



August 22, 2011

Submitted Electronically

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

Re: RIN 3142-AA08; Representation Case Procedures; Notice of Proposed Rulemaking, 76 Fed. Reg. 36812 (June 22, 2011).

Executive Secretary Heltzer:

On behalf of the nation's hospitals and their human resources administrators and nurse executives, the American Hospital Association (AHA), the American Society for Healthcare Human Resources Association (ASHHRA) and the American Organization of Nurse Executives (AONE) welcome the opportunity to submit these comments in response to the National Labor Relation Board's (NLRB or the Board's) Notice of Proposed Rulemaking Regarding Representation Case Procedures (Notice or NPRM) published on June 22 (76 Fed. Reg. 36,812). This proposed rule seeks to amend the entire election process, from petition to certification, including deferring the resolution of most voter eligibility questions until after an election, consolidating all election-related appeals into a single post-election process, and making NLRB review of post-election decisions discretionary rather than mandatory.

The AHA, ASHHRA, AONE and their members have substantial interests in this rulemaking. The AHA represents more than 5,000 hospitals, health systems and other health care organizations, and 38,000 individual members. AHA members run the gamut from large hospitals and health care systems to small, rural hospitals. Over 40 percent of the nation's hospitals are standalone hospitals and often are the sole health care provider in their communities. The burdens placed on these organizations affect the delivery of patient care throughout the country and the burdens of the Board's proposals seem inconsistent with the *Patient Protection and Affordable Care Act's* (ACA) goals for the cost-effective and efficient delivery of quality health care.

ASHHRA is a personal membership group of the AHA and represents more than 3,400 human resource managers in hospitals and other health care facilities nationwide. AONE also is a

personal membership group of the AHA, representing nurse leaders who design, facilitate and manage care at our nation's hospitals. AONE provides leadership, professional development, advocacy and research in order to advance nursing practice and patient care, promote nursing leadership excellence and shape health care public policy.

The majority of the AHA's members are covered by the National Labor Relations Act (NLRA or the Act) (29 U.S.C. §§ 151 *et seq.*). Further, a substantial number of the members of ASHHRA and AONE work at hospitals and other health care employers covered by the Act.

The proposed rules will have a significant impact on hospitals. A sampling of the NLRB's election reports since November 2010 reveals that, in any given month, between 20 and 25 percent of election petitions involve health care employers; in February 2011, 51 percent of closed election cases were in the health care field. Further, in any given month the number of employees eligible to vote in each election has ranged between 85 employees and 172 employees far surpassing the average unit size of 26 employees (*See* 76 Fed. Reg. 36,821). When aggregated into an organizing campaign at a singular employer, the size of the units at issue can be astounding. For instance, two unions are seeking to represent more than 43,000 employees at 230 California locations of Kaiser Permanente (*See, e.g.,* ALJ Recommends New Election Be Held On Representation for 43,000 Kaiser Workers, 138 Daily Lab. Rep. (BNA) AA-1 (July 19, 2011)).

The AHA, ASHHRA and AONE believe that, in its current rulemaking, the Board has engaged in a process that is unwarranted, unprecedented and contrary to the current administration's rulemaking goals by denying an opportunity for full and frank dialogue on the proposal prior to the issuance of a Notice. Legally, the proposed rule and its elimination of numerous procedural mechanisms potentially violates parties' due process rights, improperly imports legal standards from the Federal Rules of Civil Procedure and, by vastly restricting the pre-election hearing and placing the burden of identifying an alternative appropriate unit on employers, conflicts with the Act and exceeds the Board's rulemaking authority. With respect to the health care field, the proposed rule creates significant practical problems. As discussed in the attached detailed comments, the rule places unnecessary burdens on the nation's health care employers; imposes unachievable timelines in part because of the frequency of elections in the health care field and the unusually large size of health care units; and extends disputes for an undefined period of time allowing related labor tension and strife to threaten the peaceful and tranquil patient care environment essential to every hospital's delivery of care to its patients. While prolonging such labor disputes is particularly harmful to employers in the health care field, it also is contrary to the Act's objectives of "removing...sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes" (29 U.S.C. § 151).

Therefore, the AHA, ASHHRA and AONE request that the NLRB revise its process to be consistent with President Obama's Executive Order 13,563 to allow for advance and informative dialogue among all interested parties on these important issues. We believe that a better and fairer set of proposed rule changes would develop from this process.

The AHA, ASHHRA and AONE urge the NLRB to refrain from promulgating this proposed rule in its entirety or to make substantial modifications to the rule before implementation. At a

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minimum, we believe that the NLRB should extend the comment period and receive additional input before implementing the proposed revisions in their current form.

Thank you for your consideration of our views on this important matter. If you have questions about our recommendations, please contact Lawrence Hughes, assistant general counsel, at lhughes@aha.org or (202) 626-2346.

Sincerely,

/S/

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Executive Vice President

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/S/

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/S/

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**AHA, ASHHRA and AONE Detailed Comments on
NLRB's Proposed Representation Case Procedures**

I. The NLRB's process in developing and publishing the NPRM pertaining to representation case procedures without first soliciting comments from the public, in particular the employer community, is inconsistent with President Obama's Executive Order 13,563 and the Board's own prior practice and deprives interested parties of an adequate opportunity for public discussion (See 76 Fed. Reg. 36,812 (to be codified at 29 C.F.R. Parts 101, 102, 103)).

A. The Board's current rulemaking process is inconsistent with Executive Order 13,563.

When the Board published its NPRM regarding changes to its decades-old rulemaking procedures, it published not only a Notice of Proposed Rulemaking, but also the Proposed Rule itself (See 76 Fed. Reg. 36,812, 36,835-47). The revisions contained in the proposed rule are broad and include changes for more than 100 sections of the Board's rules, affecting the representation process from petition to certification.

The AHA, ASHHRA and AONE submit that the Board's current rulemaking process is inconsistent with directives from President Obama's Administration regarding the issuance of proposed rules. In Executive Order 13,563, President Obama stressed that rulemaking "must allow for public participation and an open exchange of ideas" (See 76 Fed. Reg. 3821 (Jan. 21, 2011)). In order to promote that "open exchange," President Obama required that, "before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected" by the rulemaking. (*Id.* at 3822. (emphasis added)). While administrative agencies such as the Board are not directly subject to the Executive Order, the Office of Management and Budget has recognized the Order's importance and on February 2, 2011, requested that independent agencies such as the Board comply with the Order.

Yet the Board has failed to take the important steps encouraged by Executive Order 13,563. The Board admits as much in footnote 34 to its NPRM when it states that "public participation would be more orderly and meaningful if it was based on the specific proposals described herein" (76 Fed. Reg. 36,817 n.34). However, the Board's cursory footnote explanation fails to demonstrate why advance and genuine dialogue on such extensive and important rule changes would be neither "feasible" nor "appropriate." As discussed below in Section I.C., we believe that following the mandates of Executive Order 13,563 and the Office of Management and Budget is the proper course of action for the Board in this rulemaking.

B. The Board's current rulemaking is inconsistent with the Board's prior rulemaking practice.

Not only is the process used by the Board to promulgate the proposed rule inconsistent with President Obama's Executive Order, but it also is inconsistent with the Board's own prior practice. The AHA participated in the Board's 1988-89 rulemaking defining appropriate

bargaining units in the acute health care field, a process in which the NLRB gave interested parties substantial opportunities to participate in the rulemaking and as a result had a robust record upon which to promulgate a final rule.

Specifically, the Board held a total of four public hearings across the country. The Notice of Proposed Rulemaking provided for a 120-day comment period from July 2, 1987 until October 30, 1987 (52 Fed. Reg. 25,142) and was eventually expanded to a 150-day period ending on December 1, 1987. After reviewing the written comments and oral testimony received in response to the first Notice, the Board issued a second Notice on September 1, 1988, allowing for another six weeks of comments and another open meeting in Washington, D.C. (See 52 Fed. Reg. 33,900 (Sept. 1, 1988)). After the entire process was completed, the Board had compiled 3,545 pages of testimony from 144 witnesses and 1,500 pages of written commentary in response to the first Notice. An additional 1,500 comments were compiled in response to the second Notice. The open and extensive nature of the Board's rulemaking proceeding was an important factor when the Supreme Court upheld the rule, noting that the Board relied on "extensive notice and comment rulemaking conducted by the Board" and the Board's "careful analysis of the comments that it received" (*American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 618-19 (1991)).

Like the acute health care rule, the current proposed rule includes expansive and important changes that deserve careful attention. Unfortunately, the process afforded by the Board in these proceedings is truncated and appears almost perfunctory. For instance, despite the extensive reach and impact of these proposed rule changes, the public hearings offered by the Board were scheduled before parties could meaningfully evaluate the proposed rules and far before parties had submitted comments. Even then, at the hearing, parties were limited to five minutes each to address the proposed changes. Such minimal opportunity for testimony prohibited any real "open exchange" about the costs and benefits of the proposed changes or the realistic impact and practical compliance challenges that the proposed rule poses.

