

Joint Poultry Industry Human Resources Council



August 22, 2011

SUBMITTED ELECTRONICALLY

Mr. Lester Heltzer
Executive Secretary
NLRB
1099 14th Street NW
Washington DC 20570

Re: RIN 3142--AA08, Proposed rules
Governing Representation Procedures under the
National Labor Relations Act

Dear Mr. Heltzer:

The U. S. Poultry & Egg Association, the National Chicken Council and the National Turkey Federation are non-profit trade associations representing the producers and processors of chickens, turkeys, other poultry, eggs and affiliated industry suppliers. Our associations appreciate the opportunity to submit these comments on the proposed rules issued by the National Labor Relations Board ("NLRB" or "Board") and published in the Federal Register on June 22, 2011 to set forth new representation case procedures under the National Labor Relations Act ("NLRA" or "Act").

For reasons discussed more fully below, our associations oppose the proposed regulation as drafted and respectfully request that the Board decline to adopt the proposed rules. Some general comments will be made about the rules in their entirety, and specific comments will follow under each section of the proposed new rules.

A. General Comments on Proposed New Representation Case Procedures

1. The use of Statement of Position forms injects technical pleading requirements into the rules, which should strive to be “user-friendly,” and the injection of such requirements do not serve that purpose. Indeed, the entire federal court system, and that of almost every state, has abandoned technical pleading requirements in favor of “notice” pleading, like the NLRB’s current procedures, and it is submitted that such technical “pleading” requirements inject inappropriate technical and legal requirements, upon penalty of subsequent waiver and loss of appeal rights, that do not serve the policies of the Act.

2. It is submitted that there are no provisions in the Act or the regulations that require “rushed” elections, although there are many provisions requiring “fair” elections, and the proposed changes in Section 102.60 as well as the remainder of the proposed rules do not meet that goal.

3. The requirement that the “showing of interest” be included with the petition presents an unnecessary impediment to the current system which is working quite well, an unnecessary impediment to petitioners, and such additional requirements are an unnecessary burden to the utilization of the Act.

4. Contrary to the suggestions in the proposed regulations and their commentary, the new procedures will significantly decrease the Board’s current “success” rate of having some 90% of elections be agreed upon by stipulation or consent. Contrary to the current efficient procedures, the proposed procedures provide no incentive (or time) to enter into such a stipulated or consent election.

5. Limiting the time period to 7 days between the Notice of Hearing and the hearing, presents an almost impossible sequence of events, to satisfy timely during which all parties must review the petition and attached documents, investigate the requirements and the facts, find counsel or other representatives, file technical Statements of Position upon penalty of waiver of rights to a hearing or of any appeal, prepare offers of proof, review and file appropriate voting lists, which include not only names and addresses but also e-mail addresses and telephone numbers not only of the proposed voting unit, but of alternative voting units and of any classifications to be excluded, prepare offers of proof and other witnesses, attempt to enter into a consent or stipulated election, all within the 7 days.

6. The requirements which the comments to the regulations suggest are similar to federal court procedures but require this multitude of tasks to be performed within 7 days, are a time period that would shock any other court or administrative agency, whether state or federal. The regulations contemplate a non-attorney hearing officer having the right to make rulings in a “summary judgment” fashion, within 7 days, in a manner contrary to any other court or administrative system and one that, it is submitted, lacks due process. The result can only lead to additional litigation, not less litigation, which will ultimately result in longer delays, at least in select cases. In fact, there are many

federal appellate cases in every federal court circuit setting aside such Board rulings as indicating a lack of due process for following just such “expeditious procedures.”

7. The procedures allowing or requiring putting off a decision affecting less than 20% of the electorate, will also lead to serious legal challenges, particularly since in almost every case the status of statutory supervisors or alleged supervisors is disputed. As a result, both the petitioner and the employer, in a typical case, will not know what to say or how to use these disputed persons, upon penalty of having the petition voided and/or the election set aside. The 12 year delay in a recent representation case just decided by the Board is an example of how delay will result.
8. The logistical challenge of preparing a final voting list including, in addition to the traditional names and addresses, the full names, available telephone numbers, available e-mail addresses, work locations, shifts, job classifications of all eligible voters, in some type of alphabetical format and then electronically communicating this information within 2 days, presents an insurmountable burden, upon penalty of objectionable conduct and further litigation. Further, employers are already experiencing resentment from voters because their home addresses are disclosed to petitioners, and both employees and employers have a sense of a lack of privacy or respect in such disclosures.
9. While the additional provisions requiring the Regional Director and the employer to electronically transmit the final notice to employees of election at first appear uncontroversial, such a procedure adds to the likelihood of additional objections being filed based upon failure to receive such notice and/or the “marked ballot” issue, thus increasing the likelihood of subsequent litigation and delays.
10. The proposed regulations are drafted from the thinly-veiled suggestion that delays in election dates work to the disadvantage of petitioners. No consideration is given to statutory policies behind fairness of elections (rather than rushed elections), or similar election period dates set forth in almost every other type of election conducted in our free society, nor any consideration to the rights of employees to be given time to consider a rational explanation of alternatives. As written, the proposed regulations are a step backward and thwart, rather than carry out, the policies of the Act.
11. The Board is currently meeting or exceeding its public goals concerning the timing of secret ballot elections, and it is hard to see any well-justified rationale for such dramatic changes that carry the unmistakable appearance of a denial of due process.
12. The “waiver” provisions are nothing less than shocking, requiring all documents and offers of proof to be made within 7 days, subject to not only summary ruling, but to the waiver of any rights to present evidence or contend otherwise or appeal in the future. Further, the “waiver” issues are not even related to relevant considerations, since, as it is written, an employer could somehow fail to provide available telephone numbers and e-mail addresses, which would operate as a waiver of presenting evidence or argument or even cross examining witnesses at the hearing. The regulations are vague and do not even consider these ramifications, and obviously were written very quickly.

