



April 7, 2014

Submitted Electronically

Gary Shinnars
Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Re: RIN 3142-AA08; Representation Case Procedures, Notice of Proposed Rulemaking, 79 Fed. Reg. 7318 (Feb. 6, 2014).

Dear Executive Secretary Shinnars:

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 Relations Board's (NLRB or the Board's) Notice of Proposed Rulemaking Regarding Representation Case Procedures (Notice or NPRM) published on Feb. 6, 2014 (79 Fed. Reg. 7,318). This proposed rule, identical to the rule proposed in June 2011, seeks to amend the entire union 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.

Statement of Interest: AHA, ASHHRA, AONE and their members have substantial interests in this rulemaking. The AHA represents nearly 5,000 hospitals, health systems and other health care organizations, and 43,000 individual members. AHA members run the gamut from large hospitals and health care systems to small, rural hospitals. More than 40 percent of the nation's hospitals are standalone hospitals and often are the sole health care provider in their communities. ASHHRA is a personal membership group of the AHA and represents more than 3,500 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. Burdens placed on our nation's hospitals affect the delivery of patient care throughout the country, including the costs of delivering quality care.

The proposed rules will have a significant impact on hospitals. A sampling of the NLRB's election reports since January 2013 reveals that, in any given month, between about 10 and 20 percent of election petitions involve health care employers; in February, September and October 2013, more than 20 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 99 employees and 224 employees far surpassing the average unit size of 28 employees (*See* 79 Fed. Reg. 7,327). Further, in 2013 at least 10 elections in the health care field involved votes of at least 370 employees or more, including votes involving 600, 606 and 896 employees.

Structure of Comments: Given that the proposed rules here are in most respects identical to those rules published by the Board in June 2011, the AHA, ASHHRA and AONE are submitting comments which, in large part, overlap with those comments submitted in 2011. The comments below have been updated to revise statistics and address issues raised by the current proposed rules that were not present in 2011 due to changed circumstances. Further, in light of the fact that the Board is likely to issue a final rule without obtaining further comments, the AHA, ASHHRA and AONE will take this opportunity to respond now to certain comments made by the Board to the comments filed in response to the NLRB's 2011 proposed rules.

Summary of Comments: 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 administration's rulemaking goals by resubmitting, in essentially identical form, the Board's 2011 NPRM (*See* 76 Fed. Reg. 36,812). In 2011, the NLRB received more than 65,000 comments, reviewed them, and issued a final rule, including a 40-page analysis and response to those comments (*See* 76 Fed. Reg. 80,138). Despite this prior exchange, the Board has now reissued its originally proposed set of rule changes as if nothing had happened. This is inconsistent with President Obama's Executive Order 13,563, intended to allow a full and fair exchange of views on significant regulatory changes. Essentially, the Board appears to be hiding the ball from the public regarding its current views of what should be changed, in light of the comments previously received and its analysis of those comments. The implication of the Board's reissuance of the same NPRM is that the public comment process is, from the Board's perspective, largely perfunctory.

With respect to the substance of the Board's NPRM, the AHA, ASHHRA and AONE acknowledge the Board's congressional mandate to hold elections "quickly and fairly" (79 Fed. Reg. 7,319 (emphasis added)). In our view, however, the Board's NPRM single-mindedly promotes quick elections at the expense of a fair process. This approach is imbalanced, unwarranted, and inconsistent with the Act. Moreover, we believe the Board's NPRM would not even achieve the Board's myopic goal. The NPRM changes so many elements of the

Gary Shinnors

April 7, 2014

Page 3 of 31

representation case procedure rules that its true implications are unknown and could easily cause greater delays in elections by effectively forcing employers into hearings, reducing the number of stipulated elections. Further, the proposed rules do not even address the main cause of delays in elections, *i.e.*, blocking charges.

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.

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/

Rick Pollack
Executive Vice President
American Hospital Association

/S/

Pam Thompson, MS, RN, CENP, FAAN
Chief Executive Officer
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/S/

Maureen O'Keefe
Chair of the Board
American Society for Healthcare Human Resources Administration

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

I. The NLRB's process in developing and publishing the NPRM in near-identical form to the rules proposed in June 2011 is inconsistent with President Obama's Executive Order 13,563 and the Board's own prior practice, and offends the administrative process by limiting substantive public commentary from its process (See 79 Fed. Reg. 7,318 (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 the Board's decades-old rulemaking procedures, it published not only a Notice of Proposed Rulemaking, but also the Proposed Rule itself (See 79 Fed. Reg. 7,318, 7,351-64). Moreover, the Proposed Rule published in 2014 is substantively identical to the rule changes proposed in 2011 (See 76 Fed. Reg. 36,812). Following the publication of the proposed rule changes in June 2011, the Board received more than 65,000 sets of public comments, as well as oral presentations by 66 individuals at public hearings (See 29 Fed. Reg. 7,338). As the dissent by Members Miscimarra and Johnson notes, "[t]he NPRM . . . attempts no significant qualitative evaluation" of the information received from the public comments and oral presentations (*Id.*). Indeed, the Board responded to many of the public comments when it published its final rule in December 2011 (79 Fed. Reg. 80,138). Here, however, the Board has published the NPRM as if none of the public commentary or modifications to the 2011 proposed rule had occurred.