Because the rulemaking has been initiated without an initial discussion of the subject matter and placed on an unnecessarily fast timetable, there has been very little discussion on how the proposed rules will work as a holistic regulatory scheme for representation case procedures. Rather, the commentary has been limited by the nature of the time-constrained process to an abbreviated discussion about insular proposed changes such as the time to file Statements of Positions, the preclusive nature of failing to preserve arguments, and requirements regarding employee lists.

The NPRM contains many overlapping proposed changes such as eliminating the Board's pre-election discretionary review and converting the Board's post-election review from mandatory to discretionary. Even one of these changes may have an unintended consequence on the rest of the representation process. For instance, as discussed below and raised by NLRB Member Brian Hayes in the open meetings, the Board's proposal to delay litigation over supervisory status until after the hearing—and even then only if it would be determinative to the election—could deprive a court of appeals of any substantive record for review (See Section IV.B, V.A, *infra*; July 19 Tr. at 244-45). Likewise, as discussed *infra*, little consideration has been given to the proposed rules'

potential effect on the number of technical 8(a)(5) cases¹ given that employers, including health care providers, could increasingly find themselves in a purported bargaining relationship with a representative that the employer believes is not a duly-elected representative. These are only two examples from a host of complex, difficult issues that will inevitably arise when a representation system that is the product of years of experience is discarded in a period of 60 days.

C. Complying with either Executive Order 13,563 or the Board's prior practice would improve the opportunity for full and open discussion.

If the Board had complied with Executive Order 13,563 or the Board's prior practice and invited advance or extended discussion about the potential impact of revising representation case procedures, many of the issues this letter raises could have been ferreted out prior to the publication of an NPRM. The Board's Notice cites commentator Mark H. Grunewald describing the acute health care rulemaking as "procedural overkill" (*See* 76 Fed. Reg. 36,828 & n.59), but also stating that the rulemaking, in those circumstances, was "a desirable choice" (Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 Duke L.J. 274, 319-20 (1991)). While Grunewald noted that such procedures may not be necessary "as a matter of course," he praised the Board's rulemaking for producing, "a degree of openness and broad-scale participation simply unmatched by even the most open traditional Board proceedings" and a rule that was "a model of clarity as expression of policy....promis[ing] a degree of stability for a policy area that had been overwhelmed by change" (*Id.* at 320-21, 322). Executive Order 13,563 encourages exactly this type of "public participation and an open exchange of ideas" to "promote predictability and reduce uncertainty" and "measure, and...improve, the actual results of regulatory requirements" (76 Fed. Reg. 3821). While the acute care rulemaking procedures used by the Board did not end all disputes, they allowed parties to fully express their concerns and allowed the Board to create a rule that eventually withstood judicial review (*See American Hosp. Ass'n v. NLRB*, 499 U.S. 606).

The Board did not follow its prior practice or Executive Order 13,563 when, for the vast majority of issues, it proposes specific draft text in this regulatory proposal, but it did solicit public discussion with respect to certain topics such as the blocking charge rule before developing and publishing specific rules (*See* 76 Fed. Reg. 36,827-28). We suggest that the Board use the same process for all of its election procedure rule changes that it is using with respect to the blocking charge rule.

As discussed more fully below, by soliciting input on the current blocking charge policy prior to issuing a Notice, the Board allows commenting parties to submit suggestions and initially identify points of agreement. As a result, even prior to the issuance of a Notice, affected parties

¹ Judicial review of a Board's certification decision under Section 9 is permitted only if the Board issues a final order on a related unfair labor practice (*See* 29 U.S.C. § 160(f); 76 Fed. Reg. 36,813). If an employer believes that the Board has erred in its certification decision and that a union is not properly certified, an employer might choose to refuse to bargain with the union and, by doing so, violate Section 8(a)(5). Assuming that the Board issues a final order finding that the employer committed an unfair labor practice by refusing to bargain, the employer can then appeal the final order, challenging both the unfair labor practice finding as well as the underlying representation issue. Such cases are frequently referred to as "technical 8(a)(5) cases."

can identify for the Board the path to a more efficient and clear final product, thus serving the Executive Order's goals of improving the actual results of regulatory requirements.

We are concerned that the NLRB's cautious approach to changing the rules on blocking charges—frequently used by unions to delay elections—while it promulgates without prior discussion rules that predominantly will adversely affect employers, including adding burdens on the nation's already overburdened health care providers, undermines the Board's stated goal of seeking a fair, balanced process. Additionally, the fact that the rules are published at a time when the Board is acting at less than a full complement, and with members who have not been confirmed by the Senate, is problematic particularly given the rare and sweeping nature of the proposed regulations. Those problems are further compounded by the possibility that the Board soon may be acting with only three members and without a chair.

Given the Board's failure to demonstrate that it was not "feasible" or "appropriate" to comply with Executive Order 13,563, the Board should comply with the Order in all aspects of the proposed rule, rather than just for blocking charges. At a minimum, the Board should revisit its prior rulemaking practices and realize the value of open dialogue particularly when, as demonstrated by the few hours of open hearings on July 18 and 19, 2011, the proposed rule creates both legal and pragmatic concerns not only for the nation's health care providers, but also for a broad spectrum of the nation's employers.

We encourage the Board to consider what effect such a quick yet drastic change in representation procedures has on the Board's reputation as an independent federal agency. The mere appearance that the Board is rushing to issue a rule that is viewed as favoring unions may only increase employer mistrust of the Board and its procedures. Accordingly, the AHA, ASHRA and AONE encourage the Board to follow Executive Order 13,563 or, at a minimum, expand the comment period to facilitate open dialogue and public participation on these sweeping rule changes.

II. The NLRB has neither identified a compelling need for revising its existing representation case procedures nor established a record that supports the proposed procedural amendments set forth in the NPRM.

Failing to identify a need to engage in rulemaking on such a truncated schedule, the Board also has failed to offer any evidence or justification for the substantial revisions proposed with respect to its representation case procedures, particularly since the Board is out-performing internal time targets for holding representation elections. As Member Hayes's dissent noted, in Fiscal Year 2010, the average time from petition to election for all petitions was 31 days (*See* 76 Fed. Reg. 36,831). In eight percent of contested cases, the regional director issued pre-election decisions in a median of 37 days, below the general counsel's target of 45 days (*Id.*). Post-election hearing Decisions or Supplemental Reports were issued in a median of 70 days, a full 10 days better than the Board's target (*Id.*). In post-election cases where a Decision or Supplemental Report issued without a hearing, the Board again surpassed its target median by 10 days producing decisions in an average of 22 days (*Id.*).

Fiscal Year 2010 was not an anomaly. In Fiscal Year 2009, the Board closed representation cases within 100 days in 84 percent of cases, surpassing its target of 81 percent (*See* General Counsel Memorandum 10-01 at 2 (Dec. 1, 2009), available at <http://www.nlr.gov/publications/general-counsel-memos>). The Board also conducted more than 95 percent of elections within 56 days of filing the petition, surpassing the target of 90 percent achievement. As in Fiscal Year 2010, the Board out-performed its targets for post-election decisions by approximately 10 days (*Id.* at 6.). Fiscal Year 2008 produced similar numbers (*See* General Counsel Memorandum 09-03 at 2, 6 (Oct. 29, 2008) available at <http://www.nlr.gov/publications/general-counsel-memos>).

While the Board acknowledges these successes, it notes that, “those time targets have been set in light of the agency’s current procedures, including their built-in inefficiencies” and 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. 36,829). The Board’s explanation demonstrates its cart-before-the-horse strategy in this rulemaking, however. Rather than setting what the Board believes to be reasonable targets and then soliciting comments on ways to remove the “built-in inefficiencies,” the Board proposes dismantling the entire process in the hopes that the new system will produce more efficient results. Such a process is the antithesis of rulemaking that works to measure and improve “the actual results of regulatory requirements” promoted by Executive Order 13,563.

To the extent that hearings in contested cases result in delay, those cases are a vast minority of all representation cases. Currently, more than 90 percent of representation cases result in a consent or stipulated election held just weeks after the petition is filed. The Board’s decision to totally rewrite the representation process, for both contested and uncontested cases, is wholly unjustified.

While the Board suggests a congressional imperative to have questions concerning representation resolved in a timely manner, there is no statutory requirement that representation elections must be held in the minimum possible time as the Board’s Notice proposes. By relying on *Croft Metal, Inc.*, 337 N.L.R.B. 688, 688 (2002), the Board has adopted the bare minimum notice requirement that can legally be used as the default notice requirement in every case.

Congress’s intent in the scheduling of elections was that they be held “quickly and *fairly*,” (76 Fed. Reg. 36,813 (emphasis added)), a point the Board noted. The proposed changes are not fair particularly to health care employers who are saddled with abnormally large units, complex supervisory determination issues, and can ill-afford the distraction from the provision of medical care. There is simply no statutory justification for such a rule. Further, and as the Board also notes, to the extent that Congress sought to accelerate the election process it took steps to do so by restricting the availability of judicial review of Section 9 proceedings (*Id.* (acknowledging Congress’s decision to prohibit direct judicial review of interlocutory orders or final certifications or dismissals in Section 9 proceedings)).