13. One can only wonder the necessity or compelling need for the dramatic nature and the short time frames set forth in the proposed regulations. The current procedures work well, meet and exceed all published NLRB goals, result in a 90% “win rate” by virtue of the parties being able to negotiate stipulated or consent elections without a hearing, and currently result in a secret ballot election win rate for petitioning labor organizations of over 66%. In order to even consider such controversial matters as are set forth in the proposed regulations, amendments that the average tribunal would consider a denial of due process, there should be a critical necessity for such rules and they should only be published after a great deal of input from stakeholders, much as that already followed concerning healthcare voting units. Ironically, the NLRB uses a very thorough process to “vent” stakeholder concerns about a voting issue only affecting one industry, and then publishes a broad rule affecting all industries without any such consideration.
14. The numerous legal, practical, and fairness concerns expressed in these comments apply not only to burdens placed upon employers, but apply to the burdens placed upon labor organizations and other petitioners and other parties, including procedures such as RM cases, RD cases, and other type representation proceedings.
15. The current system works quite well even in those rare 10% of cases where a representation hearing is necessary, and often the parties represent themselves without hiring outside counsel or representatives. Most such hearings are completed within 1 day. The current “user-friendly” system is working well, and there is no justification for abandoning it in favor of a highly legalistic, adversarial, summary-judgment type proceeding following technical pleading requirements abandoned many years ago by the federal and state court systems. Indeed, it is important to remember that the historical and legal purpose of a representation hearing is fact-finding, and the proposed rules abandoned that successful concept in favor of an adversarial, technical, legal system, which will undoubtedly result in a “battle of lawyers” which would shock even Charles Dickens.
16. The proposed rules do away with the current “negotiated” system of determining the type, dates, times, and locations of the election, and instead go to an adversarial, pleading, unilateral type procedure which is not a step forward.
17. The lack of the right to file briefs dealing with representation issues is another example of a lack of commonly held due process rights, as another example, which replaces a “fair” proceeding with a “rushed” election.
18. The provisions in the new rules denying voting employees the right to know the bargaining unit in which they are voting on whether or not to elect a labor organization, is another unwarranted effort to provide rushed elections rather than fair elections, and is contrary to the Act.
19. Another example of “rushed” elections is a provision indicating the Regional Director may issue a decision and direction of an election, without even stating findings or reasons for the decision.

20. The regulations do not even consider an approach to give the voters an opportunity to consider both sides, that is, to require a petitioner to provide a certain notice period to the employer prior to filing its election petition, so there will be an adequate opportunity for consideration of the issues by both sides. Such a notice requirement on the part of petitioners prior to the filing of the petition would allow time for the voters to understand the issues, a factor the proposed regulations do not even consider, and indeed an obvious right the new regulations go a long way to avoid, if not destroy.
21. The “rushed” procedures are also demonstrated by requiring a party to furnish its proof with its objection to an election, and having a hearing on such matters within 14 days after the tally of ballots, which could be within 7 days of the filing of the objections. No similar court or administrative agency sets forth such short deadlines for such significant matters.
22. The rushed nature of the procedures for an election is also in contrast not only to those of other federal agencies, state and federal courts, but to the similar procedures utilized by the NLRB in unfair labor practice cases.
23. Regarding the Board’s current “blocking charge” policy, this policy is the “poster child” of delay in conducting elections, as studies indicate it delays elections over 100 days. It should simply be abandoned, as the parties can still utilize other procedures if an election was not fairly conducted or was tainted by unfair labor practice issues.
24. Regarding electronic signatures for showing of interest purposes, abuses already exist in card signing, which would be greatly exaggerated with electronic signatures, especially since checking a box on a website is done as an afterthought today, as persons do not actually read the information electronically presented and there is a greater likelihood of confusion.
25. Because of the nature of these changes that appear to favor rushed elections over due process, the amount of litigation will ultimately significantly increase, particularly on the appellate court level, as most disadvantaged parties will seek their due process from the court system rather than the NLRB.

B. Specific Comments on Each Section

Section 102.60 (Petitions) - The requirement to serve a Statement of Position form could be unduly burdensome to petitioners. Currently, although petitioners are required to state the proposed voting unit in their petition, they are not required to serve a Statement of Position form. Labor Organizations, too, may have difficulty completing the complexities of the Statement of Position form, and an employee or group of employees or an individual may have even greater difficulty in completing such technical requirements, particularly without legal representation. It is submitted that the National Labor Relations Board (“NLRB”) should strive to make its procedures “user-friendly,” and the injection of technical “pleading” requirements like the Statement of Position form do not serve that purpose. Indeed, the entire federal court system, and that of almost every state, has abandoned technical pleading

requirements in favor of “notice” pleading, like the NLRB’s current procedures in terms of the requirements of the petition. It is submitted that such additional technical “pleading” requirements do not serve the purposes of the National Labor Relations Act (Act) and inject inappropriate technical and legal requirements, upon penalty of subsequent waiver, that do not serve the policies of the Act. Subsequently, these comments will discuss similar adverse effects on the employer, but the bottom line is that the addition of technical pleading requirements in NLRB representation cases is a step backwards, and unfair to all parties. Such steps in the name of efficiency and/or speedier election dates do not justify the deterrent effect, lack of due process, and adverse consequences of the additional technical pleading requirements, particularly since current NLRB election date results meet or exceed NLRB goals. It is submitted that there are no provisions in the Act or the regulations that require “rushed” elections, although there are many provisions requiring “fair” elections, and the proposed changes in Section 102.60 do not meet that goal, to the extent they require technical Statement of Position forms to be filed with the petition.

Section 102.61 (Contents of Petitions) - The requirement that the “showing of interest” (evidence supporting the statement that a substantial number of employees wish to be represented) accompany the petition presents an unnecessary impediment to petitioners, and consistent with the comments previously made regarding Section 102.60, such additional requirements on petitioners are an unnecessary burden to their utilization of the Act. As indicated earlier, many petitioners are unfamiliar with NLRB procedures and they may come in and file a petition without having their necessary supporting information with them or available. Under current NLRB procedures, such petitioners are allowed to file their petition but are provided guidance on supporting documentation that is necessary, and relevant time periods, and the NLRB offices typically works together with the petitioners to accomplish the necessary supporting documentation. The proposed rule, in contrast, would inject additional technical requirements on the filing of the initial petition, resulting in delays in the filing of such petitions, and/or discouraging petitioners from filing at all. Although, admittedly, the proposed rule allows for exceptions to the concurrent filing of the “showing of interest” with the petition, such rigidity in the new proposed rule works a hardship and unfairness on petitioners, and also creates a perception that the NLRB is primarily interested in its own efforts to show quick elections from the official filing of the petition date. Such emphasis on the part of the NLRB towards a too rapid processing of cases has long worked to the disadvantage of the parties appearing before the Board, and seems only designed to make the various NLRB Regional Directors and/or the Board itself, look better in its processing of cases where speed is an end to itself. For example, for many years the NLRB offices all across the country have commonly directed petitioners and/or persons filing other type cases with the NLRB, but that they must withdraw their charges if the NLRB has not been able to complete its investigation within the NLRB’s goals for processing cases. The image of the NLRB as a fair and effective institution is not assisted by such devices designed only to make Board officers appear to be efficient. Also, such procedures actually do not encourage speedy proceedings in that the petitions and/or charges that are filed, withdrawn, and re-filed, only serve to delay the process.

