded this objective, completing initial elections in representation cases in a median of 38 days from the filing of the petition and conducting 95.1 percent of all initial representation elections within 56 days of the filing of the petition. (*Id.* at 5). Moreover, decisions or supplemental reports issued in cases involving post-election objections and/or challenges requiring a hearing were issued in a median of 70 days, exceeding the Board's goal by 10 days. (*Id*.) Decisions or supplemental reports issued in cases addressing post-election objections and/or challenges not requiring a hearing were issued in a median of 22 days, also exceeding the Board's goal by 10 days. (*Id*.) These statistics do not reveal a systemic problem justifying major changes to the current administrative scheme.

[2] Pursuant to the requirements of Section 6 of the Act and Section 706(2)(A) of the Administrative Procedure Act ("APA") any rule promulgated by the Board must not (1) conflict with any other portions of the Act; or (2) be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 29 U.S.C. § 156; 5 U.S.C. § 706(2)(A).

In the NPRM, the NLRB does not adequately explain how or why these timetables for resolving representation cases are inadequate. Instead, the Board dismisses existing time guidelines (and the agency's performance compared to them) because "those time targets have been set in light of the agency's current procedures, including their built-in inefficiencies." (76 Fed. Reg. 36829). The Board appears to presume that reducing the time for processing representation cases is preferable, without sufficient consideration of the impact of reducing these timetables on interested parties. In support of this position, the NLRB states that "Congress intended that the Board adopt procedures that permit questions concerning representation to be resolved both quickly and fairly." (76 Fed. Reg. 36813). Citing *Tropicana Products, Inc.*, 122 N.L.R.B. 121, 123 (1958), the Board states that "time is of the essence if Board processes are to be effective." (76 Fed. Reg. 36813). *Tropicana Products, Inc.*, however, involved a different issue—whether the NLRB could assert jurisdiction over an employer, not the time required to process representation petitions. *Tropicana Products, Inc.*, 122 N.L.R.B. at 122-23. We do not read that decision to suggest that the NLRB must consider decreasing the time required to process representation cases as an overriding statutory objective. In the NPRM, the NLRB further states that "the proposed amendments would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation." (*Id.*) However, the NPRM fails to specifically identify these barriers and similarly fails to explain how the proposed amendments will ameliorate them. Although the NLRB indicates that "[t]he history of congressional and administrative efforts in the representation-case area has consisted of a progression of reforms to reduce the amount of time required to ultimately resolve questions concerning representation…." (76 Fed. Reg. 36829), the Board does not offer sufficient proof to support the need to further expedite representation elections. (76 Fed. Reg. 36813).

Given the importance of the issues at stake in representation cases—for employers, unions and employees—a 38-day average length of time to an election seems reasonable. Considering the major changes to existing representation case procedures contemplated by the NPRM, the NLRB should provide adequate justification based on sufficient evidence to support the Agency's position that the proposed amendments are necessary and will advance the underlying objectives of the National Labor Relations Act (the "Act" or "NLRA"), 29 U.S.C. § 151, *et seq*. *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1460 (D.C. Cir. 1997) ("[T]he Board, like every other administrative agency, must provide a logical explanation for what it has done."); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (citations omitted). Here, the NLRB has failed to do so.

Despite the Board's emphasis on the timeframes in representation cases, the NLRB does not identify any estimate of the time required to process representation cases under the proposed reforms. Moreover, the NLRB does not provide an estimate of the target time period for holding representation elections. While the NLRB has a statutory responsibility to ensure that its practices and procedures serve the legitimate purposes of the NLRA, this responsibility does not

compel the conclusion that existing rules need to be changed in the absence of a compelling justification for such reforms. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (U.S. 1962) ("The agency must make findings that support its decision, and those findings must be supported by substantial evidence."). In short, the Board has not provided sufficient justification to alter a longstanding, well-tested process in favor of a new, untested, procedural scheme that may impair due process rights, impose undue burdens on non-petitioning parties, and substantially curtail opportunities for open debate regarding questions concerning representation.

2. **The proposed amendments would impede the free and open debate regarding union representation contemplated by the Act.**

While we applaud the NLRB's interest in promptly resolving questions concerning representation and its success in doing so, any contraction of the time period between the filing of the representation petition and the holding of an election must not prejudice the rights of employers, employees, or labor organizations, nor should it interfere with the Board's statutory responsibility to permit free and open debate regarding the merits of union membership and collective bargaining. While there are myriad statutory and policy reasons that mandate a reasonable period for informed debate between and among interested parties prior to the conduct of a representation election, there are none that support, much less require, truncating such debate. This is particularly true in the higher education community, which has a longstanding and deep commitment to preserving and nurturing free and open debate.

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

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

General Shoe Co., 77 N.L.R.B. 124, 126 (1948) ("An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative."); *J.J. Cassone Bakery*, 345 N.L.R.B. 1305, 1318 (2005) ("The procedures for the conduct of elections are designed to insure, as much as possible, that the outcome reflects a free and fair choice of the voters."); *Clark Brothers Co., Inc.*, 70 N.L.R.B. 802, 805 (1946) ("The Board has long recognized that 'the rights guaranteed to employees by the Act include the full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment.'") (*citing Harlan Fuel Company*, 8 N.L.R.B. 25, 32 (1938)). Even before *General Shoe*, in *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941), the

Supreme Court specifically held that the NLRA does not prohibit employers from expressing their views about labor organizations. Indeed, in evaluating the Board's position at that time that required employers to remain neutral in the face of union organizing activity, the Supreme Court concluded:

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

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

After the Supreme Court's decision in *Virginia Electric*, in the 1947 Taft-Hartley amendments to the NLRA, Congress enacted Section 8(c) of the Act specifically to protect employer speech from improper regulation by the NLRB. (29 U.S.C. § 158(c)). As recently as 2008 the Supreme Court confirmed this fundamental purpose of the statute. *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 66-67 (2008). Section 8(c) of the Act provides, in pertinent part, that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice … if such expression contains no threat of reprisal or force or promise of benefit." Although Section 8(c) does not by its terms apply to representation cases, both the Board and Supreme Court have recognized that federal labor policy favors "uninhibited, robust, and wide-open debate in labor disputes" and that the enactment of Section 8(c) "manifested a congressional intent to encourage free debate on issues dividing labor and management." *See Brown*, 554 U.S. at 68 (citations omitted). Indeed "this policy judgment, which suffuses the NLRA as a whole, stresses that "freewheeling use of the written and spoken word …has been expressly fostered by Congress and approved by the NLRB." *Id.* at 68 (citations omitted). The employer's right to free speech, safeguarded in Section 8(c), is particularly significant to colleges and universities, where free expression is a fundamental value and part of the essential experience of university life for both students and faculty.

We disagree with the Board's suggestion that the proposed procedural amendments "do not impose any limitations on the election-related speech of any party" (76 Fed. Reg. 36829), and "do not in any manner alter existing regulation of parties' campaign conduct or restrict any party's freedom of speech[,]" (76 Fed. Reg. 36817). We think it is very clear that the practical

effect of the reduction in processing times for representation elections will reduce or eliminate opportunities for employers to communicate with eligible voters prior to the election.