The Board also has been encouraged to streamline the election procedure to stem the perceived deluge of employer unfair labor practices that allegedly permeate the current representation

process and thus hamper union organizing. Specifically, Kate Bronfenbrenner and Dorian Warren, in addition to testifying before the Board on July 19 (*see* Tr. at 326-32, 430-36), have authored a study that purports to “make a strong empirical argument for streamlining the NLRB certification process to reduce the period between the petition and the election to the shortest number of days possible” (*See* Bronfenbrenner, K., and Warren, D. The Empirical Case for Streamlining the NLRB Certification Process: The Role of Data of Unfair Labor Practice Occurrence, *ISERP Working Paper Series 2011.01* (2011), <http://iserp.columbia.edu/research/working-papers>). However, the study does not justify the proposed rule.

Some of the study data is outdated or comes from such a small sample size that it alone cannot justify an historic overhaul of the representation case procedure. For instance, the study quotes former Board General Counsel Fred Feinstein’s concern that “a party in any election case has the ability to undermine the expression of employee free choice by manipulating the Board procedures to create delay” (Bronfenbrenner, *supra* at 1). However, in 1994 when General Counsel Feinstein made that statement, the Board was conducting elections on a median of 50 days, far longer than the 31 days achieved today (*See* General Counsel Memorandum 94-13 at 22-23 (Oct. 24, 1994), available at <http://www.nlr.gov/publications/general-counsel-memos>). In addition, the issuance of regional director decisions took 45 days, longer than the current timeframe (*Id.*). The remedy recommended by General Counsel Feinstein was to hold elections within six - seven weeks (42-49 days) from filing a petition (*Id.*). Again, the Board currently is surpassing those goals by weeks. Simply stated, the concerns that justified General Counsel Feinstein’s 1994 remark, which Professors Bronfenbrenner and Warren rely on, are not present today. Further, even the 2003 data relied upon by Bronfenbrenner and Warren is outdated, as the Board has made significant improvements in its time between petition and election since 2003 (*See* General Counsel Memorandum 04-01 at 2, 6 (Dec. 5, 2003) available at <http://www.nlr.gov/publications/general-counsel-memos> (noting median time to election is 40 days, with decisions in contested cases being issued in a median of 39 days)).

More fundamentally troublesome, however, is the study’s methodology and the conclusion it draws between the data and the need for the proposed rule. Bronfenbrenner and Warren have based their entire study on the relationship between the date that a union *alleges* that an unfair labor practice has occurred and the date of a petition or election (*See* Bronfenbrenner, *supra* at 3, 4, 5). While the study adds that “47 percent of all serious allegations won through Board or Court decisions or settlements occurred before the petition was filed” (*Id.* at 4.), its focus is on the date between allegations—regardless of their eventual merit—and petition and election dates.

Simply because a union has alleged that an unfair labor practice occurred does not mean that one actually occurred. Based on the experiences of our members, it is a common tactic for a campaigning union to file multiple charges against an employer during an election period to paint the employer in a negative light, block the election or pressure the employer into settling for a consent or stipulated election in exchange for withdrawal of the charges. Relying on allegations alone is an inaccurate method for identifying the occurrence of unfair labor practices.

Likewise, the study’s conclusion that the data somehow supports the proposed rule is a *non sequitur*. While the study focuses on allegations of unfair labor practices that occurred pre-

petition, the NPRM does not propose any pre-petition changes. Nothing in the NPRM would encourage unions to file petitions sooner or prevent employers from engaging in the alleged conduct. To the extent that the study attempts to focus on post-petition/pre-election unfair labor practices, it admits that it cannot do so other than speculating that it is the lowest period of employer activity during the entire campaign (*See* Bronfenbrenner, *supra* at 7 (noting that “the twenty days after the petition was filed” would have the lowest amount of activity “[b]ut there is so little data from that period it is difficult to analyze”)).

But even where Bronfenbrenner and Warren have data that resulted in a “win”—which they include to mean settlement—the data undercuts the study’s conclusion that employer interference “make[s] a great deal of difference as to whether or not a group of workers get union representation or a first contract” (*Id.* at 1.). In one case of what the study describes as an employer’s “early, persistent, and unrelenting opposition,” the union still ran a winning campaign (*Id.* at 5.). The data is out of date, unreliable, does not support its own conclusion and does not support the need for the proposed rule.

Because neither the Board nor the Bronfenbrenner/Warren study have identified a compelling need for revisions to the Board’s existing representation case procedures, or established a record that supports the proposed amendments set forth in the NPRM, the AHA, ASHRA and AONE urge the NLRB to either refrain from promulgating this proposed rule in its entirety or make substantial modifications to the rule before implementation.

III. The NLRB’s proposed modifications to pre-hearing procedures in representation cases would impose unreasonable and burdensome requirements on health care employers in representation cases.

The Board’s Notice proposes significant modifications to pre-hearing procedures in representation cases that add unreasonable and burdensome requirements on the nation’s health care employers, which are already significantly overburdened with government regulation and paperwork requirements. Specifically, the Board proposes a requirement that, by the date of the hearing—which will be no more than seven days after the filing of a petition—the employer:

shall state whether the employer agrees that the Board has jurisdiction over the petition and provide the requested information concerning the employer’s relation to interstate commerce; state whether the employer agrees that the proposed unit is appropriate, and, if the employer does not so agree, state the basis of the contention that the proposed unit is inappropriate, and 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 and the basis of each such contention; raise any election bar; state the employer’s position concerning the type, dates, times, and location of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing.

(76 Fed. Reg. 36,838 (to be codified at 29 C.F.R. § 102.63(b)(1)(i))). In addition, the employer must designate a representative who will accept service of papers regarding the proceeding (*Id.* (to be codified at 29 C.F.R. § 102.63(b)(1)(ii))). Finally, the employer is required to produce at

least one or, if the employer contends that the unit is not appropriate and suggests another unit, two complete employee eligibility lists (*Id.* (to be codified at 29 C.F.R. § 102.63(b)(1)(iii))).

The Board expects the Statement of Position and lists to be completed within seven days of the petition being filed or the employer risks a panoply of penalties. For instance, if the employer fails to furnish the employee lists along with the Statement of Position in a timely manner, “[t]he 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” (76 Fed. Reg. 36,839 (to be codified at 29 C.F.R. § 102.63(b)(1)(v))).

The Board’s decision to prevent employers from raising issues of unit appropriateness as a penalty for failing to provide in a time manner an employee list is particularly troublesome. Under the Act, it is a statutory mandate that a unit be “appropriate” (*See* 29 U.S.C. § 159). The statute requires that *the Board* engage in the appropriateness analysis (29 U.S.C. § 159(b)). Especially given the concern of both the Board and Congress regarding unit determinations in the health care field (*see* 29 C.F.R. § 103.30; 54 Fed. Reg. 16,347 (Apr. 21, 1989)), the hearing officer will be required, at a minimum, to confirm that the unit complies with the Board’s own rules, whether that analysis is based on a presumption of appropriateness or a union’s offer of proof (*See* 76 Fed. Reg. 36,823; *Allen Health Care Services*, 332 N.L.R.B. 1308 (2000)). Given that some evidence must be taken on the issue (*see* 332 N.L.R.B. at 1309), precluding the employer from participating only makes the hearing more unfair.

Beyond requiring a timely provision of lists, the Board also has added a preclusion penalty, stating that “[a] party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party’s Statement” (76 Fed. Reg. 36,841) (to be codified at 29 C.F.R. § 102.66(c)). Further, “[i]f a party contends that the petitioned-for unit is not appropriate...but fails to state the most similar unit that it concedes is appropriate, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness on the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit” (*Id.*).

The Board’s proposed changes to pre-hearing procedures present at least three significant problems for employers, specifically for employers in the health care field. First, the proposal that a non-petitioning party—almost always the employer—file a Statement of Position within seven days after the filing of a representation petition imposes unfair and burdensome requirements on non-petitioning parties. Because of the Board’s proposed rule precluding arguments that are not raised in the Statement of Position, the proposed Statement of Position would require interested parties to articulate fixed positions with respect to the scope of the putative unit, among other issues, prior to the introduction of any evidence. Interested parties, particularly those such as small, rural health care employers who are often not conversant with technical representation issues and rarely have labor counsel on retainer, could be unfairly prejudiced by this requirement.

Further, hospitals do not have the ability to focus solely on the completion of a Statement of Position and one or more employee lists for an entire week, which is what would be required under the proposed rule. The primary goal of hospitals and health care providers is the care and treatment of patients. The proposed rule's modification of pre-hearing requirements creates a distraction not only for the administrative departments of hospitals, but also for those individual putative supervisors or unit members who will be placed under a week of scrutiny as the employer attempts to determine whether they are putative unit members. All of these requirements, and particularly the unrealistic and unwarranted accelerated timeline, distract from the employer's primary goal: treating and caring for ill patients.