Section 102.62 (Election Agreements; Voter List) – These provisions pertaining to consent election agreements, stipulated election agreements, and full consent election agreements, have been modified to be consistent with the other proposed provisions pertaining to the new proposed rule. In addition, a new provision on the so-called “Excelsior” rule has been added pertaining to voter lists. Also, a new provision for final notices to employees of the election has been added, providing for a final notice to employees of election to be transmitted to the extent practicable.

It is important to make some general comments regarding the likely effect of this proposed rule, should it be adopted. Simply stated, the proposed rule will increase litigation and discourage stipulated and consent elections. In an effort to “speed-up” balloting, the actual effect may not only increase litigation but also often bring about the opposite results, at least in contested cases.

Currently, some 90% of elections are resolved without a hearing by some type of stipulated or consent election. The reason for this is fairly simple: Since elections are currently held within a median time period of less than 38 days, petitioners know that their cooperation entering into a stipulated or consent election can actually speed the election process. Employers know this too, and as a result the parties are remarkably successful in entering into agreement to resolve the voting units without litigation. A 90% “success rate” in this regard is hard to beat.

Under the new procedures, however, there is no incentive (or time) to enter into such a stipulated or consent election. Since under the new procedures, elections could be held in as few as 10 days from the filing of the petition, but certainly in 20 days, even following a hearing, and petitioners have absolutely no incentive to enter into a stipulated or consent election. Employers, who are in most cases not the petitioner, will find it much more difficult to work out or propose a stipulated or consent election, and when they do make such a proposal, it is obvious that their proposal will be for a lengthier pre-election period than would otherwise result from a contested hearing.

Further, these considerations do not take into account the limited 7-day time period between the notice of hearing and the hearing, during which time under the proposed rules, all parties must investigate the facts, find counsel or other representatives, file technical Statements of Position upon penalty of waiver, review and file one or more initial voting lists, and the like. The bottom line is that it is highly likely that the percentage of stipulated or consent elections will drop dramatically, resulting in additional litigation. Indeed, as member Pearce commented during the NLRB hearings on July 18, 2011, “Can you understand that the proposed rules that are under consideration now are primarily for procedures that don’t really contemplate stipulated elections?” (p. 90) Further, where there is a stipulated or a consent election, it will likely provide for a much lengthier pre-election period than would otherwise be the case. In other words, the new procedures, if they go into effect, are not advantageous.

Another point will be made here in regard to the effort to “speed-up” the proceedings. An example will be made of a single case, but then some broad generalizations will be drawn from that case and similar cases and their effect on finalizing elections. A case that has to be one of the longest certification proceedings on record, that was decided by the Board on March 28, 2011, is Terry Machine Co., 356 NLRB No. 120. The election was held back in 1999, and the Supplemental Decision Certification of Representative was issued after the ruling on March 28, 2011. In other words, the representation proceeding took 12 years. The delay was so significant that the dissenting member of the Board indicated in his dissent that: “Should the employer test the validity of the union’s certification by refusing to bargain, obtaining an enforcement of a bargaining order is unlikely.”

The delay in the representation proceedings can largely be explained by litigation, allowing large numbers of voters to vote subject to challenge, delays in determining whether certain “coordinators” were statutory supervisors, and failing to allow full hearings, all of which resulted in two remands by the Board to the Regional Director, before even an initial certification. The Terry Machine case is just one of dozens, if not hundreds, of cases over the years in which the NLRB, based on its concept of

expediting representation proceedings, in effect ultimately led to additional litigation and extraordinary delays. The best examples of this result are situations that occurred during the 1970's, and 1980's, in which large numbers of election issues and certifications were resolved by the Board in a summary manner, denying the employer, for example, the benefit of a full hearing. Virtually every court of appeals issued a decision during this time setting aside Board certifications and remanding for due process hearings, finding the NLRB inappropriately resolved matters in a summary fashion without the benefit of full hearings. Examples of such cases include: NLRB v. Connecticut Foundry Co., 688 F.2d 871 (C.A. 2, 1982) (employer raised substantial and material factual issues concerning election, and because of delay the petition for enforcement denied rather than remand order given); Trimm Associates, Inc. v. NLRB, 351 F.3d 99 (C.A. 3, 2003) (enforcement denied where evidentiary hearing should have been held); National Posters, Inc. v. NLRB, 720 F.2d 1358 (C.A. 4, 1983) (Board is required by due process of law as well as its rules to hold hearing where there is a substantial and material issue of fact; whether there is such a factual issues is a question of law and ultimately a question for the courts; hearing should have been held regarding voter eligibility); NLRB v. Claxton Manufacturing Co., Inc., 613 F.2d 1364 (C.A. 5, 1980) (as a matter of due process an evidentiary hearing must be held where employer presents prima facie evidence of substantial and material issues; and whether the employer has made such a showing is a question of law and ultimately a question for the courts; Board improperly granted summary judgment); NLRB v. Gormac Custom Manufacturing, Inc., 190 F.3d 742 (C.A. 6, 1999) (Board acted unfairly in denying hearing); NLRB v. Service America Corp., 841 F.2d 191 (C.A. 7, 1988) (party entitled to hearing if it raises substantial and material issues of fact); NLRB v. Superior of Missouri, Inc., 233 F.3d 547 (C.A. 8, 2000) (employer made prima facie showing that raised fact issues requiring a hearing); NLRB v. Valley Bakery, Inc., 1 F.3d 769 (C.A. 9, 1993) (employer made prima facie showing that substantial and material issues existed warranting a hearing); North of Market Senior Services, Inc. v. NLRB, 204 F.3d 1163 (C.A. D.C. 2000) (employer raised substantial and material issues warranting an evidentiary hearing).

The point is that in an effort to expedite representation proceedings, the Board, instead, actually caused additional litigation and additional delays. The new proposed rules, with their reliance on technical Statements of Position, waiver and summary judgment provisions, denials of appeals as of right, and discouragement of stipulated or consent election arrangements, is more likely to be counterproductive, increase additional litigation, and certainly extend the time period for representation proceedings, at least in some cases. The bottom line is that if competent counsel, which is definitely required in the new procedures, determines that his or her client is not receiving adequate due process in proceedings before the Board, counsel will be obligated to suggest appropriate review in the federal court of appeals, for vindication of perceived rights. The Board will simply be shifting the focus of litigation from the Board to the courts, which in the long run will only delay the rights of the parties.

The voting list change presents significant logistical challenges both with the requirement of presenting the list (upon penalty of objectionable conduct and further litigation) within 2 days, and in addition to the traditional names and addresses, adding to the list of requirements full names, available telephone numbers, available e-mail addresses, work locations, shifts, and job classifications of all eligible voters. Further, the regulation requires a list of names to be alphabetized and be in electronic format generally approved by the Board's Executive Secretary. On the other hand, the additional requirement to file the list electronically and serve it on the other parties named in the petition does not appear burdensome, and is assistance to the process.