Shortening the time between petition and election from the current median of 38 days to an expedited time period of 10 to 21 days would deprive many colleges and universities of their right to communicate with their employees regarding unionization issues. Colleges and universities are not engaged in ongoing anti-union campaigns. In fact, they often first communicate with their employees about potential union representation when they first observe overt ongoing activity or, especially in the case of small institutions, when they first receive notice that a representation petition has been filed. To reduce the time between petition and election by as much as 28 days deprives colleges and universities of their right to inform employees of their views on labor issues, significantly reduces the time for free debate on such issues, and weakens the statutory aim to protect employees by limiting their access to information that will enable them to freely choose whether and by whom to be represented.

In the NPRM, the NLRB does not adequately balance the legitimate interests of employers in communication with employees about union membership and collective bargaining with the Board's apparent preferences for more expeditious elections. Indeed, the Board appears to presume that these interests are subservient to its own interests in processing representation cases as fast as possible. (76 Fed. Reg. 36829)("The dissent also contends that the proposed amendments will 'substantially shorten the time between the filing of the petition and the election date,' and that the purpose is 'to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining' in order to increase the election success rate of unions. That accusation is unwarranted. The Board seeks to gain the efficiency and savings that would result from streamlining of its procedures."). Given that the Board already processes elections within its objectives, the NLRB should not take steps to shorten elections where the primary impact will be to deny employees of the right to communicate with their employers regarding union representation issues.

B. The Proposed Modifications to Pre-Hearing Procedures Would Impose Unreasonable Requirements on Employers and Will Likely Lengthen the Election Period.

Although the NLRB states that the proposed procedural amendments "are intended to simplify the procedures… and provide parties with clearer guidance concerning representation procedure" (76 Fed. Reg. 36817), the NPRM would impose new pre-hearing requirements on non-petitioning parties that will complicate rather than simplify pre-hearing procedures. The NPRM would require non-petitioning parties to file a pre-hearing "Statement of Position,"[3]

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

articulating the party's position with respect to the appropriateness of the petitioned-for bargaining unit and identify potential unit placement issues or risk waiving objections to the scope of the unit. (76 Fed. Reg. 36838-36839 (*to be codified* at 102.63(b)(1)). In the event that a dispute exists with respect to the appropriateness of the petitioned-for unit, the non-petitioning party would also be required to identify the "most similar unit that it concedes is appropriate." (*Id*. at 36838). Each of these substantial departures from the current practice would place significant burdens on non-petitioning parties and could raise important due process concerns.

1. The proposed amendments regarding Statements of Position impose unfair and unduly burdensome requirements on non-petitioning parties.

The requirement that non-petitioning parties raise all issues in a pre-hearing Statement of Position filed prior to the representation hearing or risk waiver of arguments or defenses raises significant due process concerns and would both increase the number of representation hearings and likely lengthen, rather than shorten, the proceedings. (76 Fed. Reg. 36838-36839 (*to be codified at* 29 C.F.R. § 102.63)). The NPRM would require that prior to the commencement of a pre-election hearing, non-petitioning parties must file a Statement of Position in a form to be established by the NLRB. The NPRM does not provide a copy of the form or a description of the content set forth in the form. However, the NPRM states that the Statement of Position would solicit the parties' position with respect to (a) the Board's jurisdiction to process the petition; (b) the appropriateness of the petitioned-for unit; (c) any proposed exclusions from the petitioned-for unit; (d) the existence of any bar to the election; (e) the type, dates, times, and location of the election; and (f) any other issues that a party intends to raise at hearing. (76 Fed. Reg. 36821). This framework is unworkable and unnecessary for a number of reasons.

As an initial matter, the new procedural framework advocated by the Board in the NPRM would change the character of pre-election hearings in representation cases. Historically, such hearings have been investigatory, not adversarial.[4] The procedures outlined in the NPRM would place the entire burden of "investigation" on the non-petitioning parties and require one-sided pre-hearing "discovery" in the form of arguments and employee lists that must be included with the Statement of Position.[5] Petitioners would enjoy the benefits of receiving this information in

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

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

advance without any corresponding requirement to disclose evidence supporting their position on the appropriateness of the unit and/or unit placement issues. Such a one-sided process is arbitrary and capricious and would create potentially devastating pitfalls for some employers.

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

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

(emphasis added). Similarly, Section 3-810 (Nature and Objective) of the NLRB General Counsel's OUTLINE ON LAW AND PROCEDURE IN REPRESENTATION CASES (August 2008)[6] provides, in pertinent part, as follows:

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

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

While representation cases are intended to be investigatory and not adversarial, it is also true that any proceeding before any hearing officer in any context carries with it a certain implicit adversity among the parties. But the NPRM would explicitly change the character of

(continued…)

any individuals … whose eligibility to vote the employer intends to contest" and provide lists of employees to both the petitioner and the agency identifying all employees in the petitioned-for unit as well as any alternative unit proposed by the employer. (*Id.*)

[6] The OUTLINE ON LAW AND PROCEDURE IN REPRESENTATION CASES is available on the NLRB's website (www.nlrb.gov).

these proceedings in favor of a "litigation style" adversarial proceeding.[7] The NPRM concedes this up front. Indeed, the NPRM specifically states that "[t]he statement of position requirement is modeled on the mandatory disclosures described in Fed. R. Civ. P. 26(a) as well as on contention interrogatories commonly propounded in civil litigation." (76 Fed. Reg. 36821). The NPRM provides no further explanation with respect to why the agency should adopt these adversarial quasi-litigation procedures in lieu of its current investigatory practices. Moreover, unlike Rule 26 disclosures (which are mutual and must be submitted by all parties), the Statement of Position would unfairly burden only non-petitioning parties by requiring them to file Statements of Position while placing no corresponding burden on petitioners. Accordingly, the Board's reliance on Fed. R. Civ. P. 26(a) for its novel procedural changes is unwarranted and inappropriate.

2. **"Most similar unit" requirement in contesting unit sought by union unfairly burdens the non-petitioning party with identifying the appropriate bargaining unit.**

Not only will the non-petitioning party (most commonly, the employer) be required to articulate its position with respect to the appropriateness of the petitioned-for unit, the NPRM also would impose the unprecedented requirement that the non-petitioning party identify the "most similar unit" that the party concedes is appropriate. (76 Fed. Reg. 36838).[8] There is no justification for implementing such a requirement and then enforcing it with the draconian sanction of issue preclusion for parties that fail to comply. It is difficult to imagine how such a process advances the NLRB's articulated interest in "simplify[ing] the procedures."

Significantly, in those cases in which a party takes the position that the proposed unit is not an appropriate unit, the non-petitioning party would also be required to state the basis of the contention and identify the "most similar unit" that the party concedes is appropriate. (76 Fed. Reg. 36838 (*to be codified at* 29 C.F.R. § 102.63(b)(1)(i))).[9] Non-petitioning parties have never been required to define an appropriate bargaining unit, and they certainly have never been

[7] The hearing officer's role in the investigatory proceedings is that of a fact finder, not of a judge or arbitrator resolving an adversarial dispute. NLRB CHM, Part Two, Representation Proceedings Sections 11185 ("The hearing officer's role is to guide, direct, and control the presentation of evidence at the hearing. . . . The hearing officer does not make any recommendations or participate in any phase of the decisional process."). Yet the proposed regulations change the role of the hearing officer from fact finder to judge and transfer the investigatory burden to non-petitioning parties.

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

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

required to identify the "most similar" appropriate bargaining unit.[10] Indeed, "most similar" unit is an altogether novel concept in and of itself. At most, current NLRB representation case procedures require non-petitioning parties to take a position with respect to the appropriateness of the petitioned for unit. *See, e.g., Mariah, Inc.,* 322 N.L.R.B. 586 fn. 1 (1996) (upholding Regional Director's determination regarding the scope of the unit where employer "declined to take a position on the appropriateness of the unit, a unit that [was] presumptively relevant").