Second, the proposed regulation's requirement that a non-petitioning party identify the most similar appropriate unit is an extraordinary shifting of the burden of organizing and petitioning for a unit. As the Board observed in *Overnite Transportation*, "[t]he Board... does not compel a petitioner to seek any particular appropriate unit. The Board's declared policy is to consider only whether *the unit requested* is an appropriate one" (322 N.L.R.B. at 723). Just as a plaintiff is the master of a complaint, so too is a union the master of its petition. Nothing in the NLRA requires, or permits, the Board to require that an employer stipulate to the petitioned-for unit or propose its own unit, as the Board's proposed rule would require. Further, to the extent that the proposed rule requires the employer to recommend a unit that is "most similar" to the union's already-organized unit, the unit appropriateness question will necessarily turn on "the extent to which the employees have organized" thus violating section 9(c)(5) (*See* 29 U.S.C. § 159(c)(5)).

Particularly in the acute health care field, there is simply no need for an employer to recommend an alternative unit. Under the Board's own regulations, there are only eight appropriate units (*See* 29 C.F.R. § 103.30). Given that unions have been organizing under those rules for more than 20 years, they are well-familiar with what is an appropriate unit. There is simply no need to shift that burden to employers.

The Board's "preclusion rule" coupled with accelerated timelines will prompt fewer election agreements and, as a result, more contested hearings and more election delay. We believe that in order to avoid the Board's preclusion rule, non-petitioning parties may adopt the practices of defendants in civil litigation when filing answers, *i.e.*, asserting as many defenses as possible in order to avoid waiver of any issue. As a result, contested cases will require the hearing officer to sort through countless issues—simply to determine that they do not involve genuine disputes—and thus lengthen the hearing process. By encouraging parties to increase the frequency of hearings, length of hearings and number of litigated issues, the proposed rule is counter to the Act's objectives of removing industrial strife and unrest by promoting "the friendly adjustment of industrial disputes" (29 U.S.C. § 151).

Likewise, while the Board has made deciding to proceed to a hearing incredibly burdensome, some employers caught unaware by the petition may elect to proceed to a hearing in order to have enough time to have their voice heard by their employees on the election question. Rather than consenting or stipulating to an election, such employers may elect to proceed with a hearing in the hopes that it will buy them more time before the election is held, resulting in a longer period of time to election than if they simply agreed to have an election. As a result, the number of contested cases that cause the problematic delays—historically ranging between eight and 14

percent—will likely increase. If this occurs, the Board’s proposed rule would result in fewer stipulated or consent elections, more contested hearings and more delays in conducting elections.

Given the relatively small number of currently contested proceedings, the NLRB majority has not made a persuasive case that any modifications to pre-election hearing procedures are necessary to expedite elections in the overwhelming majority of cases. To the extent that there are extraordinary cases that routinely cause delay, such as cases involving blocking charges (*see* Section VIII, *infra*), the Board should consider focusing on those cases that make up the statistical “tail” of election delay and directly address those issues rather than overhauling the entire representation system.

IV. The proposed rule’s provisions requiring employers to produce comprehensive employee lists would unduly burden health care employers and impose unfair consequences in the event of inadvertent errors.

A. The proposed rule ignores the realities of preparing accurate employee lists and imposes additional burdens on the nation’s already overburdened health care providers.

Under the proposed rule, when parties reach an agreement to hold either a consent or stipulated election, “within two days after approval of an election agreement...the employer shall provide...a list of the full names, home addresses, available telephone numbers, available e-mail addresses, work locations, shifts, and job classifications of all eligible voters” (76 Fed. Reg. 36,838 (to be codified at 29 C.F.R. § 102.62(d))). In the event that the parties cannot consent or stipulate to an election and instead proceed to a hearing, the employer must prepare a list for the petitioned-for unit and also for the most similar unit that the employer concedes is appropriate (*See id.* (to be codified at 29 C.F.R. § 102.63(b)(i)(iii), (iv))). Of course, the provision of two lists is in addition to the voluminous other information that the employer will be required to produce at the hearing occurring no more than seven days after the filing of a petition (*See id.*).

The Board’s proposal for the provision of lists within 48 hours of the direction of an election ignores the actual work that goes into producing accurate employee lists under Board procedures. The requirement that a final voter eligibility list must be submitted two days after a direction of election places an undue burden on the nation’s health care providers, as well as all other employers. Particularly for larger bargaining units such as those found in acute care hospitals, this requirement will create practical compliance problems for many employers who struggle to produce a fully accurate *Excelsior* list within the current seven-day time period.

As the AHA has advocated elsewhere, the nation’s hospitals and health care providers are currently subject to extensive workforce regulations and burdens outside of those accompanying the National Labor Relations Act and the Board’s current procedures. The Board seems to believe that employers will be able to produce these lists on command, based on the Board’s statement that “many, if not most, employers maintain electronic records” of employee information (*See* 76 Fed. Reg. 36,820). That is simply inaccurate. Hospital information technology (IT) systems, like those of other employers, are not designed to produce—at the push of a button—lists of employees based on the Board’s prescribed standards such as differentiating

between technical and professional employees or based on circumstances unique to the election, such as the union's petitioned-for unit or the most similar appropriate unit identified by the employer.

Currently, hospitals and other health care providers face increased financial pressures as a result of mandates for improving health IT while simultaneously complying with demands from government, payers and patients to reduce the costs of health care delivery. Hospitals are being asked to expend significant resources upgrading their IT systems to provide for the use of electronic health records. For instance, under the *Health Information Technology for Economic and Clinical Health Act of 2009* and implementing regulations passed by the U.S. Department of Health and Human Services' Centers for Medicare & Medicaid Services (*see American Recovery & Reinvestment Act of 2009, Pub. L. 111-5, Title XIII; 75 Fed. Reg. 44,314 (July 28, 2010)*), hospitals are required to implement electronic health records and also demonstrate "meaningful use" of the records and other technology in order to qualify for certain Medicare and Medicaid limited financial incentives (*See id.*). As a result over the next several years, resources for upgraded IT systems in hospitals need to be focused on the integration of electronic health records and other patient-care-focused initiatives rather than on upgrading human resource systems to comply with expedited election procedures imposed by the Board.

B. Requiring health care employers to identify eligible employees on 48 hours' notice is unrealistic and subjects employers to significant liability for misclassification of Section 2(11) supervisory employees.

In its effort to expedite the election process by requiring employers to produce lists on unreasonably short deadlines, the Board has sacrificed the importance of accurate employee lists and created a number of legal pitfalls for both health care employers and organizing unions. The preparation of employee lists frequently requires complex factual and legal research that cannot reasonably be done within the few days proposed in the Board's Notice.

The Board's proposed rule requires that the final employee list contain information for "all eligible voters" (76 Fed. Reg. 36,838 (to be codified at 29 C.F.R. § 102.62(d))). In order to do so, employers will be required to identify—in 48 hours—those employees who are supervisors and thus ineligible to vote in the election as well as those employees who are non-supervisors and putative unit members. That analysis, particularly when applied to health care employees such as charge nurses, is a time-consuming and fact-intensive task.

Responding to directions from the United States Supreme Court and in order to be consistent with the Act, the Board in *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006), established a fact-intensive test for determining supervisory status. Under that test, hospitals are required to analyze, among other factors: (1) whether an employee directing other employees has an element of accountability if the directed tasks are not performed properly (*id.* at 691-92); (2) whether an employee's exercise of judgment is truly "independent" or if it is governed by company policies or rules, verbal instructions of a higher authority, or a collective-bargaining agreement, among other potential sources of control (*id.* at 693); and (3) whether an assignment or direction is "routine or clerical" which could depend upon the options available to the decision maker at the time the assignment or direction is made (*id.* at 693-94).

As the Board's application of this test in *Oakwood Healthcare* demonstrates, the analysis requires a review of the actual functions performed by each individual employee and how those functions relate to hospital policies and practices (*See id.* at 695-98). Even then, the Board itself split on whether the employees who worked as permanent charge nurses were actually statutory supervisors (*See id.* at 709). Requiring health care employers to rush through this analysis in two days' time will almost certainly produce flawed results.

Importantly, the ramifications for errors in the determination of supervisory status reflected on the employee list are significant for both health care employers and unions. For instance, if a hospital erroneously believes that a charge nurse is a supervisor and thus gives him or her management training on what he or she can or cannot say about the union during a campaign, the hospital is at risk for restraining Section 7 protected activity (*See St. Alphonsus Hosp.*, 261 N.L.R.B. 620 (1982) (finding a violation where an employer mistakenly believed that employees were supervisors; "it is too well settled to brook dispute that the test of interference, restraint, and coercion...does not depend on an employer's motive.")). Conversely, if the hospital erroneously believes that the charge nurse is not a supervisor and does not forbid the nurse to talk with a co-worker about unionization when the charge nurse is actually a Section 2(11) supervisor, the employer also has violated the Act (*See, e.g., Lee-Rowan Mfg. Co.*, 129 N.L.R.B. 980 (1960) (holding that line leaders were supervisors and then finding violations based on acts of line leaders); *see also Israel, A.C., Commodity Corp.*, 160 N.L.R.B. 1147 (1966) (accord)).