The provision on providing available telephone numbers and available e-mail addresses violates the ordinary person's (both employer and the employee) sense of privacy. Many employers already experience significantly distressed employees because their home addresses are disclosed to petitioners without their consent. To add e-mail addresses and telephone numbers will only exacerbate the current sense of abuse on the part of employees from the disclosure of home addresses, and the employees commonly blame the employer for such disclosure. In one sense, the Board's disclosure rules will result in an unnecessary resentment of the employer for privacy violations, when in fact it is no fault of the employer. If the use of e-mail addresses and telephone numbers is to facilitate the Board's issuance of notices of elections directly to employees, there would be no need to serve the list of e-mail addresses and telephone numbers on the petitioner. Further, the rules do not clarify that the petitioner may not use the telephone numbers and e-mail addresses for organizational purposes, as comments are only solicited on the issue of appropriate use of the list for purposes unrelated to the representation proceedings. The proposed rules do not specify whether use of telephone numbers and e-mail addresses for organizational purposes is consistent with the uses set forth in the proposed rules. The proposed regulation is also unclear as to whether it refers to employees' private e-mail addresses or their business e-mail addresses, or both. If e-mail addresses include the latter, unions will be encouraged to utilize workplace e-mails to issue mass e-mails, raising a host of litigation in regard to no-solicitation policies, spam filters, monitoring of employee e-mails and related issues of surveillance and the like. Further, providing telephone numbers and e-mail addresses can lead to subsequent unwanted contact and sexual advances, identity theft, and requiring more information won't solve the problem of outdated information, as people change e-mail addresses and cell phone numbers all the time.

In any event, the additional requirements of the proposed voting list regulations, the vagueness of the regulation, and the short time frame for compliance will only increase the number of objections to elections that will be filed by not only by the employer, but by other parties concerning an election, and the subsequent litigation and related delays or rerun elections.

The provision requiring the Regional Director to electronically transmit the final notice to employees of election "to the extent practical," at first appears to be an acceptable act of providing additional information to voters, but it also serves as an additional basis for objections to be filed by any party. Undoubtedly some party will contend that the Regional Director did not fulfill its responsibilities, or that somehow notice was issued to some, but not other voters, or that the notice is somehow incomplete and create additional grounds for objections and additional litigation. Further, these electronically distributed notices will likely be printed out, marked up, and perhaps distributed by voters, which will create additional issues as to "marked ballots." The current procedure of requiring the employer to post notices of election is working efficiently, and creating so many requirements that could result in additional litigation would appear to be an unnecessary addition.

Section 102.63 (Investigation of Petition – Notice of Hearing; Service of Notice; Initial Notice to Employers of Election; Statement of Position Form; Withdrawal of Notice) – The provision in the regulations requiring a hearing to be set at a date 7 days from the date of service of the notice of hearing is unduly rigid and too short. Currently, the Board's "best practices" contemplate that the hearing will commence within the tenth and fourteenth day following the filing of the petition. "Representation Cases Best Practices Report", General Counsel Mem. 98-1, at 2 (January 26, 1998). First, the time necessary to review the petition and other documents that are to be served with the petition, locate counsel or some other representative that can advise on the new technical pleading requirements, investigate the facts, potentially locate and interview witnesses (not only for investigation of the facts

but also to prepare for the hearing) make an initial determination of supervisory status, eligible voters, and the scope of the bargaining unit, prepare a list of names, work locations, shifts, and job classifications (not only of all employees set for the in the petition, but also in any alternative unit to be proposed by the employer and of classifications suggested for exclusion), prepare and file Statements of Position, prepare offers of proof, consider and discuss stipulated and consent elections, and have all this done within 7 days, is, at best, incredibly difficult, and, at worst, impossible. Such a time sequence is going to adversely affect small employers that may not have the information and professional capabilities available, and large employers, because of the magnitude of the matters presented. This “almost impossible” time limitation is further exacerbated by the magnitude of the adverse consequences for failure to comply, because a party essentially waives its position on the issues going forward without a proper response. In several places in the comments on the proposed rule, a suggestion is made that the proposed rules somehow brings the Board into conformity with the practices of state and federal court in their motion practice. There is not a single court in the entire United States that requires such a magnitude of technical requirements to be completed within 7 days, as does the Board’s proposed rules. Indeed, many litigated court cases have been set aside because the judge has set forth too short a time frame for a response, a factor generally considered by appellate courts to be akin to the denial of due process. One can only imagine the amount of new litigation these new rules are going to generate with the enormity of their requirements to be completed within a one week period, upon penalty of waiver of legal rights. When combined with the denial of an appeal as a matter of right, a factor to be discussed later, the entire new proposed process smacks of a denial of due process, and undoubtedly there will be substantial litigation on that issue.

The real question becomes “why” a government agency would introduce, publish, and attempt to enforce such onerous requirements as are specified in these proposals. If this were a situation where a person on death row was about to be executed, there would be a reason for such short deadlines. But the only purported reason to justify the proposed rules, seemingly, is to expedite the conducting of elections, inasmuch as it is suggested that a delay in holding an election does not work to the petitioner’s advantage. (No consideration is given, it seems, to the rights of employees to be afforded time to consider a rational explanation of alternatives, or for employers to make such explanations.) As stated earlier, it is submitted that there is nothing in the Act or the existing regulations that requires rushed elections, but there is a lot in the Act and the regulations and enforcement policy that require fair elections. Further, the Act is crystal clear on the position of neutrality as to which party has a better opportunity to win an election. These rules appear drafted to favor a union petitioner, and a rule designed to favor one party in an election over the other appears to be totally contrary to the policies of the Act. Most experts interpret the Act, as amended by the 1947 Taft-Hartley Amendments, to “represent a fundamental change in philosophy, which rejects outright the policy of encouraging collective bargaining.” Archibald Cox, “Some aspect of the Labor Management Relations Act of 1947,” 61 HARV. L. REV. 1, 204 (1947). Further, in light of the fact that the Board is meeting or exceeding its published goals concerning the timing of secret ballot elections, it is hard to see any well-justified rationale for such dramatic changes that carry both the unmistakable appearance of a denial of due process along with a prejudice in favor of one side.

The requirement on the employer to electronically distribute the notices to employees of election, while on its face appearing to be a helpful additional dissemination of election information, also creates additional grounds for objections and subsequent litigation which could be brought by any party. The entire issue of electronic “notice” to employees on various matters is legally controversial today. Some courts consider it appropriate “notice,” and some do not. Further, such a concept “segregates” those

who have electronic equipment from those who do not, thus favoring some voters over others. As stated in the discussion previously, undoubtedly issues will be created about which employees received such electronic notice and which did not, the downloading of such notices and subsequent copying and distribution of them creating “marked ballot” issues, and additional complications resulting from the additional requirements that are fraught with danger, upon penalty of objections being filed and resulting in additional litigation.