Such a requirement would be unfair and very difficult to consistently enforce, especially given the NLRB's rules on appropriate units which hold that myriad different units may be deemed to be "appropriate" in a given industry or facility. *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422–423 (4th Cir. 1963), *cert. denied*, 375 U.S. 966 (1964) (upholding NLRB's unit determination creating distinct bargaining units for technical and professional engineers, while noting that a unit combining the two groups also would have been proper); *Mountain States Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962). As such, the requirement that non-petitioning parties take a position regarding the appropriateness of the unit, and if contesting the petitioned for unit, identify the "most similar unit" should be eliminated from any final rule.

Current procedures for determining appropriate units require the hearing officer to first evaluate the unit requested by the petitioner. If that unit is appropriate, the investigation ends and the Regional Director will direct an election in the petitioned-for unit. *Boeing Co.*, 337 N.L.R.B. 152, 153 (2001). "The selection of an appropriate bargaining unit lies largely within the discretion of the Board whose decision, if not final, is rarely to be disturbed." *Southern Prairie Construction v. Operating Engineers Local 627*, 425 U.S. 800, 805 (1976); *see also NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (U.S. 1985); *Packard Motor Co. v. NLRB*, 330 U.S. 485, 491 (1947).

If the petitioned-for unit is not appropriate, the hearing officer *may* examine potential alternative units suggested by the parties, but the Regional Director has the discretion to direct an election in an appropriate unit that is different from the alternative proposals of the parties. *See, e.g., Overnite Transportation Co.*, 331 N.L.R.B. 662, 663 (2000); *NLRB v. Lake County Assn. for the Retarded*, 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997). Normally, the Regional Director will only rule on the appropriateness of units that have been advocated by the parties to the proceeding. *See e.g., Acme Markets, Inc.*, 328 N.L.R.B. 1208 (1999) (holding that Board could only consider employer-wide unit proposed by employer because it was the only appropriate unit "argued for on the record."). However, regardless of the positions advocated by the parties, "the Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employees." *See Bartlett Collins Co.*, 334 N.L.R.B. 484 (2001) (holding that the smallest appropriate unit encompassing mold *repair* employees must also include the Employer's mold *cleaning* employees) (emphasis added).

[10] "The selection of an appropriate bargaining unit lies largely within the discretion of the Board whose decision, if not final, is rarely to be disturbed." *Southern Prairie Construction v. Operating Engineers Local 627*, 425 U.S. 800, 805 (1976).

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

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

> Because the scope or the unit is basic to and permeates the whole of the collective-bargaining relationship, each determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.

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

Further, requiring non-petitioning parties to make a judgment about the appropriate unit that is "most similar" to the unit sought in the petition is untenable and unfair. As noted above, in any facility or facilities, there may be many alternative units that could be deemed "appropriate" under extant Board law. *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 418 (1950) (noting that the Board need not determine "that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit: the Act requires only that the unit be 'appropriate'") (emphasis in original). Given the large number of potentially appropriate bargaining units, it may be extremely difficult for non-petitioning parties—particularly unsophisticated smaller academic institutions—to determine which possible alternative unit would be the "*most similar*." This is especially true with respect to employers in industries where the NLRB has adopted special rules regarding appropriate units, such as colleges and universities, healthcare institutions, and the postal service. Additionally, there is no legal framework under which the Board can resolve issues with respect to whether any alternative units are, in fact, the "most similar" to the unit described in the petition. Indeed, such a determination would necessarily be entirely subjective, if not arbitrary.

In short, there is no justifiable basis for requiring non-petitioning parties to identify the "most similar" unit to whatever the petitioner has proposed.[11] Instead, the NLRB should retain the current practice of allowing full investigation of the appropriate unit based upon the facts and circumstances of the case rather than placing the burden on non-petitioning parties to narrow the scope of potential appropriate units before the first witness is sworn. Indeed, the process contemplated by the NLRB in the NPRM would turn the unit definition process on its head, requiring non-petitioning parties to argue their position regarding the appropriateness of the petitioned-for unit before—rather than after—development of the evidentiary record. Moreover, as more fully described below, the NPRM compounds this problem by authorizing the hearing officer to resolve the unit issue based solely upon the Statements of Position and perfunctory offers of proof submitted by the parties. (76 Fed. Reg. 36841). These formalistic processes are a poor substitute for a full evidentiary hearing and certainly are not conducive to thoughtful and reasoned decision-making by the agency.

3. The Statement of Position's seven-day filing requirement compounds unfair burdens on employers.

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

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

Statement of Position be filed at the commencement of the representation hearing *or before* in the discretion of the Regional Director, at a time when the employer has little or no information with respect to the evidence supporting the petition. (76 Fed. Reg. 36838 (*to be codified at* 29 C.F.R. § 102.63)). Given that the hearing must be scheduled within seven (7) days after the filing of the petition, the mandatory Statement of Position will be due in seven days *or less*. (*Id.*) Such a short timeline is unreasonable and unfair—especially where the failure to file a Statement of Position or raise any issue in the Statement of Position would result in the waiver of any arguments and denial of the right to participate in the pre-election hearing. (*Id.* at 36839). Seven days or less simply is not enough time for a non-petitioning party to identify and research all unit definition and unit placement issues and prepare multiple employee lists.[12] This is particularly true for smaller academic institutions that have little or no experience with NLRB proceedings and those that lack the wherewithal to retain experienced counsel to advise them in such matters. Adding this level of complexity to the process will make the representation-case process virtually inaccessible to the laymen and does nothing to simplify and streamline NLRB procedures. The Board should not risk prejudicing the rights of smaller academic institutions in its effort to expedite the resolution of representation cases.

Furthermore, "the authority structure of a university does not fit neatly within the statutory scheme of the [NLRA]." *Yeshiva Univ. v. Yeshiva Univ.*, 444 U.S. 672, 680 (1980). Authority is often "divided between a central administration and one or more collegial bodies[,]" and "the Board has recognized that principles developed for use in the industrial setting cannot be imposed blindly on the academic world." *Id.* (quotations and citation omitted). Academic institutions generally will face great challenges in responding in the allotted time due to their decentralized nature and the complexity of the issues involved in organizing university employees and determining the appropriate bargaining unit. This complexity is reflected in the fact-intensive analysis conducted by the Court in *Yeshiva* in determining that the bargaining unit approved by the Board was overly broad and that full-time faculty members are managerial employees not protected by the Act. The Court considered the scope of the faculty's decision-making authority, including whether they decided the course offering, the schedule, the students to whom the courses will be taught, the teaching methods, grading policies, matriculation standards, student admission, retention, and graduation, the size of the student body, tuition, and location.[13] *Id.* at 686. Such an inquiry is highly fact-specific, and it would be impracticable for

[12] Although the petitioning party, typically the union, would also be required to file a Statement of Position, as first mover, the union would have more time to contemplate the issues involved and formulate its position. This is especially true where, as in most instances, the union organizing campaign is conducted outside of the employer's view.

[13] The *Yeshiva* Court noted that the scope of an employee's decision-making is significant in determining whether he or she is a "manager" not protected by the Act. However, the Court went on to recognize that:

> this is a starting point only, and that other factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or

colleges and universities to collect data on this non-exhaustive list of factors in such a short period of time.