Likewise, a union could face ramifications if relying on the employee list, it mistakenly uses supervisors as part of its organizing campaign. If a charge nurse is handing out authorization cards based on the union's belief that the nurse is a putative unit member, but the nurse is actually a supervisor then, under *Oakwood Healthcare*, that would almost certainly be objectionable conduct that could result in a successful union election being overturned² (*See Harborside Healthcare, Inc.*, 343 N.L.R.B. 906-07 (2004) (noting that supervisory solicitation of authorization cards is inherently coercive absent mitigation circumstances and that, generally, "employees are protected from conduct by supervisors, be it prounion or antiunion, which interferes with the employees' freedom of choice"))).

In addition to questions of supervisory status, health care employers under the acute health care rules also are required to undertake a complex and fact-intensive analysis regarding who qualifies as, for example, a technical as opposed to a professional employee. Given the large array of skilled classifications in hospitals, it is unreasonable to expect health care employers to complete the required analysis in 48 hours.

C. *The Board's proposal requiring disclosing work location, telephone numbers, shift assignments, and e-mail addresses is not necessary, contrary to current law, contrary to many employer's privacy policies, and could violate employees' privacy rights.*

² If the union wins the election and the challenged ballots would not be determinative, it is unclear if the charge nurse's true supervisory status—and thus the union's unfair labor practice—would ever be discovered under the proposed rules (*See* 76 Fed. Reg. 36,824 (noting that where eligibility issues were non-determinative, the parties would be left to bargaining or subsequent Board proceedings)).

The AHA, ASHHRA and AONE have significant concerns regarding the Board's proposal that hospitals disclose their employees' full names, home addresses, available telephone numbers, available e-mail addresses, work locations, shifts, and job classifications (*See* 76 Fed. Reg. 36,838 (to be codified at 29 C.F.R. § 102.62(d))). While the Board observes that communication has "evolved far beyond the face-to-face conversation on the doorstep imagined by the Board in *Excelsior*" (76 Fed. Reg. 36,820), the Board has not identified any actual need for the inclusion of telephone numbers and available e-mail addresses. Further, by requesting comments on the appropriate penalty for misuse of such personal information (*see id.* at 36,821), the Board openly acknowledges that the proposal carries a risk of intruding on employees' privacy rights.

The requirement to produce work e-mail addresses, unit locations and shifts creates unique issues for employers in the health care field. For instance, allowing unions to inundate a hospital's IT systems with e-mails could overwhelm the hospital's system and distract employees at work, all jeopardizing patient care. Many hospitals have policies prohibiting the use of the Internet for non-work related purposes specifically to avoid such distractions.

Finally, many hospitals have policies against disclosing employee information in order to protect the employee's privacy and safety. Indeed, many hospitals include only an employee's first name on their identification badges explicitly to protect the employee. It is contrary to these policies and the privacy rights of employees to require publication of not only the employee's name and home address as is currently law, but also the employee's telephone number and e-mail address. Particularly given the Board's inability to articulate a need to revisit the *Excelsior* requirements in the first instance, such drastic invasions of privacy are unnecessary.

V. The NLRB's proposed revisions to the current procedures for representation hearings would erode due process protections and, in many cases, authorize the regional director to proceed to an election without resolving disputes regarding unit definition and unit placement.

The Board's Notice contains numerous proposed changes to the procedures applicable to pre-election hearings and all sacrifice process and discussion of issues for the sake of a potentially faster election. Such changes include closing a hearing when the only issue in dispute affects less than 20 percent of the unit; importing a "summary judgment" type standard to determine relevancy of issues; and denying parties the opportunity to file post-hearing briefs. Not only are the proposed changes unwarranted (*see* Section II, *supra*), they also create a number of legal and practical challenges to the rule's viability.

A. The proposed "20 Percent Rule" violates Section 9(c)(1) of the Act and would deny due process rights to non-petitioning parties.

Under the Board's proposed rule, assuming that a party was able to successfully identify and articulate all of the disputed issues in its Statement of Position, there is no guarantee that disputed issues will be addressed at a hearing, a fact recognized by HR Policy Association and

the Society for Human Resources Management in their submitted comments.³ The proposed rule indicates that “[i]f, at any time during the hearing, the hearing officer determines that the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer shall close the hearing” (76 Fed. Reg. 36,841 (to be codified at 29 C.F.R. § 102.66(c))). Particularly in the health care field where elections frequently occur with hundreds of eligible voters, allowing an election with such a large group of individuals in dispute creates a host of legal and practical problems.

From a legal standpoint, the proposed rule’s denial of a hearing if less than 20 percent of employees in the unit are in controversy is inconsistent with the requirements of Section 9(c)(1) of the Act and exceeds the scope of the NLRB’s rulemaking authority. Section 9(c)(1) of the Act requires the Board to hold “an appropriate hearing” *prior* to the election to ensure that a question concerning representation exists (*See Allen Health Care Services*, 332 N.L.R.B. 1308, 1309 (2000) (“Absent a stipulated agreement, presumption, or rule, the Board must be able to find—based on some record evidence—that the proposed unit is an appropriate one for bargaining before directing an election in that unit.”); *Angelica Healthcare Service Group, Inc.*, 315 N.L.R.B. 1320 (1995) (“We find that the language of Section 9(c)(1) of the Act and Section 102.63(a) of the Board’s Rules required the Acting Regional Director to provide ‘an appropriate hearing’ prior to finding that a question concerning representation existed and directing an election.”); *Barre National, Inc.*, 316 N.L.R.B. 877, 880-81 (1995)).⁴ To the extent a final rule would deny an “appropriate” pre-hearing election, the proposed rule would exceed the Board’s rulemaking authority by conflicting with Section 9(c)(1) of the Act (*See, e.g., Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (striking down Board action that is “made in excess of its delegated powers and contrary to a specific [provision] in the Act”)).

From a practical standpoint, delaying the litigation of eligibility issues where under 20 percent of the putative unit is in dispute would exacerbate election delay. Allowing a hearing officer to defer even making a record of the dispute until post-election is a vast departure from current Board practice, particularly in the health care field. Currently, while eligibility decisions might not be made prior to an election, the hearing officer is required, at a minimum, to take evidence and create a record of the dispute prior to the election. The Board’s NLRB Guide for Hearing Officers states, “where a party raises an issue that a particular employee performs unit work but also performs work as a supervisor, the hearing officer must delve into the 2(11) issues and obtain testimony in this regard” (*See* NLRB Guide for Hearing Officers at 123, available at http://www.nlr.gov/sites/default/files/documents/44/hearing_officer_guide.pdf). As the Board has recognized in both *Oakwood Healthcare* and General Counsel Memorandum 91-3, this issue

³ We note that Sections V.B, V.C, VI, and VII also raise concerns similar to those raised in the comments submitted by HR Policy Association and the Society for Human Resources Management.

⁴ The cases cited by the Board in support of this proposed amendment – *Morgan Manor Nursing and Rehabilitation Center*, 319 N.L.R.B. 552 (1995) and *Toledo Hospital*, 315 N.L.R.B. 594 (1994) – are clearly distinguishable. As noted in the NPRM, the Board in both cases held that an approximate 20 percent post-election change in the scope of the unit was not sufficient to set aside the election results. However, in both of these cases, the regional director’s decision and direction of election defined the scope of the voting unit, and the post-election proceedings involved disputes over whether particular individuals fell within the scope of the defined unit.

routinely occurs in the health care field. Describing procedures for pre-election hearings under the Board's acute care unit regulations, the Board notes, "[o]f course, absent stipulation, hearings will need to be held to resolve disputed issues other than unit scope such as... (2) Supervisory and managerial status" (General Counsel Memorandum 91-3 at 10 (May 9, 1991), available at <http://www.nlr.gov/publications/general-counsel-memos>).

Retaining the Board's current procedure of requiring hearing officers to take evidence and create a record of the supervisory status issues serves four important purposes. First, by allowing employees to prove their positions on supervisory status prior to the election, parties may be able to resolve unit eligibility issues prior to the election rather than leaving those issues for bargaining or post-election objections. Leaving so many individuals subject to post-election challenge or bargaining will create more delay after the election or, if review is denied, during bargaining.

Second, the failure to resolve unit issues prior to the election will create confusion among eligible voters regarding composition of the employee group at stake in the election. Board orders upholding elections have been reversed where the "character and scope of the pre- and post-election units" differed significantly, in part because of the inclusion or exclusion of employees who supervised other putative unit members (*See NLRB v. Beverly Health & Rehab. Servs., Inc.*, 120 F.3d 262 at *4-5 (4th Cir. 1997)). The Fourth Circuit noted that the difference in size between the pre- and post-election unit also was a factor to be considered (*Id.* at *4.). Automatically leaving 20 percent of the unit in question threatens the employees' right to make an informed choice regarding representation, and gives employers and unions little comfort that the election result will withstand challenge.