As discussed earlier, the Statement of Position that must be filed at or before the hearing date is an extremely technical pleading requirement that must be met within 7 days or less.

The mandated requirement to also distribute the Initial Notice to Employees of Election electronically, if the employer customarily communicates with its employees electronically, is debatable. While it seems to be an additional useful device to inform employees about election information, it also leads to additional grounds for the filing of objections and subsequent litigation. It also provides unequal treatment of the voters as some will have electronic access and some will not.

The requirement to file and serve a Statement of Position by the date and in the manner specified in the notice unless that date is the same as the hearing, is one of the most technical and inappropriate portions of the proposed rules. This technical “pleading” requirement is generally inconsistent with the more modern “notice” type pleading requirements not only under existing Board rules, but under the rules of the federal court system, as well as those of most states. Under the federal rules of civil procedure, an answer to a complaint is due in 20 days from the service of the complaint in the federal system and 30 days in the state systems. Further, the federal rules under Rule 26(c) do not preclude a party from amending its disclosures at any time, nor does it prevent a party from raising and litigating any issue about which it learns during the course of the litigation. As a matter of fact, even in Board proceedings it is common for a party to move to amend pleadings to conform to the evidence presented, and federal judges are typically very liberal in so doing in the interest of fundamental fairness. Further, the short time frame (which could be 7 days or less) is shorter than those existing under any court or administrative system operating in the United States today. If a state of federal judge were to impose such a requirement in a given case, it would undoubtedly be reversed on appeal for a number of reasons, including a denial of due process. How can any employer review a petition and potentially have to learn election procedures, find and approve counsel or some other representative, investigate the facts, determine supervisory status and an appropriate voting unit, prepare Statements of Position, prepare offers of proof and/or witnesses to present at a hearing, prepare a complicated initial voting list including shifts, classifications, and the like, not only for the petitioned unit but for alternative voting units and classifications, determine appropriate type, dates, times, and location of the election and an eligibility period, describe all other issues the employer intends to raise at the hearing, and do all this in 7 days? Even if all of this is accomplished, what time remains for negotiating a stipulated or consent election? Further, when this matter goes to a hearing date, hearing officers are required to review all of these petitions and offers of proof and, in many cases, make on the spot determinations of whether material issues of fact exist, warranting a hearing, the numbers of potentially eligible voters and the like, the hearing officer in many cases not even being an attorney. All of these technical requirements are even more important, because their penalty is a waiver of legal rights, and rights of appeal.

If there was ever a system which denied due process, discouraged consent and stipulated elections, and designed to bring about a mass of post-election litigation, primarily at the federal Court of Appeals, this is it. As stated in an earlier discussion, often when the NLRB attempts to expedite proceedings, it ultimately results in increased resistance and/or appellate review in the federal court

system, resulting in significant delays. The Terry Machine case cited previously is just one example, as are the cited circuit cases from virtually every Circuit Court of Appeals. One must also wonder about the purpose of the additional requirement to file with the Regional Director (though not served on any other party) available telephone numbers, e-mail addresses, and home addresses of all individuals. There is no articulated reason for this requirement, and one is left to speculate about the use and necessity of such information. An impartial observer would only conclude that this is another example of an intrusion of basic privacy interests of all concerned, and a time consuming one at that.

Significant due process concerns are compounded by the waiver provisions. These not only waive legal rights, but preclude presenting evidence or argument at the hearing. Further, as worded, the waiver applies to unrelated items, as the regulations expressly state that if the employer should somehow fail to provide available telephone numbers and e-mail addresses, it is thereafter precluded from presenting evidence or argument or even cross examining witnesses at the hearing. These rules are not even rational, much less reasonable. They may even invite unscrupulous persons to fail or refuse to provide certain information, make that point on the record, and then “bait” the hearing officer, not even an attorney, to deny the employer due process rights at the hearing, setting up many years of subsequent litigation. A more fertile ground for long term delays in election proceedings can hardly be imagined, at least in contentious cases. The proposed regulations actually play into the hands of those parties that want to delay the process, by creating so many controversial procedures that will make court review almost common in these type cases in the future.

Based upon the July 18-19 NLRB Public Board Meeting hearings, there is even total confusion among practitioners and the Board as to what the waiver regulations mean. Member Becker commented that if the employer or any party fails to raise in a Statement of Position or at the hearing an eligibility question, it can be raised without preclusion through a challenge, but most commentators disagree, saying that the rule is clear that the employers are precluded if it is not raised its position in the Statement of Position absent some extraordinary showing to a hearing officer. (p. 243) Some of the confusion obviously results from the fact that Section 102.63 of the proposed regulations require the employer in its Statement of Position to “describe the most similar unit that the employer concedes is appropriate; identify any individuals occupying classifications in the petitioned-for unit whose eligibility to vote the employer intends to contest at the pre-election hearing on the basis of each such contention; . . . and describe all other issues the employer intends to raise at the hearing.” The proposed regulation goes on to state that “The employer shall be precluded from contesting the appropriateness of the petitioned-for unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses, if the employer fails to timely furnish the information described” in certain subparagraphs, but in effect the subparagraphs cross reference each other. Obviously, the hearing officer is going to have difficulty in resolving this dilemma, and employers may ultimately end up litigating these type issues in court resulting in many years of delay.

The situation is particularly serious in that almost all of the changes are so unjustified and unnecessary. The current procedures meet all published NLRB goals, are consistent with the policies of the Act, result in a 90% “win rate” by virtue of the parties being able to negotiate stipulated or consent elections without a hearing, and are currently resulting in a secret ballot election win rate for unions of over 66%. In order to even consider such controversial changes that would result in a denial of due process and a reversal of any trial judge who applied such procedures, these rules should be put aside for

more study and thorough preparation as was done in the case of the voting unit rules for the healthcare industry.

The numerous legal, practical, and other concerns expressed in these comments, also apply to burdens placed upon labor organizations and other petitioners, such as in RM cases, RD cases, and other representation proceedings.

Another point should be made here, pertaining to the hearings that are conducted and not resolved by stipulated or consent arrangements. By and large, these hearings currently function rather efficiently and properly. Often at the hearing parties represent themselves, rather than hiring outside counsel or representatives. This result is possible, because the hearing officers by and large do a good job completing the record, and in some cases assisting the parties in some manner in addressing necessary issues. Further, the hearings are not especially lengthy, as most are completed in less than a day. The bottom line is that the current system works quite well, even in those rare 10% of cases where hearings are necessary.