The thread of complexity spun in *Yeshiva* runs through more recent cases such as *Brown University*, 342 N.L.R.B. 42, n.7, 8 (2004), where, as the facts of the case developed, the parties amended their positions with regard to the scope of the appropriate bargaining unit. *Brown* illustrates the importance of time for fact development to the process of determining the contours of representation and bargaining unit issues involved in organizing college and university employees, especially in light of the fact–intensive nature of the inquiry. The "open-ended rough-and-tumble of factors on which *Yeshiva* launched the Board and higher education" requires careful consideration by the parties to a representation case, as well as the agency representative reviewing the facts. *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (citation omitted). It would be nearly impossible, especially in the case of a novel organizing campaign or grouping of employees, for an academic institution of any size to timely prepare, under the NPRM, a fully refined Statement of Position and Offer of Proof.

Moreover, academic institutions are unique as employers because of the intermingling of college and university "customers" with "employees" on many levels and the unique nature of campus life. These characteristics, compounded by the efficacy and prevalence of social media, make communications on campus rapid, dynamic and widespread. As employers, these institutions need time to fully prepare a response to a petition relating to union representation of its employees in order to effectively avoid the disruptions that that can occur during organizing campaigns, preserve peace on campus, and maintain a positive learning environment for students.

4. **The short timeframe for filing the Statement of Position together with the burden on the non-petitioning party to identify a "most similar unit" will complicate and lengthen the election process.**

In the NPRM, the NLRB asserts the new procedures will "eliminate unnecessary litigation." (76 Fed. Reg. 36817). By raising the stakes for non-petitioning parties at the pre-hearing stage, the proposed rules will have precisely the opposite effect. Considering the extremely tight turn-around times for the mandatory Statement of Position coupled with the draconian effect of the exclusionary rule, non-petitioning parties will be incentivized to raise each and every conceivable possible arguments defense and unit placement in their Statements of

(continued…)

> predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit.

444 U.S. at 690, n.31.

Position simply to avoid potential waiver of any issues not yet apparent. It would be irresponsible, or worse, for a lawyer representing a non-petitioner not to do so. Such a result would undermine the NLRB's declared purpose to simplify and streamline representation-case procedures. (76 Fed. Reg. 36829).

Although the NLRB can, and does, require employers and other interested parties to articulate their positions with respect to the appropriateness of the petitioned-for unit, the positions are not written in stone. The proposed procedural regulations go too far by requiring employers and other interested parties to take firm positions on these issues in the pre-hearing Statement of Position with potential preclusion of evidence or arguments on issues not included.[14] (76 Fed. Reg. 36838-36839 (*to be codified at* 29 C.F.R. § 102.63)). Admittedly, a handful of Board cases have denied parties the right to litigate unit issues when the party obstinately refused to take any position with respect to these issues as an obstructionist tactic to frustrate the investigative process. *See, e.g., Bennett Industries*, 313 N.L.R.B. 1363 (1994); *Seattle Opera Ass'n*, 323 N.L.R.B. 641 (1997); *Mariah, Inc.*, 322 N.L.R.B. 586 n.1 (1996). However, this handful of cases does not justify the significant steps contemplated by the Board where, as here, existing procedures provide ample sanctions for such conduct.[15]

As noted above, under the proposed rules, parties who fail or refuse to file a pre-hearing Statement of Position will be precluded from contesting the unit and from even participating in the hearing. (76 Fed. Reg. 36838-36839 (*to be codified at* 29 C.F.R. § 102.63)). Further, non-petitioning parties who fail to identify potential unit placement issues in their Statement of Position will likewise be precluded from raising these issues later. (*Id.*) Given that the petitioner has no obligation to provide any support for the petitioned-for unit and no obligation to disclose those individuals the petitioner believes are included within the petitioned for unit, non-petitioning parties will be required to anticipate potential issues without any knowledge of the other parties' position. Even worse, the penalty for guessing wrong will be waiver of arguments and exclusion from the hearing process. Such an onerous procedure does little to make the representation process more accessible or understandable for non-petitioning parties, and raises significant due process concerns.

The requirement that non-petitioning parties preserve all contested issues in their Statements of Position or risk waiving their arguments further essentially converts what was intended to be an investigatory proceeding into a markedly adversarial one. Moreover, given that only non-petitioning parties risk waiving their arguments and that most unit definition and unit

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

[15] Section 11217 of the NLRB CHMprovides that parties should be given the following notice in such circumstances: "If a party refuses to state its position on an issue and no controversy exists, the party should be advised that it may be foreclosed from presenting evidence on that issue."

placement issues arise in RC petitions (as opposed to RM or RD cases), the proposed rule is unfair to employers. Unfortunately, under the proposed rule, they will be deprived of many of the procedural protections provided under current NLRB rules. Tilting the balance in favor of petitioners in this manner is unlikely to encourage voluntary resolutions and most likely will result in litigation of issues that are typically resolved by mutual agreement under current NLRB procedures. As noted above, with limited time to respond and without necessary information to adequately analyze all potential issues covered in the Statement of Position, non-petitioning parties will be compelled to raise all possible issues that could possibly arise, an unfortunate result that would undermine the Board's stated goal to streamline representation-case procedures, and would likely result in more contentious elections. (76 Fed. Reg. 36829). Such contentiousness is disruptive to academic institutions due to the unique intermingling of college and university "customers" and employees that occurs on campus, together with the nature of the campus environment.

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

As part of the mandatory Statement of Position, the NPRM would require the non-petitioning party to file employee lists prior to the representation hearing setting forth the names and other personal information regarding the petitioned-for unit and any alternative units advocated by the non-petitioning party. (*Id.*) These provisions of the NPRM also place unreasonable and unnecessary burdens on non-petitioning parties and should be stricken from the final rule. (76 Fed. Reg. 36838 (*to be codified at* 29 C.F.R. § 102.63(b)(1)). Under the proposed amendments, as part of the Statement of Position in representation cases, the employer would be required to provide at least two lists of individuals employed by the employer in the petitioned-for unit. (*Id*.) One version of the list to be filed with the Regional Director (but not served on other parties) with the Statement of Position must include each employee's work location, shift and classification as well as "available telephone numbers, available email addresses, and home addresses" [of all individuals in the] proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing." (76 Fed. Reg. 36838 (*to be codified at* 29 C.F.R. § 102.63(b)(1)(iv)). The second list, which is filed with the Regional Director, and served on the other parties, lists each employee with details with respect to the employee's work location, shift and classification. (76 Fed. Reg. 36838 (*to be codified at* 29 C.F.R. § 102.63(b)(1)(iii)). The proposed amendments further provide that, if the employer contends that the petitioned-for unit is not appropriate, the employer must file a third list in which it "describe[s] the most similar unit that the employer concedes is appropriate." This list would also include names, work locations, shifts and job classifications, including information pertaining to employees not included in the petitioned-for unit. (*Id*.)

As an initial matter, there is no real need for requiring multiple employee lists to be compiled and filed before the representation hearing. There is no conceivable basis for requiring

the compilation of lists with respect to all the potential units that *might* be considered at the hearing. Compelling the production of such lists shifts the burden of investigation from the agency to the employer and provides unilateral pre-hearing discovery to the petitioner without any reciprocal obligation on that petitioner to provide information prior to the hearing. Further, the requirement that the employer compile two different lists—one for the use of the NLRB (which includes home addresses, telephone numbers and email addresses) and one for the use of the petitioner (which includes full names, work locations, shifts and job classifications)—is particularly cumbersome.