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 (OMB) has recognized the order's importance and, on Feb. 2, 2011, requested that independent agencies such as the Board comply with the order.

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." 79 Fed. Reg. 7,323-24 n.34. The Board's cursory explanation in footnote 34, however, fails to demonstrate why advance and genuine dialogue on such extensive and important rule changes would be neither "feasible" nor "appropriate." This is especially so given that the Board already has more than 65,000 public comments providing commentary on a rule identical to the NPRM (*Id.* at 7,347). The Board's explanation that it has incorporated by reference the more than 65,000 comments from 2011 (*id.* at 7,318) is belied by the fact that it has issued a rule identical to that proposed in 2011, in spite of significant public commentary. As discussed below in

Section I.C, we believe that following the mandates of Executive Order 13,563 and the OMB 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 practice in rulemaking.*

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 Oct. 30, 1987 (52 Fed. Reg. 25,142) and was eventually expanded to a 150-day period ending on Dec. 1, 1987. After reviewing the written comments and oral testimony received in response to the first Notice, the Board issued a second Notice on Sept. 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 rulemaking, the current rulemaking proposes 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, while the public comment process has been improved over that used in conjunction with the 2011 NPRM, all of the public comments are taking place over a two day period in a single location (Washington, D.C.), thereby limiting participating in the meeting. Moreover, the proposed rules were submitted long after the public's 2011 submissions, without any attention paid to or analysis based on such comments. Such a minimal opportunity for public input and commentary precludes 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.

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 as raised by NLRB Member Brian Hayes in the open meetings regarding the 2011 proposed rule changes, 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, 2011 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) cases,¹ 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. 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. 3,821). While the acute care rulemaking procedures used by the Board did not end all disputes, it did allow 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 (1991)).

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* 79 Fed. Reg. 7,334-35). 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. We further suggest that the Board review and respond to the public comments submitted in response to the 2011 proposed rule changes prior to re-issuing proposed rule changes in 2014.

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 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

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); 79 Fed. Reg. 7,319). 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."

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.

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. But at a minimum, the Board should revisit its prior rulemaking practices and realize the value of such open dialogue particularly when, as demonstrated by proposed rulemaking in June 2011, and recognized by the Board in the final rules published in December 2011, the proposed rule here 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 (*See* 76 Fed. Reg. 80,145).

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, take an alternative approach in its rulemaking by: (1) reviewing the voluminous public comments submitted in 2011, and (2) issuing more opened-ended questions based on those comments. This will allow for a more robust dialogue between the Board, the employer community and the union community, and will result in a process that better demonstrates the integrity of the agency's rulemaking process.

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 without taking into account the lessons of 2011, 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 noted in Members Miscimarra and Johnson's dissent, "Casehandling statistics since 2011 indicate no significant variation from those described in the 2011 proposed election rule" (79 Fed. Reg. 7,341 (citing 76 Fed. Reg. 26,813-14)). In Fiscal Years 2011 and 2012, the median time from petition to election for all petitions was 38 days (*See* General Counsel Memorandum 13-01 at 2, 7 (Jan. 11, 2013), available at <http://www.nlr.gov/publications/general-counsel-memos>). Further, in 2012 and 2013, about 94 percent of all initial elections were conducted within 56 days of the filing of the petition (*Id.*; NLRB Performance Accountability Report, Fiscal Year 2013, <http://www.nlr.gov/reportsguidance/reports>). Similarly, as then Member Hayes's dissent noted in 2011, in Fiscal Year 2010, the average time from petition to election for all petitions was 31 days (*See* 76 Fed. Reg. 36,831). In the 8 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 produced decisions in an average of 22 days, again surpassing its target median by 10 days (*Id.*).

While the Board acknowledges these successes, it notes that “those time targets have never been intended to establish an ideal standard,” that they reflect the current procedures’ “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. . . .” (79 Fed. Reg. 7,337). 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.

Moreover, the Board itself recognized, when it issued its final rule in December 2011, that a “radical departure from [past] Board practice” is not the proper method of revising and updating Board procedures (76 Fed. Reg. 80,148). Responding to the argument advanced by AHA and other parties in 2011 that the Board had not identified a compelling need for modification of the representation case procedures, the Board’s comments regarding the final rule noted that the “amendments the Board has chose to adopt represent a continuation of this incremental improvement process,” and not a “radical departure” (*Id.*). While it contained significant (and we believe unwarranted) changes to the election process, the December 2011 final rule at least represented a more incremental shift from current procedures than the June 2011 proposed rule, and consequently, the NPRM today. The proposed rule changes currently on the table represent the very radical departure that the Board disavowed in December 2011.

