



June 30, 2010

The Honorable Wilma Liebman, Chairman  
The Honorable Lafe Solomon, Acting General Counsel  
National Labor Relations Board  
1099 14th St. N.W.  
Washington, D.C. 20570-0001

***Re: Request for Information, Secure Electronic Voting Service, Solicitation Number RFI-NLRB-01 (June 9, 2010, Response Date: July 2, 2010).***

Dear Chairman Liebman and Acting General Counsel Solomon:

The American Hospital Association (AHA), on behalf of our more than 5,000 member hospitals, health systems and other health care organizations, and our 40,000 individual members; the American Society for Healthcare Human Resources Administration (ASHHRA), an AHA-affiliate that represents 3,300 health care human resources managers in hospitals and other health care facilities; and the American Organization of Nurse Executives (AONE), with its more than 7,000 registered professional nurses in executive practice throughout the United States and abroad, wish to express concerns over the National Labor Relations Board's recent "Request for Information" (RFI), which asks vendors to provide information about "secure electronic voting" for Board-supervised elections. The RFI states that the Board's Division of Administration is interested in acquiring equipment that will enable not only on-site electronic balloting, but also "remote electronic voting technology," which will permit telephone and Internet voting in union-representation elections.

The RFI, which was not published in the *Federal Register* or on the Board's website but only on the federal government's on-line procurement portal, raises serious concerns about the Board's views and plans respecting ballot secrecy. We are equally concerned about the transparency of the processes that the Board will use if it intends to reject 75 years of law.

The Board has long valued the secrecy of the ballot box in representation elections. The *only* type of Board-supervised election provided under the *National Labor Relations Act* (NLRA) is a "secret ballot of the employees" (NLRA § 9(e); *accord* NLRA § 9(c) (directing that when a question concerning representation exists, the Board "shall direct an election by secret ballot")). The Board's Rules and Regulations are equally unambiguous in this regard: "All elections are by secret ballot" (*Rules and Regulations of the NLRB* § 102.69 (emphasis added)). The leading treatise on the *NLRA* states: "Voting is by secret ballot and takes place in voting booths because of the necessity that the employees be furnished a place where they can vote in absolute secrecy" (John E. Higgins, Jr., et al., *The Developing Labor Law* 612 (5th ed. 2002)). No less an authority

than the U.S. Supreme Court declared that the “privacy and independence of the voting booth” provide “safeguards of voluntary choice” to employees in Board-supervised elections (*see Brooks v. NLRB*, 348 U.S. 96 (1954) (justifying election bar based on parties’ prior Board-supervised, secret-ballot election)). Eliminating the voting booth and holding remote elections away from the supervision of Board personnel fails to honor this standard.

To be sure, the Board has permitted elections by mail, but only where a strike or lockout was ongoing, or where employees were scattered by virtue of location or schedule. Outside of these narrow circumstances, mail ballots are permitted only in “extraordinary” circumstances, against the backdrop of the Board’s “longstanding policy... that representation elections should, as a general rule, be conducted manually” (NLRB Casehandling Manual § 11301.2 (reflecting revisions directed by *San Diego Gas & Elec.*, 325 NLRB 1143 (1998))). Unfortunately, even in the limited circumstances permitted thus far, mail ballots have occasioned improper conduct that would not be possible in a manual election (*Fessler & Bowman, Inc.*, 341 NLRB 932 (2004) (union collected ballots for mailing to Board); *Space Mark, Inc.*, 325 NLRB 1140 (1998) (eligible voter permitted his wife to mark ballot)).

Parties also may adopt voluntary election procedures. However, the Board has recognized that, even where parties agree to a voluntary election or recognition procedure, employees still are entitled to petition for a Board-supervised election with a secret ballot (*see Dana Corp.*, 351 NLRB 434 (2007)). In addition, our experience is that voluntary elections often take place with much more elaborate rules than provided by the Board to limit aggressive electioneering.