The Board presumes that the compilation of multiple lists is a simple matter given modern technology. (*See* 76 Fed. Reg. 36821). However, due to the structure of most colleges and universities, particularly large research institutions, they do not typically have access to electronic systems that gather such information in one spot with a ready-made button to push for such purposes. Moreover, given the scope of information that must be produced (in seven days or less), larger colleges and universities may find accurate compliance with these requirements difficult, perhaps impossible, if the petitioned-for unit or any alternative unit includes a large number of employees. These institutions are typically decentralized with an array of highly independent schools and programs (e.g., undergraduate departments, professional schools, masters and Ph.D. programs, medical schools and teaching hospitals), making the identification of employees and potential employees in a short timeframe particularly challenging and potentially inaccurate. For example, it would be nearly impossible to identify and collect accurate and detailed information on adjunct faculty, who teach part time, do not necessarily teach at one institution on a consistent basis and often hold other jobs outside of the academic institution. Similarly, because graduate students are not yet eligible to organize as employees, but may become eligible, it would be extremely difficult and time consuming to identify the target students, and any resulting list would necessarily be over or under-inclusive. Further, in the event that the academic institution takes the position that a multi-site unit is appropriate, it may be required to compile and share substantial amounts of information regarding its workforce at facilities that are outside the scope of the petitioned-for unit. *See e.g.*, *Longcrier Co.*, 277 N.L.R.B. 570 (1985) (rejecting the union's petition for a multi-site unit). This would be true even if the petitioner made no effort to organize employees at these other facilities. Also, this may open the door for unions to misuse these rules by petitioning for clearly inappropriate units in order to get access to information regarding a broader unit that they hope to organize.[16]

[16] The impracticality of requiring pre-employment employees lists could be exacerbated by the NLRB's anticipated decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 356 N.L.R.B. No. 56 (2010), in which the Board issued a Notice and Invitation to File Briefs with respect to the question of whether a unit composed of all employees performing the same job at a single facility is a presumptively appropriate bargaining unit. If the NLRB were to adopt a presumption in favor of single job "micro-units" in *Specialty Healthcare*, employers and other interested parties likely would contest such "single job" petitions by seeking a facility-wide unit (which is also presumptively appropriate). *See Hegins Corp.*, 255 N.L.R.B. 1236 (1981) (noting presumption that single location unit is appropriate). In such cases, under the proposed rules, the employer would be required to produce a list of all employees in the facility-wide unit as part of its Statement of Position, which the employer would be required to serve on the petitioning union. By requiring the employer to provide a list with respect to the

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

The limited time permitted for the preparation and filing of the pre-hearing lists is also potentially problematic. As noted above, because they must be filed at or before the commencement of the pre-election hearing, employers will have, at most, seven (7) days to prepare the compulsory employees lists. In most cases, the employer will have less than seven days. The short turnaround time to compile up to three (3) lists raises substantial and unnecessary compliance challenges. Given that none of the lists may ultimately reflect the universe of eligible voters (depending upon the Regional Director's ultimate determination) and that an accurate list will have to be provided after the Regional Director makes a unit determination (*see* 76 Fed. Reg. 36838 (*to be codified at* 29 C.F.R. § 102.62(d)), there is little reason to mandate expedited disclosure of employee lists. For this reason, the proposed regulations in the NPRM requiring the filing of multiple employee lists prior to the pre-election hearing should not be included in any final regulations issued by the Board.

1. **The proposed modifications regarding voter eligibility lists impose unfair burdens on employers and impinge upon the privacy rights of employees.**

The proposed amendments would require employers to file voter eligibility lists setting forth work locations, shift assignments, telephone numbers and, where available, email addresses. The short two-day time limit on its own raises significant compliance challenges, especially for larger bargaining units. Moreover, the requirements that the lists set forth substantial personal information about each voter, including contact information, appears to be intended to provide union organizers with increased access to the pool of eligible voters. While it

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entire facility in response to a petition seeking to represent only one job, the petitioning union would thus gain access to information about all of the other employees in the facility. Such practices would encourage piece-meal organizing of single facilities and potentially increase the number of representation cases processed by the NLRB.

is not clear from the proposed regulations whether the requirements for the disclosure of telephone numbers and email addresses apply to home or work telephone numbers (or even mobile phone numbers) or personal or work email addresses, the NLRB should not compile any rule that would require employers to provide personal information regarding its workforce to union organizers absent the express consent of each individual employee.

a. The proposal to require voter eligibility lists within two days will create substantial compliance challenges.

The proposed amendments regarding expedited voter eligibility lists would create practical compliance problems for larger employers. Under the proposed regulations, voter eligibility lists will be required within two (2) days after the Regional Director's decision and direction of election or the approval of an election agreement. This is a substantial decrease from the current seven-day period.

Preparation of employee lists could, in many cases, require time consuming factual and legal research that cannot reasonably be done within the time proposed. This is particularly true given that the proposed regulations require the employer to provide substantially more information in the voter eligibility list. (76 Fed. Reg. 36843 (*to be codified at* 29 C.F.R. § 102.67(j)).

Moreover, the short turn-around required for voter eligibility lists creates the potential for unfair labor practice litigation pertaining to mistaken employer decisions regarding the supervisory status of its employers. The determination of supervisory status requires careful assessments in order to ensure compliance with the Act and the Board's fact-intensive tests for determining supervisory status. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006); *Croft Metals, Inc.* 348 N.L.R.B. 717 (2006); *Golden Crest Healthcare Center,* 348 N.L.R.B. 727 (2006). Given the often complex analysis involved in making supervisory determinations, and the significant legal ramifications for errors in the employee lists, the Board's proposal places well-intentioned employers at undue risk of inadvertently violating the Act and the Board's rules. If the regulations were to make exceptions for large units, perhaps automatically excusing inaccurate lists absent a showing by a petitioner of intent by non-petitioner to manipulate the process, a reduction in timing for submission of the voter-eligibility lists might conceivably be acceptable.[17]

b. The final rule should not require disclosure of personal information in the voter eligibility lists.

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

The proposed amendments requiring employers to disclose personal information about employees are not necessary, contrary to current law, and contrary to many employers' privacy policies. Indeed, the Board's request for comments on the penalty for misuse of personal information on employee lists constitutes a tacit admission regarding the risk of intrusion on employees' privacy rights. The proposed rules will significantly increase the amount of information that must be disclosed by employers regarding eligible voters. Under *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), an employer is required to provide only the names and address of employees in its voter eligibility list. The proposed amendments would require that both telephone numbers and, where available, email addresses be included along with each unit employee's name and address on the eligibility list. (76 Fed. Reg. 36843 (*to be codified at* 29 C.F.R. § 102.67(j)). Moreover, the proposed amendments would also require that the voter eligibility lists must include work locations, shifts, and job classifications for each employee. (*Id*.)

Any requirement that employers provide non-work-related mobile telephone numbers or personal email accounts for employees raises significant employee privacy concerns and may reduce the likelihood that employees will voluntarily provide such information to their employers. (76 Fed. Reg. 36843 (*to be codified at* 29 C.F.R. § 102.67(j)). This is especially true in the context of colleges and universities where, students may be especially eager to obtain and circulate the personal email addresses of professors and teaching assistants, a problem compounded by the capabilities and prevalence of social media and networking on college and university campuses. Moreover, such a rule is directly contrary to current law. *Trustees of Columbia University*, 350 N.L.R.B. 574, 576 (2007) (noting potential privacy concerns in requiring employer to provide employee email addresses);[18] *JHP & Assocs., LLC v. NLRB*, 360 F.3d 904, 911-12 (8th Cir. 2004) ("The particular facts of this case do not show a compelling need for the Union to obtain the strike replacement employees' home addresses and telephone numbers.").