In contrast, the proposed rules would create a highly technical, adversarial, contentious, and complicated-type hearing in which no party can afford not to have experienced legal counsel. The longstanding purpose of the representation hearing is fact-finding. This process is replaced with an adversarial system of pleadings, offers of proof, and the like. It is submitted that this is not a step forward, and the new rules abandon a current system that is working remarkably well. Why replace the long history of fact-finding representation hearings, in favor of a technical, complicated, adversarial, pleading system, with procedures all to be resolved within 7 days?

Section 102.64 (Conduct of Hearing) – The proposed rules as to the conduct of the hearing generally reflect the changes already addressed in these comments. The proposed regulation states that the issues required to be determined under Section 9(c) of the Act involve whether there is a unit appropriate for the purpose of collective bargaining, and sometimes related issues. As stated previously, over the many years of the Act, the hearing was available to resolve these issues by fact-finding, without adversarial and technical pleading requirements. The new procedures are a definite step backwards. In the short run, they may seem to be efficient, but in the long run they create an almost impossible 7 day deadline to resolve complicated legal issues that in a court of law would take many months to resolve. They do not allow for a determination of the appropriate unit prior to the election, even in the case of incredibly important issues like the “supervisory status” of lead persons or foremen and the voting eligibility of “plant clericals.” Further, rather than having complete fact-finding, the hearing is limited to the determination of “material facts” as determined by the hearing officer after a series of technical pleadings and offers of proof requirements. As repeated many times in these comments, there are no provisions in the Act or regulations requiring “rushed” elections which leave little time for thoughtful consideration of the issues. However, there are numerous provisions in the Act and regulations requiring fair elections. Neither goal is accomplished with these proposed regulations. The regulations will lead to the ultimate result of long delays and court litigation, which will actually be counterproductive to the Board’s purported goals.

Section 102.65 (Motions, Interventions) – No substantial issues warranting comment are contained in this section.

Section 102.66 (Introduction of Evidence, etc.) – Most of the comments in Section 102.66 are discussed in reference to the comments on Sections 102.62 and 102.63 above. These comments will not be repeated here, and we incorporate by reference the comments to Sections 102.62 and 102.63. Additional comment will be made on three matters not addressed in these comments previously.

The proposed rules require at the hearing a solicitation of the parties' positions on the type, dates, times, and locations of the election and the election period. While undoubtedly the proposed rules added these requirements to expedite the proceedings, the rules in this respect are another example where in the name of expeditious proceedings, the Board is abandoning a long used and successful procedure. Currently, whether in stipulated or consent elections or even in elections determined by decision and direction of election, these election details are basically negotiated between the parties and the regional office. The current procedures work quite well, as evidenced by the high percentage of stipulated or consent elections (90%), and the Board's meeting of all of its published goals on the dates of holding elections. More importantly, the current procedures further the goal of fair elections.

To change this successful procedure and instead delegate the process to one determined by "formal" Statements of Position at the hearing, is a significant step backwards. Although the regulations indicate that there will be no litigation of those issues at the hearing, the hearing may turn into a "negotiating session" of such matters, thereby slowing it down, and one in which the Regional Director unilaterally selects one proposal or another, without knowing the background information and positions of the parties warranting such a determination. Or, perhaps the Regional Director simply follows the current process after reviewing such positions taken at the hearing. Whichever results, the current system works quite well, and the proposed rules set forth new procedures fraught with danger. The new rules in this regard discourage elections determined by the mutual agreement of the parties. Indeed, as Member Pearce commented during the NLRB hearings on July 18, 2011, "Can you understand that the proposed rules that are under consideration now are primarily for procedures that don't really contemplate stipulated elections?" (p. 90) Member Pearce is really right that under the proposed rules, stipulated elections will become extremely rare, rather than the norm, which represents another step backwards under the proposed regulations.

As a matter of fact, the complications added by the new regulations could cause some employers to refuse to allow elections on their premises. This occasionally, but rarely, happens currently. The regulations do not specify what happens if the Regional Director issues a decision setting forth such election location details, and the employer refuses to comply. In any event, as discussed previously in depth, the new regulations will undoubtedly result in a much greater number of contested bargaining units as opposed to stipulated and consent elections, and many more legal issues being raised subsequent to the election either before the NLRB or through the judicial system.

Special comment needs to be made here on the provision that, where disputes concern less than 20% of the unit, the hearing officer should close the hearing. These are the type proceedings followed to some extent in the Terry Machine case, discussed previously, which ultimately resulted in two remands and a 12-year representation case, even before the potential for judicial review. The issues are particularly acute where the 20% include persons alleged by one party or another to be statutory supervisors. The Act has been interpreted for years to prohibit statutory supervisors from soliciting any authorization or de-authorization or decertification cards, directing employees how to vote, interrogating employees, and the like. The new regulations now provide that these issues need not be determined before the election. Thus, both parties will go through an election campaign and an election, not only

without knowing whether certain potential supervisors are eligible to vote, but not knowing whether those potential supervisors can campaign or exercise free speech for or against the union or the employer. In some cases, the persons whose eligibility is yet to be determined would otherwise be the voices of “free speech” on the part of either the petitioning union, the employer, or some other party, and yet no one knows how or if these free speech rights can be exercised, or the legality of these rights being exercised. When combined with the “rushed” nature of the election period, in which an election could be held in as few as 10 days from the filing of the petition, a system for failure is thus set up, inviting legal contentions, objections, litigation and uncertainty. Again the Terry Machine case is an example of just this result, resulting in a 12 year representation proceeding.

While the statute requires a representation proceeding to determine the appropriate voting unit, as the proposed regulations acknowledge, such a determination is precluded where the dispute concerns less than 20% of the unit, not even allowing a hearing on those issues, and particularly in the case of critical issues like supervisory status, and precluding a hearing under the “pleading” and “summary judgment” provisions, it is submitted that the statutory requirements of the Act are not being met. Section 9 of the Act as well as due process requirements, require the Board to provide parties with the opportunity to present evidence and advance arguments concerning relevant issues. See, e.g., Bennett Industries, Inc., 313 NLRB 1363 (1994). In addition to the language of Section 9(c)(1) of the Act and Section 102.63(a) of the Board’s current rules, the Regional Director must provide “an appropriate hearing” prior to finding that a question concerning the representation exists, and an election. See, e.g., Angelica Healthcare Services Group, Inc., 315 NLRB 1320 (1995). Further, significant due process issues are going to be presented at a hearing concerning the right of parties to amend their Statements of Position, and there is no specific addressing of whether offers of proof can be amended. It is likely that every good lawyer will prepare “form pleadings” to raise every conceivable issue, to avoid the onerous subsequent waiver provisions. The proposed regulations are thus another step backward, reminding one of the technical pleading requirements that previously existed in many state court systems, and even in the federal system, prior to the adoption of “notice” pleadings under the federal rules.