Third, as raised by Member Hayes at the Board's open meetings (*see* Tr. at 245), if the Board does not create a record of the dispute prior to the hearing and then exercises its newly-expanded discretion to deny post-election review, there will be virtually no record for the Board or courts of appeals to consider in subsequent technical 8(a)(5) cases. Given the lack of a record, these issues almost certainly will be returned to the regional office for fact-finding, again disrupting labor relations and increasing, rather than decreasing, the actual commencement of a bargaining relationship.

Fourth and most importantly in the health care field, the Board's proposal to delay resolution of contentious issues, many of which require analyzing the jobs and testimony of individual employees, threatens the tranquil and peaceful nature of the workplace. Both the Board and the courts have recognized the important of peace and tranquility to the healing environment necessary in hospitals and other health care providers (*See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 495 (1978) (noting that "the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function." (quoting *St. John's Hosp. & Sch. of Nursing, Inc.*, 222 NLRB 1150 (1976))). Leaving open for dispute such important issues as supervisory status and other issues that inject tension and labor strife into the patient care environment is unwise and, as discussed above, inappropriate.

B. The Board's Proposed Use of the Federal Rules of Civil Procedure and its 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) (finding that hearing did not meet the requirements of the Act because of regional director's decision to prohibit employer from offering evidence on supervisory status at pre-election hearing)). However, without establishing a need for any change, the Board now proposes a process in which a hearing officer makes a legal conclusion as to whether there is any issue on which the parties have a "genuine dispute as to any material fact" based on only Statements of Position or offers of proof (76 Fed. Reg. 36,841 (to be codified at 29 C.F.R. § 102.66(b))). The Board's adoption of a formalistic version of the "summary judgment" process found in Rule 56 of the Federal Rules of Civil Procedure (*see* 76 Fed. Reg. 36,823) is a flawed 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 Notice 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 (*See* 76 Fed. Reg. 36,829). 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 access to the other party's evidence. The Board is using "summary judgment" standards to determine whether issues will be litigated prior to an election. However, in civil litigation, an issue is only disposed of under the summary judgment standard 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); *e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). Taking a standard used by federal courts to determine whether an issue is legally unsupportable and applying it as a relevancy standard without the benefit of discovery or any other fact investigation results in a flawed, arbitrary and capricious Board proposal.

In the event that the Board persists in its proposal to adopt various standards from the Federal Rules of Civil Procedure, the AHA, ASHHRA and AONE encourage the Board to engage in an open dialogue regarding the standards that hearing officers—many of whom are not attorneys—will apply in deciding whether to permit parties to raise issues. At the very least, the Board should invite comments on proposals that provide for a more comprehensive and detailed description of the process by which the hearing officer is required to make these significant determinations.

- C. *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 AHA, ASHHRA and AONE also object to the Board's proposal to eliminate a party's current right to submit post-hearing briefs stating the party's position on the application of Board law to the petition for representation (*See* 76 Fed. Reg. 36,842 (to be codified at 29 C.F.R. § 102.66(h))). The elimination of post-hearing briefs would have a substantial negative impact on the resolution of hearing disputes, particularly when the rules also prohibit any litigation of those issues at the hearing itself. 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 (29

C.F.R. § 102.67(a)). 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 the hearing officer and subject to any other limitations imposed (76 Fed. Reg. 36,842 (to be codified at 29 C.F.R. § 102.66(h))).

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 also would have no opportunity to conduct post-hearing legal research or to cite legal authority regarding complex issues raised at the hearing. Given that many hearing officers are not lawyers and do not have encyclopedic knowledge of the NLRB's vast body of case law, there is no valid reason that they should be making rushed determinations without the benefit of the parties' legal research and arguments. The AHA, ASHHRA and AONE encourage the Board to revisit its proposal to eliminate post-hearing briefs, particularly if it persists in its proposal to drastically reduce the scope of issues that may be litigated at the hearing itself.

D. The wide-ranging nature of the Board's proposal, coupled with the limited period for review and comment, prevents a careful, holistic consideration of how representation cases will be processed under the rule.

In the Board's desire to have faster elections, its proposal would significantly impair the current hearing process, likely create statutory issues by denying an "appropriate" hearing, inject uncertainty into nearly every election and, in the health care field, inject heightened tension and unrest to a peaceful and tranquil health care environment. While the AHA, ASHHRA and AONE have significant concerns about many of the proposals as individual changes, we also are concerned about how the representation case procedure will operate as a whole.

As the Board acknowledges in its Notice (*see* 76 Fed. Reg. 36,814-15), the Board's current representation procedures are the product of over 70 years of experience and improvement, normally coming in the form of slight modifications to the process. Even then, the process has not been revised since 1977 (*Id.* at 36,815.). While we agree that measures could be taken to improve the representation process particularly with respect to blocking charges, rewriting the entire process in 60 days' time tests the boundaries of what is reasonable for the Board to accomplish through its rulemaking authority.

The comment period allowed by the Board essentially prohibits a careful and thorough consideration of how a petition will be processed during the entire representation procedure. In the health care field a number of issues could arise under the proposed rule. Assume that a union petitions for a unit with over 500 putative unit members.⁵ The employer objects to the inclusion of 100 charge nurses and submits an offer of proof establishing that the nurses are Section 2(11)

⁵ Such large units are not far-fetched in the health care field. Based on the 2011 edition of *AHA Hospital Statistics*, there were 5,008 U.S. Registered Community Hospitals—defined as nonfederal, short-term general and other special hospitals—in 2009. The average hospital employed 1,079 full-time and part-time employees. RNs made up a significant portion of these employees. In the over 580 hospitals with between 200 and 299 beds, the average number of RNs was 444 nurses. The 266 largest hospitals averaged 1,595 registered nurses per hospital.

supervisors and thus should be excluded from the unit. However, because those 100 charge nurses are less than 20 percent of the petitioned-for unit and because there is no other issue in dispute, the hearing is closed without taking evidence on or resolving the issue of the 100 disputed charge nurses (*See* 76 Fed. Reg. 36,841 (to be codified at 29 C.F.R. § 102.66(d))). The Notice suggests that while all employees will vote, subject to challenge, the voting employees will be told that the 100 charge nurses may or may not actually be included in the unit (*See* 76 Fed. Reg. 36,825).

While the charge nurses would be permitted to vote subject to challenge (*id.*) and subject to post-election objections, it is unclear whether and when eligibility of their votes will be addressed. Because the election has occurred with at least 100 ballots subject to challenge, the union must win by a number of votes—here a 3:1 margin—that is sufficient to make the disputed votes non-determinative at which point the eligibility issue will not be addressed and the time-saving desired by the Board is achieved. With cursory pre-election procedures and the lack of any meaningful post-election review, we are concerned that many employers will feel as if they never received a “fair shake” from the Board and that the recognition is not legitimate. The potential for those employers to commit a technical 8(a)(5) violation in order to obtain actual review of the issues from a court of appeals would only delay the actual commencement of bargaining.

If the union wins the election but the disputed ballots could be determinative, the *Oakwood Healthcare* analysis must still occur. However, because no record was made at the initial hearing, there is no record for the regional director to review.⁶ It would appear that the Board has only moved the delay to after the election. In the event that either the regional director or the Board finds error in the hearing or direction of an election, the commencement of the bargaining relationship—the actual objective of the election—will be delayed while the error is remedied and the alleged benefit of the proposed rule is lost.

During this entire process, health care providers must continue providing for the sick and recovering while offering an environment that promotes healing (*See Beth Israel Hosp.*, 437 U.S. at 495; *St. John’s Hosp. & Sch. of Nursing, Inc.*, 222 N.L.R.B. 1150). But, because of the uncertainty created by the Board’s proposed rule, all parties involved are left in limbo while the questions concerning representation—which should have been addressed at the pre-hearing election—remain unresolved. Nurses working side by side on the floor are unsure who is in the unit and who is not, or who is “management” and who is not, creating an inevitable “us” against “them” mentality that will disrupt the environment. By doing so, the proposed rule works against the Act’s stated objectives of “removing...sources of industrial strife and unrest” instead prolonging contentious issues such as supervisory status (*See* 29 U.S.C. § 151).

All the while, the employer must continue to treat the putative supervisors as supervisors, including advising them not to discuss union matters directly with the putative unit members they work with on a daily basis. The rule does not indicate when, if ever or how, the dispute will

⁶ The proposed rule at 29 C.F.R. § 102.69(e)(1)(i) indicating what will constitute the record of a hearing forwarded to the Board for review includes numerous materials such as exhibits, legal memoranda or briefs, and other items that under the proposed rules would frequently no longer be a part of the hearing.

be resolved. In the interim, the legal risks for the hospital and the personal relationship risks for the nurses are rampant.