There is a substantial body of case law addressing the issue of the privacy of personal email under the federal Freedom of Information Act ("FOIA"). These cases clearly articulate that there is a substantial privacy interest with respect to the disclosure of personal email addresses in the context of an information request under FOIA. *Electronic Frontier Foundation v. the Office of the Director of National Intelligence*, No. 09-17235, 2010 WL 1407955 at *10 (9th Cir. April 9, 2010) (in upholding the redaction of personal email addresses in response to an information request, the court stated that it could "easily envision possible privacy invasions resulting from public disclosure of the email addresses" and that disclosure of personal email addresses "may add to the risk of privacy invasion with little additional benefit to the public interest."); *Government Accountability Project v. U.S. Department of State*, No. CIV.08-1295, 2010 WL

[18] In *Trustees of Columbia University*, the majority noted that the Board was not in a position to extend the Excelsior rule to Columbia, an ACE member, to require the employer to provide the email addresses without briefing and a full record on the technological issues involved. *Trustees of Columbia University*, 350 N.L.R.B. at 576.

1222156 at *6-7(D.D.C. March 29, 2011) ("[P]rivate individuals mentioned in these records have a clear privacy interest in avoiding the disclosure of their personal email addresses . . . .").

Specifically with regard to graduate students also employed by educational institutions, the NPRM poses a potential conflict with the requirements of Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(b)(1) (2010), which prohibits educational institutions receiving federal funds from releasing, without prior consent, its students' "education records," other than "directory information," to "any individual, agency, or organization." "Directory information" is defined by the statute as "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." § 1232g(a)(5)(A). Any educational institution that seeks to make public directory information must first "give public notice of categories of information which it has designated as such information with respect to each student attending the institution . . . and shall allow a reasonable period of time after such notice" for students to opt out. § 1232g(a)(5)(B).

There is little guidance from the courts as to whether the release of graduate student employee names to labor organizations would violate FERPA. However, the Family Policy Compliance Office ("FPCO"), an office within the United States Department of Education which provides guidance with regard to FERPA, has suggested the release of these employee names and addresses to be included on voter eligibility lists as required by *Excelsior Underwear, Inc*., may violate FERPA under certain circumstances: "Should a school disclose the names and addresses of its teaching assistants under FERPA's directory information exception, the school would also be disclosing, at the same time, the fact that those students are teaching assistants. Under FERPA, the fact that a student is a teaching assistant is not directory information." LeRoy S. Rooker, *Letter of Technical Assistance to the Regents of the University of California re: Disclosures to Employment Relations Board* (Sept. 17, 1999);[19] M. Hutchins and N. Hutchins, *Catching the Union Bug: Graduate Student Employees and Unionization*, 39 GONZ. L. REV. 105, 117-124 (2004). To the extent that the NPRM would require educational institutions to release the personal information of graduate student employees that will soon be potentially eligible voters, the NPRM may conflict with FERPA.

The FPCO has suggested that a university may choose to include the names of teaching associates as part of its "directory information." LeRoy S. Rooker, *Letter to University of Massachusetts Relating to Teaching Assistants* (Feb. 25, 2002).[20] Were such information so designated, release may be permitted under FERPA. However, the designating institution would be required to give public notice of the designation and establish an opt-out process to allow for

[19] Available at http://www.ed.gov/print/policy/gen/guid/fpco/ferpa/library/oakland_ca.html (last visited Aug. 14, 2011).

[20] Available at http:// www.ed.gov/print/policy/gen/guid/fpco/ferpa/library/josephambash.html (last visited Aug. 14, 2011).

student employees to keep their employee status confidential. The withholding of the information of students opting out would appear to be in violation of the NPRM's requirements.

Moreover, even if a student's status as an employee were designated as directory information, "FERPA would prevent [a] University from disclosing information such as the student ID number, social security number, *number of hours contracted for*, stipend, length of contract, *employment category* and, entrance date to the Union absent another provision that allows for the disclosure." *Id.* (emphasis added). This poses a potential conflict with the NPRM, which requires that the list of eligible voters filed with the Regional Director, and served on the other parties, include details with respect to each employee's work location, shift and classification. (76 Fed. Reg. 36838 (to be codified at 29 C.F.R. § 102.63(b)(1)(iii)). Where the employer contends that the petitioned-for unit is not appropriate, the employer must file a "most similar unit" list which would also include work locations, shifts and job classifications, including information pertaining to employees outside of the petitioned-for unit. (Id.) According to the FPCO, the release of these details as required by the NPRM, would likely be prohibited by FERPA.

D. By Authorizing the Regional Director to Proceed with Elections Without Resolving Unit Issues, the NPRM Impinges Upon the Due Process Rights of Interested Parties.

1. Employers denied fair hearing to litigate appropriate bargaining unit

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

2. Confusion among eligible voters as to unit

Significantly, the failure to resolve unit issues prior to the election will create confusion among the eligible voters regarding the composition of the employee group at issue. In the NPRM, the NLRB explains that the Regional Director will "advise employees that [] individuals

[whose eligibility or inclusion remains in dispute] are neither included in, nor excluded from, the bargaining unit…." (76 Fed. Reg. 36842). Failure to inform employees whether they will be included in the bargaining unit if the petitioner is certified would create an untenable situation for the employer and employees. Indeed, it is difficult to imagine how an employee could make a free and informed choice about whether they want to engage in collective bargaining in situations where they do not know which of the other employees would be included in their bargaining unit.

3. Confusion of employers as to who may speak for employers during organizing campaigns

Moreover, if there are disputes regarding the supervisory status of certain individuals, the failure to determine their status prior to the election will create uncertainty on the part of both the employer and the employees regarding the permissible scope of their pre-election activities. For employers, the failure to resolve supervisory determinations would create confusion with respect to who the employer may rely on as an agent in connection with a campaign. Indeed, the determination of supervisory status requires careful assessments in order to ensure compliance with the Act and the Board's fact-intensive tests for determining supervisory status. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006). Moreover, the failure to distinguish supervisors from employees could lead to attorney-client privilege issues.

Significantly, the failure to resolve supervisory determinations could lead to otherwise avoidable post-election objections and unfair labor practice charges. *See Harborside Healthcare, Inc.*, 343 N.L.R.B. 906 (2004) (holding that if an employee who solicits authorization cards is later deemed to be a supervisor, a valid objection would exist and the election could be overturned). For example, if an employer trains an individual on what he or she can and cannot say during a campaign, believing that the individual is a supervisor, when the employee is actually a unit member, the employer has violated the Act. *See Glasgow Indus., Inc.*, 204 N.L.R.B. 625 (1973) (holding that employer violated Section 8(a)(1) when supervisors spoke to employees about the possibility of work loss, cancellation of orders, and layoffs). Likewise, if the employer assumes that the individual is not a supervisor and allows the individual to talk with a co-worker, when the individual is actually a section 2(11) supervisor, the employer has also violated the Act. *See Harborside Healthcare*, 343 N.L.R.B. at 911. Accordingly, the ultimate impact of the proposed regulation could be to substantially increase the NLRB's workload by creating additional unfair labor practice charges.