America’s hospitals are committed to complying with the NLRA, and indeed, many AHA member hospitals have longstanding collective-bargaining relationships with unions. The NLRA, however, protects not only the rights of unions to organize but also the rights of employees to choose whether or not to be represented by unions, free of coercion or interference from labor or management.

Expanding the use of off-site elections – which could be conducted in employees’ homes or in union halls – dramatically increases the risk of union coercion of employees. For example, while employers are forbidden to campaign against union representation by making home visits (*see Peoria Plastic Co.*, 117 NLRB 545 (1957)), unions are under no such restriction. Unions can and do pay frequent visits to eligible voters, often to the point of harassment. These visits will take on increased and troubling significance if employees can be pressured to cast a vote by Internet or telephone in their homes (or in union halls). A Board agent cannot be present in every home as repetitive and harassing home visits take place. Employees might well be tempted to show visiting union representatives, on their personal computers, that they are voting for the union, simply to make the visits stop. Obviously, nothing like this could happen in a Board-supervised manual election, where employees cast their ballots in secrecy.

Similarly, decades of other Board doctrines requiring “laboratory conditions” in the pre-election period, and especially in the presence of the ballot box, would either disappear or take on ludicrously one-sided proportions if remote voting is expanded. In addition, other issues of a more technical nature would arise with electronic voting, whether conducted on-site or remotely. For example, ballots are often issued in different colors to accommodate elections involving

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multiple potential units. In other elections, multi-step ballots are required, for example, to determine the desire of professional employees for separate representation. Paper ballots also easily can be separated for challenge. One could foresee decades of litigation over these issues. Congress has thus far refused to amend the NLRA to mandate “card check” or other non-secret ballot election procedures, despite years of lobbying from organized labor that it do so. We believe this is a clear statement of congressional intent, and should be respected.

In summary, we believe that the NLRA does not authorize remote electronic elections and that it would be wholly inconsistent with 75 years of Board practice and precedent to adopt them now.

We expect that organized labor will argue that remote voting is permitted in elections under an entirely different statute, the *Railway Labor Act* (RLA). That law, however, does not limit the government to conducting “secret ballot” elections, but instead permits the relevant agency to hold a secret-ballot election *or* to “utilize any other appropriate method” of determining majority support (45 U.S.C. § 152, Ninth). The NLRA, as confirmed by its Rules and Regulations and long-standing practice, has never permitted such latitude. In addition, representation elections historically have had a very different purpose under the RLA since, at least until recently, every non-vote was considered a “no” vote. Many more RLA elections than Board elections also involve far-flung operations, due to the RLA’s unique bargaining-unit rules. As a result, we believe that analogies to the RLA are legally and practically misinformed.

Turning beyond the substance of the RFI, we also are concerned by the procedure used here and what that may signal about the Board’s intentions. Ballot secrecy has been a part of the NLRA since 1935. The Supreme Court has praised it. Management, employees and labor have come to expect it. Setting aside the question of whether the Board has the authority to direct remote electronic elections (which we doubt), we would have hoped for a more direct and open vetting of the concept. Instead, the proposal was made, indirectly at best, through an obscure federal procurement RFI, rather than through open adjudication or notice-and-comment rulemaking. It was not even publicized on the Board’s own website. As matters stand now, it is not clear who within the Board directed that the RFI be issued, nor on what legal authority. Nor is it clear what the Board’s roadmap for further action on this issue is. We respectfully request that the Board consider a more open way of making proposals regarding this and other important issues.

If you have any questions about our comments, please contact Lawrence Hughes, assistant general counsel, at [lhughes@aha.org](mailto:lhughes@aha.org) or (202) 626-2346.

Sincerely,

Rick Pollack  
Executive Vice President  
AHA

Pamela A. Thompson, Ms, RN, FAAN  
Chief Executive Officer  
AONE

Jeffery L. Payne, SPHR  
Board President  
ASHHRA

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Cc: The Honorable Craig Becker  
The Honorable Brian Hayes  
The Honorable Mark Gaston Pearce  
The Honorable Peter Schaumber  
Mr. Douglas S. Wolf & Mr. David L. Graham, NLRB Division of Administration