The Board's proposals as individual changes are, as discussed throughout these Comments, flawed. Currently, the parties are able to reach agreement on individual election issues in approximately 90 percent of cases, resulting in consent or stipulated elections held just weeks after the petition is filed. But the Board has focused on those few contested cases and proposes a wholly-new process carrying ramifications which when applied in the health care field simply cannot be fathomed. Given the unnecessary nature of the regulations, the significant burden they place on health care employers and the likelihood that the proposed rule would actually increase rather than decrease election delay, the AHA, ASHRA and AONE encourage the Board to refrain from promulgating the proposed rule or, at a minimum, invite further open and free dialogue regarding the most practical ways to eliminate unnecessary delay.

VI. The NLRB's proposed revisions to post-election procedures in representation cases substantially curtail the rights of parties to develop evidence to support objections and present their evidence in a contested hearing.

In addition to vastly curtailing parties' rights to an "appropriate" hearing before an election occurs (*see* Section V, *supra*), the Board's proposed rule also makes drastic revisions to the post-election procedures for obtaining review of the hearing. Initially, the Board's proposal to reduce the amount of time permitted for the investigation and presentation of evidence supporting post-election challenges and objections from 14 to seven days does not provide sufficient time to gather evidence supporting those challenges or objections (*See* 76 Fed. Reg. 36,844 (to be codified at 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 (29 C.F.R. § 102.69(a)). 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. 36,844 (to be codified at 29 C.F.R. § 102.69(a))). Particularly in health care field with elections frequently involving hundreds of ballots, 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.

Moreover, the regulations outlined in the NPRM would incorporate a similar "summary judgment" process discussed in Section V.B. (*supra*) for post-election proceedings pertaining to challenges and objections. Under the proposed process, if a party files timely objections to the election but "the regional director determines that the evidence described in the accompanying offer of proof would not constitute grounds for overturning the election if introduced at a hearing," the regional director can refuse to hold a hearing and issue a report certifying the representative (76 Fed. Reg. 36,844 (to be codified at 29 C.F.R. § 102.69(d)(1)(i))). 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 a meaningful opportunity to be heard and resolve significant outstanding issues.

In the event that a regional director determines that a hearing is justified, the director must set the hearing “no later than 14 days after the preparation of the tally of ballots or as soon as practicable thereafter” (76 Fed. Reg. 36,844 (to be codified at 29 C.F.R. § 102.69(d)(1)(ii))). Given that objections and offers of proof must be submitted within seven days after the tally of ballots is prepared (*see* 76 Fed. Reg. 36,844 (to be codified at 29 C.F.R. § 102.69(a))) and the regional director will ostensibly make a reasoned review of the challenges to determine if a hearing is necessary, it is unclear exactly how long a party will have to prepare for the post-election hearing. Under the proposed rules, it seems that seven days would be the maximum time allowed absent an extension from the regional director.

Further, if the election occurred with ballots subject to challenge—which, in the health care field, could be hundreds of ballots under the proposed rule—and the regional director determines that a hearing on issues other than eligibility is warranted, the Notice is unclear as to whether the hearing will address non-determinative challenges that were deferred until post-election (*See* 76 Fed. Reg. 36,844 (to be codified at 29 C.F.R. § 102.69(d))). However, it appears that the Board’s intention is that even if there are unresolved eligibility issues of non-determinative ballots and a hearing is held, the individual employees’ eligibility will not be addressed. The NPRM majority’s commentary explains that “[i]f...a majority of employees choose to be represented, even assuming all the disputed votes were cast against representation, the Board’s experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining and, if they cannot do so, either party may file a unit clarification petition to bring the issue back to the Board” (76 Fed. Reg. 36,824).

If the Board’s intention is not to address non-determinative eligibility issues even when a hearing is held, the AHA, ASHHRA and AONE urge the Board to reconsider. Particularly in the health care field where Congress and the Board have taken extensive steps to ensure that individuals are appropriately classified into bargaining units, leaving such issues unresolved is inappropriate. The Board’s suggestion that parties can file a unit clarification petition further extending the debate over the petitioned-for unit is inexplicable particularly when the Board or regional office could, and should, have resolved the issue in the initial hearing on the petition. Further, leaving the individuals’ inclusion or exclusion from the unit to be used as a bargaining chip is unfair to employees and disrespectful of their Section 7 rights and counter to the Act’s purposes of promoting labor peace (*See* 29 U.S.C. § 151).

By sacrificing hearing processes for expedited elections, the proposed rule increases uncertainty in elections by shifting delay until after the election. Even then, the proposed post-election hearings are so truncated that it is unclear whether the issues will ever be addressed. Prolonging labor strife threatens the therapeutic environment required in health care institutions and violates the Act. In addition, health care and other employers face a significant legal risk in the potential post-recognition timeframe with respect to unilateral changes. Employers such as hospitals and other health care providers will be forced to choose between bargaining with a union that may or may not be the duly-authorized bargaining representative or, in the alternative, making unilateral changes at their peril. The threat of unwittingly engaging in a unilateral change in an employee’s terms or conditions of employment is particularly high for hospitals and other health care providers who frequently ask employees to alter shifts or work locations in order to meet patient

care needs. On a larger scale, should the dispute last from one plan year to another and the employer make even miniscule changes to benefit plans, that unilateral change could have significant economic ramifications particularly for large employers such as Kaiser Permanente which would find itself virtually prohibited from managing its 43,000 person potentially-unionized workforce.

The AHA, ASHHRA and AONE strongly urge the Board to consider how the reduction of both pre-election and post-election hearing rights and procedures will affect the overall representation case process and whether an “appropriate” hearing will actually be afforded. For these reasons, we urge the Board to either refrain from adopting the proposed changes or invite further comment on how the entire hearing process can be improved.

VII. 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 regulations, including only discretionary review before the NLRB, decisions rendered by hearing officers and regional directors will be effectively insulated from pre-election review by the Members of the Board⁷ (76 Fed. Reg. 36,842 (to be codified at 29 C.F.R. § 102.67(c))). The Board should not abdicate its statutory responsibilities by making review of all pre-election regional decisions discretionary. 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. The AHA and other parties have requested that the Board produce information regarding the number of cases in the last five fiscal years in which the Board reversed, in whole or in part, a regional director’s resolution of pre-election hearing disputes. Under the proposed rules, those issues will not be addressed until after the hearing and even then only if the issues are not mooted out by the election and the Board decides to review the matter. Under such circumstances, the ultimate impact of the proposed rules could be to create additional work for the regions and actually delay representation disputes.

The proposed rule also makes Board review of a regional director's resolution of post-election disputes discretionary in both stipulated and directed elections (76 Fed. Reg. 36,844 (to be codified at 29 C.F.R. § 102.69(d)(3))). Such discretion is especially problematic given the hearing officer’s broad discretion, including the new discretion under the proposed “summary judgment” standards, and the absence of Board review prior to the election. This aspect of the Board’s proposed rule if not a violation of due process, at a minimum raises serious procedural fairness issues. Making Board review of regional decisions discretionary opens the door for unchecked regional error, as happened in *Copps Food Center*, 301 N.L.R.B. 398 (1991), where the Board took two years to consider a direction of election, eventually reversing the direction and dismissing the petition.

⁷ The majority in the NPRM assert 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. 36,814). The AHA, ASHHRA and AONE respectfully submit that the Board’s failure to expeditiously resolve legitimate cases needing review should not be used to justify eliminating a party’s right to any review. We encourage the Board to produce data and information detailing the reasons for delay in pre-election review and to invite open dialogue and comments on how that delay can be decreased.

Further, because the hearing officer reports to the regional director and the regional director is the party reviewing the hearing officer's analysis, the proposed scheme does not constitute meaningful review. While the aggrieved parties increasingly may elect to refuse to bargain and obtain review in federal court, many employers will simply be left without any avenue for review.

Significantly, the proposed appeal procedures appear contrary to the preferences of both employers and unions. Currently, nearly 90 percent of representation cases result in parties entering a Consent Election Agreement (Form NLRB-651) or Stipulated Election Agreement (Form NLRB-652). As described in Section 11084.1 of the NLRB Casehandling Manual: “[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,⁸ the NPRM would eliminate the guarantee of Board review in stipulated election agreements and adopt the review procedures currently applicable to rarely used consent election agreements (76 Fed. Reg. 36,837 (to be codified at 29 C.F.R. § 102.62(b))).

VIII. Given that blocking charges are one of the most significant causes of delay in election proceedings, the Board should revise its blocking charge rule to limit those charges that can be used to delay elections.

If the Board is serious about its goals to “better insure that employees’ votes may be recorded accurately, efficiently and speedily and to further the Act’s policy of expeditiously resolving questions concerning representation” (76 Fed. Reg. 36,816), the AHA, ASHHRA and AONE encourage the Board to revise its blocking charge policy to limit those charges that can be used to delay elections. Proposing specific changes on employer responses in contested election cases—approximately eight percent of all cases—while leaving blocking charges—which occur in up to 14 percent of cases—open to future debate leaves a huge hole in the election process while creating the appearance that the proposed rule changes do not take a balanced approach to addressing all causes of election delay identified by the Board.