Another deficiency in this section of the proposed rules is the denial of the opportunity to file briefs dealing with the hearing. The proposed regulation provides that briefs shall be filed only with special permission of the hearing officer and within the time the hearing officer permits, currently just 7 days. For all of these many years, Board processes have considered briefs of the parties to be helpful and necessary. Indeed, in almost all judicial proceedings, the right to file a brief is allowed. The Board’s new rules again deny basic concepts recognized by the judicial system of due process, including the right to file a brief, all in the name of expediting the proceedings. As stated many times, the Act and regulations require fair elections; they do not require rushed elections, particularly where commonly accepted rights are denied. The Board likens its new rules to the motion practices in federal court, and yet denies the parties all the basic rights associated with motion practices in federal courts, a procedure that would be stricken down by almost any judge or appellate court on the basis of the denial of due process. Such an approach does not speak well for a federal agency charged with the mission of free and fair elections.

Section 102.67 (Proceedings before the Regional Director, etc.) – Among other things, these provisions deal with the closing of the hearing where less than 20% of the unit is in dispute, and allowing such individuals to vote subject to challenge, and comments on this issue were made above concerning Section 102.66. However, we will supplement those comments by addressing the fact that under the proposed rules the Final Notice to Employees of Elections shall advise employees that the

disputed individuals are neither included in, nor excluding from, the bargaining unit, and instead will vote subject to challenge. Some courts have indicated that it violates the Act and basic due process not to allow employees to know the voting unit. See NLRB v. Beverly Health and Rehabilitation, No. 96-2195, 1997 WL 457524, at 4 (C.A. 4, 1997), and cases cited therein. Knowledge of the eligible voting unit can have a significant effect on employees' voting choices. Indeed, one would think that the voting unit, in which a collective bargaining agreement might be negotiated, would be one of the most important considerations in the employee's choice of voting for or against a labor organization. Further, the Act commands such a determination. Thus, the proposed regulations abandon not only the express purpose of the Act, but the obvious right of employees to want to know in which unit their bargaining agreement might be negotiated, all in the name of expediting the process. Again, the Act and regulations require fair elections, not rushed elections, the current system is working fine, and a great deal of history and successful experience is abandoned with the new rules. The proposed rules are appropriately coming to be called "a bad solution in search of a problem." By utilizing such procedures every employer would have valid grounds to contest this issue in the federal courts of appeals.

Comment will also be made about the new provision allowing the Regional Director to direct an election with findings and a statement of reasons to follow prior to the tally of ballots. The concern about this proposed provision is that it smacks of denial of basic rights in favor of expeditious processing. Obviously, a decision and direction of an election without a statement of findings and conclusions, does not allow the parties to know their respective rights or even the basis of the decision and direction of election. This procedure does not encourage reasoned decision-making on the part of the regional office. It suggests a procedure of "Let's get this show on the road, and worry about the rationale latter." It invites inappropriate decision-making setting the stage for even more time consuming litigation down the road. Further, the same section contemplates that a party may file a Petition for Review regarding the Decision and Direction of Election, but one wonders how a party may determine whether to file or how to file a Petition for Review without knowing the Regional Director's findings and conclusions. The procedures set forth in this provision are almost a contradiction in terms.

Comment is also necessary on the statement that the Regional Director shall schedule the election for the earliest date practicable consistent with these rules. The latter provision is particularly controversial in light of a provision in current procedures that absent a waiver by a petitioner (but not by the employer), that an election will not be directed until 10 days after the receipt of the final voting list. Such procedures tend to favor the petitioner, giving the petitioner the right to change the regulatory period for voting, while denying the employer the same right. Further, again the rules expressly emphasize expediting the election, rather than the conducting of a fair election, a public policy not supported by the Act or existing regulations or concepts of due process. This situation is exacerbated if the Regional Directors are "graded" in some fashion as to how quickly they conduct elections. Such pressure to conduct secret ballot elections fly in the face of the Act's emphasis on fairness. It is hard for the public or these commenters to imagine a public election in which any candidate can file a "demand" for an election in 10 days, or 20 days, at a time of his or her own choosing, and denies all other candidates the opportunity to have their position heard before the election is held. Yet, such a system is just what the proposed regulations impose. Most recently in Chamber of Commerce v. Brown, 128 S. Ct. 2408 (2008), the Supreme Court characterized Section 8(c) of the Act as granting the right to supplement "the First Amendment right of employers to engage in non-coercive speech about unionization," and it is submitted that the free speech provisions include the opportunity to speak in terms of the time period before the election.

There is, however, a partial solution to this dilemma, not mentioned in the proposed regulations or the Board's comments thereon. Apparently, there is no obligation on a petitioner to provide prior notice to the employer that a petition may be filed in the future. The only obligation under the proposed regulations is to serve a copy of the petition at the time it is filed at the regional office. Thus, there is a way for the Board to expedite elections, and yet to solve some of the problems raised by the proposed regulations expediting elections. That is, to require petitioners to provide prior notice to the employer, perhaps 30-45 days prior to filing of the petition, or some other pre-determined date, that a petition is going to be filed. This would allow an opportunity for a reasoned consideration of the issues on the part of the potential voters. An even better way of addressing this issue is to require the petitioner to serve such a notice on the employer, prior to signing authorization cards evidencing the showing of interest. This would allow all parties to be able to present the issues to the voters, without a "secret" campaign being held, subject to shorter period for holding a secret ballot election. Such a concept is already recognized by the Board in Dana Corp., 351 NLRB 434 (2007). If the Board desires a speedy election, and yet also desires to allow a "free speech" debate and understanding of the election issues prior to that vote, such prior official notice to the employer must be mandated by the new regulations. Unfortunately, this would not solve all the issues raised by the new regulations, particularly the due process issues previously raised, but at least it would allow an expeditious election with an opportunity for the voters to become informed prior to casting a ballot.

Comments that have previously been made will not be repeated regarding the Regional Director's designation of the type, date, time, place of the election, and the eligibility period, and the Regional Director's electronic transmission of the Final Notice to Employees of Election to affected employees to the extent practicable. Similarly, the requirement on the employer to distribute electronically the Final Notice to Employees of Election has been discussed previously, and shall not be repeated herein. Mention will be made of reducing the 3 full day requirement for the posting in the facility of the Board's Final Notice to Employees of Election to 2 days, and it is submitted this is another step backward. As indicated in many comments herein, the Board's new proposed regulations are designed to expedite proceedings, rather than conduct fair proceedings, a policy not called for by the Act or the regulations. The regulations do not appear to address the public interest on the employee's part of having an adequate opportunity to understand and explore the election issues, which should be one of the prime requisites, if not the prime object, behind a fair election. Instead, the Board's rules all appear designed to provide advantages to the petitioner on the basis of some perception that somehow the public interest is better served in this manner. There is no statutory basis for this concept, however.