And the risks with respect to misclassification of supervisors would be borne by the union as well as the employers. For example, if the union asks an individual to hand out authorization cards under the mistaken belief that the individual is a unit member, but the individual is actually a supervisor, that would almost certainly be objectionable conduct that could result in a successful union election being overturned. *See e.g., Southeastern Newspapers*,

129 N.L.R.B. 311 (1961) (petition dismissed where supervisor participated in obtaining signatures).

Moreover, the failure to revise supervisory issues would also have a substantial impact on the rights of employees, including their First Amendment rights. Indeed, an employee who believes he could be a supervisor might be reluctant to attend union meetings or to discuss the merits of unionization with other employees. Such a result would impede the rights of employees on an individual basis and would also violate those provisions of the Act established to facilitate a full and free discussion regarding union issues. (29 U.S.C. § 158(c)) ("The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice … if such expression contains no threat of reprisal or force or promise of benefit."). Accordingly, the final rule should require Regional Directors to proceed to an election only after resolving disputes regarding unit definition and unit placement.

4. **The "summary judgment" process would improperly limit the rights of interested parties**.

Under current NLRB procedural rules, a party is guaranteed the right to submit evidence in support of its position at the hearing. *See, e.g.*, *Barre-National Inc.*, 316 N.L.R.B. 877, 877 (1995) ("For the reasons set out below, we find that the Regional Director erred in refusing to permit the Employer to introduce the testimony of his witnesses at the scheduled pre-election hearing."). Contrary to existing rules, the proposed amendments describe a process whereby the hearing officer identifies the issues in dispute prior to receiving any evidence and determines if there are genuine disputes as to facts material to those issues based upon the Statements of Position and offers of proof proffered by the parties. This formalistic "summary judgment" process is a poor substitute for contested case hearings, live testimony, and cross-examination of witnesses which afford parties a full opportunity to develop the record.

As an initial matter, the NLRB majority's assertion that the proposed "summary judgment" standard "simply import[s] the norms of modern civil procedure from the federal judicial system and appl[ies] them to adjudication of representation-case issues" is inaccurate. Indeed, at the beginning of the pre-election hearing, the parties have not had the opportunity to take discovery (as they would in a civil proceeding), nor have they had full access to the other party's evidence, much less its witnesses. *See* 29 C.F.R. § 102.118(b)(1).[21] Neither the Board nor any court has ever utilized a summary judgment standard to determine whether to evaluate evidence. Rather, summary judgment is a standard utilized to resolve legal questions *after* the

[21] Although applicable to unfair labor practice proceedings , and not yet to representation proceedings, it is worth noting that pursuant to 29 C.F.R. § 102.118(b)(1), "after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the act, the administrative law judge shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified."

facts have been established to the point where material facts are no longer in dispute. Indeed, Federal Rule of Civil Procedure 56(c) requires summary judgment when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). As such, in the absence of a full record or at least access to all of the relevant evidence, non-petitioning parties cannot reasonably be expected to articulate and substantiate their positions through an informal summary judgment process in representation hearings. Accordingly, the imposition of a summary judgment standard by the Board is simply misguided.

Moreover, the NLRB provides no guidance as to how the hearing officer would identify material fact issues in dispute based upon Statement of Position forms rather than admissible evidence. Accordingly, at the very least, the Board should articulate a rule that provides for a more comprehensive and detailed description of the process by which the hearing officer is required to make these significant determinations.

In any event, granting hearing officers—many of whom are not attorneys—the unprecedented authority to issue summary judgment with respect to unit issues based upon perfunctory offers of proof undermines the due process protections afforded to parties in representation cases. (29 C.F.R. § 101.20) ("The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the Regional Office but may be *another qualified Agency official*.") (Emphasis added). The NPRM makes no attempt to explain how non-attorneys are qualified to make judgments about what, if any, disputed issues constitute genuine issues of material fact within the meaning of the law. If the Board intends to give such significant responsibility to hearing officers, it should address these legitimate concerns.

Representation cases are significant events with a substantial impact not only on employers and unions but perhaps especially on employees. Accordingly, the parties to a representation case must have the opportunity to submit evidence and to evaluate the other parties' evidence and to cross-examine their witnesses. The NLRB should not promulgate a rule that obviates these critical rights.

5. **The elimination of post-hearing briefs as a matter of right will erode the efficacy of the hearing process by limiting the parties' ability to articulate their positions and explain applicable authority.**

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

with special permission. The elimination of post-hearing briefs further erodes the efficacy of the hearing process and denies the parties the opportunity to summarize the record and argue their respective positions in writing with respect to critical and often complex unit scope issues. Parties would also have no opportunity to do post-hearing legal research or to cite legal authority regarding complex issues raised at the hearing. Indeed, the parties would not even have the opportunity to review the transcripts of testimony prior to making oral arguments on these issues. (76 Fed. Reg. 36842 (*to be codified at* 29 C.F.R. § 102.66(h)). Given that many hearing officers are not lawyers and do not have encyclopedic knowledge of the NLRB's past decisions, there is no plausible reason that they should be making off the cuff determinations without the benefit of the parties' legal research and arguments. Accordingly, the final rule promulgated by the Board should not provide any limitations on the rights of the parties to file post-hearing briefs.

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

By sacrificing hearing processes for expedited elections, the proposed amendments to the procedural rules increase uncertainty in elections by shifting delay until after the election—a time when employers engage in unilateral changes at their peril. *O'Connor Chevrolet*, 209 N.L.R.B. 701, 703 (1974) ("The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made."). Yet, the NPRM fails to provide sufficient opportunities to resolve these significant outstanding issues even after the election. To the contrary, the NPRM would curtail the rights of the parties to meaningful post-election review. For instance, the proposed revisions would unfairly shorten the time period for a party filing objections to investigate and present evidence supporting those objections. Moreover, the NPRM would adopt a post-election summary judgment process pertaining to challenges and objections that potentially raises additional due process issues. Given that the NPRM would defer so many significant issues until after the election, at a minimum, it must provide comprehensive post-election review procedures that will facilitate the accurate resolution of outstanding issues.

1. Reducing time for investigation/presentation of evidence regarding post-election challenges/objections from 14 to seven days denies parties the right to develop complete record.

The NLRB's proposal to reduce the amount of time permitted for the investigation and presentation of evidence supporting post-election challenges and objections from fourteen (14) to seven (7) days will not afford aggrieved parties sufficient time to gather evidence to support objections and prepare for post-election hearings on challenges or objections. (29 C.F.R. § 102.69(a)). The current rules provide a filing party with seven days to file objections to an election and an additional seven days to file an offer of proof. (*Id*.) While the seven-day period

for the filing of post-election objections would remain the same, the proposed amendments would require the objecting party to submit an offer of proof outlining the evidence supporting the objections contemporaneously with the objections. (76 Fed. Reg. 36844 (*to be codified at* 29 C.F.R. § 102.69(a)). Elimination of the seven-day period to submit the offer of proof would significantly decrease the time parties have to develop evidence in support of challenges and objections.