A study authored by Samuel Estreicher has recognized that a significant portion of the statistical “tail” of cases that take the longest time for an election involve blocking charges (*See* Estreicher, Improving the Administration of the National Labor Relations Act, 25 ABA J. of Labor & Emp. Law No. 1 at 1, 9 n.28 (Fall 2009)). According to the study which relied on NLRB data on file with the author, 2,024 petitions proceeded to an election in 2008 (*Id.* at 9.). Of those cases, 284, or 14 percent, involved blocking charges (*Id.*).

The cases involving blocking charges experienced significant delays in holding elections. In 2008, the median and average number of days from petition to election in unblocked cases was 38 and 39 days respectively (*Id.*). However, in the 284 blocked petitions, the median number of

⁸ *See, e.g.*, NLRB Annual Report for Fiscal Year 2009 at Table 10 (2009), available at <http://www.nlr.gov/sites/default/files/documents/119/nlr2009.pdf> (showing that 1.5% of representation cases, or 41 elections, involved consent elections, while 51.6%, or 1,370 cases, involved stipulated elections).

days from petition to election was 139 days (*Id.*). Comparatively, cases that involve contested hearings—approximately eight percent of all representation cases—have an average of 124 days between petition and election, according to a study conducted by the University of California, Berkley (*See Rep. George Miller, NLRB Proposal Modest and Will Help To Reduce Unnecessary Election Delays* (July 7, 2001), available at <http://georgemiller.house.gov/2011/07/nlrb-proposal-modest-and-will-help-to-reduce-unnecessary-election-delays.shtml>).

Based on the statistics contained in Estreicher’s study, union blocking charges comprise one of the most—if not the most—significant causes of delay in representation cases. Further, information obtained from the Board through a Freedom of Information Act request filed by the AHA and other parties supports Estreicher’s findings. The data obtained from the Board shows that there were 233 blocked cases with an average of 199 days from petition to election in Fiscal Year 2010. This information coupled with the data cited in Estreicher’s study is compelling evidence that one key to faster elections would be for the Board to address the strategic use of blocking charges to delay elections.

We urge modification to the scope and application of the current blocking charge rule in representation and decertification cases given that blocking charges result in some of the longest and most unjustified delays in representation cases (*See* 76 Fed. Reg. 36,827-28). In most cases, the blocking charge rule should be eliminated in its entirety. Pre-election misconduct that improperly affects the laboratory conditions for the election can be appropriately adjudicated in post-election objections. The regional director should have discretion only to delay processing of a representation petition in situations where serious unfair labor practices have been committed that prevent the holding of a free and fair election. However, in order to serve the Board’s stated goal of achieving faster resolutions to questions concerning representation, the regional director’s discretion should be exercised only in extraordinary cases rather than applied as the normal practice.

As noted above, the AHA, ASHHRA and AONE request that further dialogue occur before the Board issues final rules on modifications to the Board’s current blocking charge policy. Nonetheless, as solicited by the Board (*see id.*), we respond to the Board’s specific questions on blocking charge procedures as follows.

Question 1: Whether “any party to a representation proceeding that files an unfair labor practice charge together with a request that it block the processing of the petition shall simultaneously file an offer of proof of the type described in relation to §§ 102.66(b) and 102.69(a)?”

Answer: The AHA, ASHHRA and AONE believe that such a requirement should be adopted. Doing so would allow clearly unmeritorious blocking charges to be avoided at the earliest possible stage of the proceedings and allow elections to proceed in a timely fashion.

Question 2: Whether “if the regional director finds that the party’s offer of proof does not describe evidence that, if introduced at a hearing, would require that the proceeding

of the petition be held in abeyance, the regional director shall continue to process the petition?”

Answer: The AHA, ASHHRA and AONE encourage the Board to adopt this proposal.

Question 3: Whether “the party seeking to block the processing of a petition shall immediately make the witnesses identified in its offer of proof available to the regional director so that the regional director can promptly investigate the charge as required by section 11740.2(c) of the Casehandling Manual?”

Answer: Again, the AHA, ASHHRA and AONE believe that such a requirement would result in quicker resolution of an initial merits determination on a blocking charge and, where the charge is unmeritorious, would allow the regional director to direct an election.

Question 4: Whether “unless the regional director finds that there is probable cause to believe that an unfair labor practice was committed that requires that the processing of the petition be held in abeyance, the regional director shall continue to process the petition?”

Answer: The AHA, ASHHRA and AONE believe that this should be the regional director’s routine practice, focusing not only on whether the charge has merit, but whether the unfair labor practice allegedly committed is of a serious enough nature to *require* that the processing of the petition be held in abeyance.

Question 5: Whether, “if the regional director is unable to make such a determination prior to the date of the election, the election shall be conducted and the ballots impounded?”

Answer: In the event that the regional director is not persuaded that there is a meritorious allegation of an unfair labor practice charge serious enough to warrant processing the petition, the election should occur. The allegations supporting the blocking charge can be resolved during the objections process following the election.

Question 6: Whether “if the regional director finds that there is probable cause to believe that an unfair labor practice was committed that would require that the processing of the petition be held in abeyance under current policy, the regional director shall instead conduct the election and impound the ballots?”

Answer: Except in truly egregious circumstances, such as an unfair labor practice that substantially modifies the number of eligible voters, the regional director should proceed with conducting the election and then handle the unfair labor practice charge as part of the objections process.

Question 7: Whether “if the regional director finds that there is probable cause to believe that an unfair labor practice was committed that would require the petition be dismissed

under section 11730.3 of the Casehandling Manual, the regional director shall instead conduct the election and impound the ballots?”

Answer: Again, except in truly egregious circumstances, we believe that the regional director should proceed with conducting the election and then handle the unfair labor practice charge as part of the post-election objections process.

Question 8: Whether the blocking charge policy should be eliminated altogether, “but the parties may continue to object to conduct that was previously grounds for holding the processing of a petition in abeyance and the objections may be grounds for both overturning the election results and dismissing the petition when appropriate?”

Answer: Yes, again with the caveat that when truly egregious circumstances such as an unfair labor practice that would substantially modify the number of employees participating the election, the charges may be addressed immediately.

Question 9: Whether “the blocking charge policy should be altered in any other respect.”

Answer: As explained above, the AHA, ASHHRA and AONE submit that the Board should engage in further dialogue regarding the potential procedural modifications to the current blocking charge policy and how such modifications could eliminate some of the longest and most unjustified delays in representation cases. We encourage the Board to eliminate the blocking charge rule in most cases, and reserve the regional director’s discretion to delay an election for extraordinary cases.

Further, the AHA, ASHHRA and AONE submit that the question and answer format used by the Board for its revisions to the current blocking policy promotes an open dialogue and input from affected parties prior to the Board expending the resources to draft a proposed rule. Accordingly, we request that the Board revisit its process for addressing changes to the election procedures to allow more genuine and advance dialogue about these issues.

IX. Although the NLRB’s proposed rule requiring filing of the showing of interest at the time that a petition is filed does not raise significant concerns, electronic signatures should not be accepted for purposes of the mandatory showing of interest in representation cases because of the high potential for fraud and abuse.

The Board’s Notice states that it continues to study the use of electronic signatures to support a showing of interest under Sections 102.61(a)(12) and (c)(11) and, “seeks comments on the questions of whether the proposed regulations should expressly permit or proscribe the use of electronic signatures for these purposes” (76 Fed. Reg. 36,819). However, there have been no significant problems with the current showing of interest requirements that would justify such a substantial change in these rules. Like many of the Board’s other proposed changes, allowing electronic signatures seems to be an answer in search of a problem.

To the extent that there are issues with showings of interest that may be problematic, it appears that allegations of fraud or forgery on authorization cards are the most frequent allegations.

Indeed, the Board's Casehandling Manual has entire sections on how regional directors should handle allegations, including investigations and handwriting comparisons (*See* NLRB Casehandling Manual II § 11028.1 *et seq.*; *see also Perdue Farms, Inc.*, 328 N.L.R.B. 909 (1999) (remanding matter to Regional Director to engage in signature comparison and full consideration of forgery allegations)). It is unclear how, if at all, the Board would be able to verify the authenticity of electronic signatures.

Further, the Board has held that post-election challenges to the showing of interest are invalid (*See* NLRB Casehandling Manual II § 11028.4; *Gaylord Bag Co.*, 313 N.L.R.B. 306 (1993)). If the Board were to adopt the use of electronic signatures for authorization and allegations of fraud were to increase, this would only raise yet more issues that would have to be resolved pre-election counter to the Board's goals of eliminating election delay.

Because there is not a demonstrated need to modify the Board's current practice and accept electronic signatures on authorization cards, we suggest that the Board not adopt a proposed change. In the event that the Board continues to consider allowing electronic signatures, the AHA, ASHRA and AONE encourage the Board to follow Executive Order 13,563 and allow for a full and open dialogue on the issue and its legal and practical ramifications.