The voting list issue requiring the full names, home addresses, available telephone numbers, available e-mail addresses, work locations, shifts, and job classifications of all eligible votes, also has been addressed previously in these comments in connection with the discussion of Section 102.62. Reference is made to that section for comments on these issues.

Section 102.68 (Records; What Constitutes; Transmission to Board) – While the record is expanded somewhat to include items encompassed by the proposed new rules, there is no express mention to add to the record any "written statement" of an offer of proof. Earlier provisions in Section 102.66 are ambiguous in that they refer to "an oral statement on the record," but do not expressly indicate that the written statement may also be added to the record.

Section 102.69 (Election Procedure, etc.) – One change in the proposed new regulation is the requirement to file a written offer of proof with any objections to the election within seven (7) days after

the tally of ballots. The time period for producing this “evidence” seems quite short, particularly in light of the comparable time period allowed in contested cases of a legal nature before almost any other tribunal. The adverse impact of this time requirement affects employers, labor organizations, and individual parties equally, and it is another example of sacrificing normal time periods considered necessary for unduly short periods without a critical need to do so. The short time periods suggest a lack of due process or at least basic concepts of fairness in Board proceedings. The current procedures are working well and to the general satisfaction of the parties, and the change reminds one of the old statement, “if it ain’t broke, don’t fix it.”

A similar problem is created by requiring a hearing on election objections or challenged ballots to be held no later than fourteen (14) days after the preparation of the tally of ballots (or as soon as practical thereafter). The same rules allow objections to be filed seven (7) days after the tally of ballots, and so, in effect, seven (7) days later, a hearing is held. Again, these unduly short time frames suggest a lack of basic fairness and due process, being inconsistent with time frames allowed or required in almost every other court system or administrative agency, and indicate a desire to prefer speedy resolutions over fair resolutions, a concept inconsistent with the policies of the Act.

The Section goes on to provide in the case of the review of Regional Director reports in stipulated or directed elections, a party may file a request for review of such a report or decision which may be combined for the request for review with the Regional Director’s decision to direct an election, within fourteen (14) days from the date of the issuance of the Regional Director’s report or decision on challenged ballots or objections, or both. It is unclear from any proposed regulations whether the party that did not timely file a request for review of the decision and direction of election within fourteen (14) days after the tally of ballots may still file the Request for Review of the Regional Director’s Decision to Direct an Election within fourteen (14) days from the issuance of the Regional Director’s report or a decision on challenged ballots or on objections, a date which may fall later than the earlier time limit for filing a request for review. While the regulations suggest an affirmative answer, the regulations are not entirely clear in this regard.

The undue brevity of the time limits in the proposed new regulation are further demonstrated by comparison to the related provisions in unfair labor practice proceedings, particularly since representation proceedings may be consolidated with unfair labor practice proceedings. In contrast to the proposed new regulations in representation proceedings, in unfair labor practice proceedings after a complaint is issued, which is comparable to a petition in a representation case, the respondent is allowed fourteen (14) days following service to respond to the complaint, with extensions of time freely granted. Thereafter, notices of hearing dates are issued, which typically occurs at least sixty (60) days from the issuance of the complaint. Exceptions to administrative law judge decisions may be filed within 28 days after issuance of the decision, again with extensions of time being freely granted. The bottom line is that the Board has long determined or practiced a concept that longer periods of time are necessary to insure a fair functioning of its hearing system. The proposed new representation regulations in contrast unduly shorten all relevant time periods not only in a manner inconsistent with the practice in state and federal courts, and other agency proceedings, but in the Board’s own unfair labor practice proceedings. Thus, the Board’s own procedures and practices demonstrate the unfairness of the unduly short time frames set forth in the proposed regulations.

Section 102.71 (Dismissal of Petition, etc.) – No comments are submitted.

Section 102.76 (Petition, etc.) – No comments are submitted.

Section 102.77 (Investigation of Petition, etc.) – No comments are submitted.

Section 102.83 (Petition for Referendum, etc.) – No comments are submitted.

Section 102.84 (Contents of Petition to Rescind Authority) – No comments are submitted.

Section 102.85 (Investigation of Petition by Regional Director) – No comments are submitted.

Section 102.86 (Hearing; Post-hearing Procedure) – No comments are submitted.

Section 102.112 (Date of Service; Date of Filing) – No comments are submitted.

Section 102.113 (Methods of Service, etc.) – No comments are submitted.

Section 102.114 (Filing and Service of Papers, etc.) – No comments are submitted.

C. Conclusion

For these reasons and others addressed in other comments, the NLRB should not adopt the proposed rule. The rules will only serve to increase litigation, and shift that litigation from the NLRB to the federal appeals court, resulting in additional delays. Further, the Board should undertake reasoned rulemaking after first following the suggestions of stakeholders, a procedure long recognized and followed by the Board in a less important rule, the rule dealing with healthcare voting units. The same approach should be followed herein.

In addition to the rules themselves being contrary to the policies of the Act and existing law, the procedures which have been used to propose the new provisions present additional concerns. President Obama's Executive Order 13563 specifically states that "(b)efore issuing a notice of proposed rule-making, each agency where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rule-making." The Board majority not only failed to follow this Executive Order, but apparently prepared its proposed rule in isolation. The majority avoided triggering the public meeting requirement of the Government in the Sunshine Act, 5 U.S.C. Section 552(b), and apparently never held a meeting to agenda the issue with the sole Republican Board member, Brian Hayes, since such a meeting would require notice and have been open to the public. The Board also excluded key agency personnel and outside labor law practitioners whose views are routinely solicited by the Board when considering changes in its rules and procedure. The majority did not bring the issue before the Board's Rules Provision Committee, the group of agency officials responsible for recommending and considering proposed changes in existing and proposed new rules. The majority did not bring its proposal to the attention of the Practice and Procedures Committee of the American Bar Association, which for many years has been consulted on proposals on changes in the Board's rules of practice and procedure. Finally, the majority did not heed the public statements of its own Chairman, where she stated: "Recess appointments should be hesitant to overrule precedent because it could be seen as a rush to judgment and undermine public confidence. Recess Boards should be caretakers and keep the railroad running and not make policy decisions." It is thus quite untimely for a Board majority, which will soon be

composed of only two members, one of whom is sitting by recess appointment, to propose and consider such a far reaching new rule which substantially and fundamentally changes the provisions of the Act. The rule as stated must be characterized as arbitrary, capricious, and conflicting with the provisions and policies of the Act.

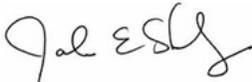
Respectfully submitted,



Michael J. Brown
President
National Chicken Council



Joel Brandenberger
President
National Turkey Federation



John E. Starkey
President
U.S. Poultry & Egg Association