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

2. **Proposed procedural rules increase uncertainty by requiring employers to operate and perhaps to engage in unilateral changes without knowing whether unit certified will be upheld on appeal process.**

Most significantly, if the hearing officer or Regional Director deferred any issue with respect to the appropriate unit because less than 20 percent of the potential voters were in issue, the NPRM does not make clear whether the proper definition of the unit may be litigated in post-election proceedings where challenged ballots are not determinative. Since the Region can defer resolution about bargaining unit issues until after the election, it is unclear what the election certification will say with respect to the unit and it is unclear whether the parties will have the ability to litigate the appropriateness of that unit after the election takes place. The NLRB dismisses these problems in the NPRM, asserting that "parties are often able to resolve the resulting unit placement issues in the course of bargaining and, it they cannot do so, either party may file a unit clarification petition to bring the issue back before the Board." (76 Fed. Reg. 36824). However, placing the burden on the parties to resolve these issues through bargaining will almost certainly prove ineffective considering that unit scope is a non-mandatory subject of bargaining. *Douds v. International Longshoremen's Association*, 241 F.2d 278, 282 (2d Cir. 1957). There can be little doubt that requiring parties to file after-the-fact unit clarification petitions will unnecessarily delay proceedings and create additional work for the NLRB. Accordingly, to the extent that the final rule defers unit determination issues until after the election—which it should not—the rule must, at a minimum, provide a mechanism to resolve such issues during post-hearing proceedings.

Moreover, the regulations outlined in the NPRM would incorporate the same "summary judgment" process—detailed above pertaining to pre-election hearings—for post-election proceedings pertaining to challenges and objections. (76 Fed. Reg. 36844 (*to be codified at* 29

C.F.R. § 102.69(a)). This proposal pertaining to challenges and objections could potentially deny aggrieved parties the opportunity to develop a complete and thorough record with respect to voter eligibility and/or objectionable conduct. Given the substantial number of significant issues that are deferred until after the hearing, the final rule should provide meaningful post-hearing procedures that will afford all parties due process rights and facilitate the accurate resolution of significant issues.

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

Under the proposed amendments, the decisions rendered by hearing officers and Regional Directors will be effectively insulated from pre-election review by the NLRB as a result of the implementation of discretionary review procedures. The Board should not abdicate its statutory responsibilities by making review of all regional decisions discretionary.

1. Denying parties the right to appeal adverse determinations to Board denies due process.

In the NPRM, the NLRB asserts that "[t]he right to review of Regional Directors' post-election decisions has caused extended delay of final certification of election results in many instances." (76 Fed. Reg. 36814). The proposed amendments would make Board review of a Regional Director's resolution of post-election disputes discretionary in cases involving directed elections as well as those involving stipulated elections. Such discretion is especially problematic given the hearing officer's broad discretion and the absence of Board review prior to the election. If not an outright violation of due process, this aspect of the Board's rule change raises serious procedural fairness issues. Making Board review of regional decisions discretionary opens the door for unchecked regional error. *Copps Food Center*, 301 N.L.R.B. 398 (1991) (where a case sat for over two years while the Board considered the Regional Director's decision and direction of election; the Board ultimately reversed the Regional Director's finding that a separate department of meat department employees was appropriate and dismissed the petition). Because Hearing Officers report directly to Regional Directors, appeal to the Regional Director, as provided under the NPRM, does not constitute meaningful review. Given that NLRB decisions in representation cases are generally not subject to court review, denying aggrieved parties the right to appeal adverse determinations to the Board clearly undermines due process protections. Even if the right of review currently in force does delay the final certification of election results, the failure of the Board to expeditiously resolve legitimate cases presented to the Agency by aggrieved parties in representation cases does not justify elimination of the appeal rights of the parties.

Significantly, the proposed appeal procedures are contrary to the preferences of both employers and unions. Currently, the voluntary agreement of the parties to hold an election is reflected in a Consent Election Agreement (Form NLRB-651) or Stipulated Election Agreement (Form NLRB-652). As described in Section 11084.1 of the NLRB CHM "[t]he Basic difference between the consent election agreement and the stipulated election agreement is that questions that arise after the election are decided by the Regional Director in a consent election and by the Board in a stipulated election." Although parties under the current regulations are far more likely to enter into a stipulated election agreement than a consent election agreement,[22] the NPRM would eliminate stipulated election agreements and adopt the review procedures currently applicable to rarely used consent election agreements. Indeed, in cases where the Regional Director determines that there are genuine issues of material fact that must be resolved, the proposed amendments would provide that, in such cases, the Regional Director will provide for a hearing before a hearing officer who shall, after such hearing, issue a report containing recommendations to the Regional Director as to the disposition of the issues. (76 Fed. Reg. 36844 (*to be codified at* 29 C.F.R. §102.69(d)(1)(iii)).

2. **Proposed elimination of pre-election requests for review is not justifiable and will lengthen the election process**.

The elimination of pre-election requests for review is not justifiable in light of the strict requirements currently in place, which warrant review to relatively rare and compelling circumstances. Under the current regulations, parties may file a request for review of a Regional Director's determination with respect to the scope of the appropriate unit with the Board within 14 days of such determination. (29 C.F.R. §102.67(b)). The Board grants requests for review only where compelling reasons exist to do so. (29 C.F.R. §102.67(b)). Such compelling reasons include substantial questions of law or policy, substantial factual issues that prejudice the rights of parties, prejudicial error caused by the Regional Director's ruling, or compelling reasons to reconsider an important Board rule or policy.

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

[22] In 2009, 1419 elections (87 percent) were held pursuant to stipulation while only 46 (2.7 percent) consent elections were held. Seventy Fourth Annual Report of the NLRB for the Fiscal Year Ended September 30, 2009 pg. 118, Table 11.

III. CONCLUSION

The NLRB has a legitimate statutory responsibility to continuously evaluate its practices and procedures to assure they continue to serve the legitimate purposes of the NLRA, and to take affirmative action to rectify legitimate problems with the administration of the Act. However, this statutory responsibility is tempered by the equally applicable statutory requirement that the NLRB not promulgate any rule that is contrary to the Act or arbitrary and capricious. Moreover, given the NLRB's success in processing representation cases, the Board should proceed cautiously before promulgating any rule that could have substantial unintended consequences on representation-case procedures.

In its NPRM, the NLRB presumes without any empiric or other justification that shorter time frames for representation elections are necessarily inherently beneficial. However, the NLRB's attempts to shorten the time period for elections would place substantial and stringent compliance burdens on employers and other interested parties. And, we submit, shortening the time period between petition and election will necessarily curtail debate and reduce the amount of information available to eligible voters in representation elections. Even more significantly, the Board's attempts to shorten the election process will, in many cases, come at the expense of the parties' due process rights. Indeed, the procedural changes set forth in the NPRM potentially could inhibit the parties' ability to develop a complete evidentiary record, limit the evidence and scope of the issues considered by hearing officers, and preclude non-petitioning parties from actively participating in representation hearings. At best, the NPRM would sacrifice accuracy and completeness to achieve modest reductions in the length of representation cases. Even assuming the NPRM would reduce the length of representation cases such a tradeoff cannot be justified.

Given the significant issues it raises and the substantial public policy and practical criticisms to which it is susceptible, the NLRB should withdraw the pending NPRM and solicit comments and ideas from stakeholders with respect to appropriate revisions, if any, to the existing regulations governing representation cases. Only after all interested stakeholders have had the opportunity to be heard should the NLRB issue a revised NPRM that is more directly aimed at avoiding delays in the processing of representation cases without prejudicing the rights of parties in representation cases. There is no compelling reason why the procedural changes proposed by the NLRB must be resolved and implemented within the time frames laid out by the Board in the NPRM. Indeed, because the current procedures are functioning more than adequately at this time, the NLRB can, and should, utilize a more inclusive and thorough process for the development and implementation of any changes to the current representation-case procedures.

Sincerely,

Molly Corbett Broad
President

MCB/ldw

On behalf of:

American Council on Education
Association of American Universities
College and University Professional Association for Human Resources
National Association of Independent Colleges and Universities