To the extent that hearings in contested cases result in delay, those cases are a small 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 timely manner, there is no statutory requirement that representation election 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*” (79 Fed. Reg. 7,319 (emphasis added)), a point the Board has noted. The proposed changes are not fair particularly to health care employers who face abnormally large units and 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, Professors Bronfenbrenner and Warren, in addition to testifying before the Board in 2011 (*see* July 19, 2011 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 such a 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 to seven weeks (42-49 days) from filing a petition (*Id.*). Again, the Board is currently 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 Professors 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—their 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).

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.

(79 Fed. Reg. 7,355 (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 to 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” (79 Fed. Reg. 7,355 (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 timely provide 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). Indeed, 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* 79 Fed. Reg. 7,330; *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 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” (79 Fed. Reg. 7,355) (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, and 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 National Labor Relations Act requires, or permits, the Board to require that an employer either 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 over 20 years, they are well-familiar with what is an appropriate unit. There is simply no need to shift that burden to health care employers or any other employer.

The Board's "preclusion rule," coupled with the accelerated timelines, will prompt fewer election agreements and, as a result, more contested hearings and more, rather than less, 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.² As a result, contested cases will

² The Board's response to the contrary in its December 2011 final rule, that "there was no significant drop in the consent or stipulation rate following former General Counsel Fred Feinstein's initiative aimed at commencing

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 the decision 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. Thus, rather than consenting or stipulating to an election, those employers may elect to proceed with a hearing in the hopes that it will, in essence, buy them more time before the election is held, resulting in a longer period to election than if they simply agreed to have an election. As a result, the number of contested cases that actually 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 thus 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 address directly 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 rules, 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” (79 Fed. Reg.

(continued...)

all pre-election hearings between 10 and 14 days after the filing of the petition” (76 Fed. Reg. 80,157), is not apposite. First, former General Counsel Feinstein’s initiative was just that, an initiative—it was not a wholesale re-writing of the representation case procedures. Second, that initiative did not address a critical part of the proposed rules that is likely to lead to a more litigious process: the “preclusion” rule. Finally, the December 2011 final rule did not even contain the preclusion provisions that the Board is proposing today.

7,354 (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 takes an almost "Ivory Tower" approach to this issue, ignoring the actual work that goes into producing accurate employee lists under Board procedures. The requirement that a final voter eligibility list must be submitted in 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 often found in acute care hospitals, this requirement will create practical compliance problems for many employers, who often 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* 79 Fed. Reg. 7,327). 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 in order 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 not only implement electronic health records, but also to make "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, in doing so, has created a number of legal pitfalls for both employers and organizing unions in the health care field. 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" (79 Fed. Reg. 7,354 (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 are ineligible to vote in the election, and 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 for each affected employee in two days' time will almost certainly produce flawed results.

Importantly, the ramifications for errors in the determination of supervisory status that are 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. For example, 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 under *Oakwood Healthcare*, that would almost certainly be objectionable conduct that could result in a successful union election being overturned³ (*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 and many employers' privacy policies, and could violate employees' privacy rights. The Board should examine alternative methods for dissemination of information to employees prior to issuing the proposed rules.

The AHA, ASHRA 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* 96 Fed. Reg. 7,354 (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*" (79 Fed. Reg. 7,326), 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 7,327-28), 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

³ Of course, 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* 79 Fed. Reg. 7,331 (noting that where eligibility issues were non-determinative, the parties would be left to bargaining or subsequent Board proceedings)).

jeopardizing patient care. Many hospitals have policies prohibiting the use of the Internet for non-work related purposes specifically to avoid such distractions.

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.

Recognizing that "the voter list proposals may implicate concerns about individual privacy and the dissemination of personal information" (79 Fed. Reg. 7,327), the Board has solicited comments regarding potential restrictions or solutions for the problems created by the revised *Excelsior* requirements. Specifically, the Board has requested that interested parties comment on the possibility and feasibility of the NLRB "hosting protected communications portals (*e.g.*, sealed-off email systems) to facilitate electronic communication between the nonemployer parties and employees without those parties receiving employee email addresses" (*See id.* at 7,328). That the Board has raised such issues demonstrates precisely why more time is needed in order to consider such ideas and engage in a dialogue regarding possible solutions *before* the issuance of a proposed rule.

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. The changes—such as 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—all sacrifice process and discussion of issues for the sake of a potentially faster election. 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 still no guarantee that those issues will be addressed at a hearing. 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" (79 Fed. Reg. 7,358 (to be codified at 29 C.F.R. § 102.66(d))). 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, accordingly, 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 less than 20 percent of the putative unit is in dispute, likely would exacerbate, rather than alleviate, 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 that "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/attachments/basic-page/node-1727/hearing_officers_guide.pdf). As the Board has recognized in both *Oakwood Healthcare* and General Counsel Memorandum 91-3, this issue routinely occurs in the health care field. Describing the procedures for pre-election hearings under the Board's acute care unit regulations, the Board has noted that "[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>).

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 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.

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 almost certainly 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 was also 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.⁵

Third, as raised by former Member Hayes at the Board's open meetings in 2011 (*see* 2011 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. Data received from the Board pursuant to a Freedom of Information Act request shows the average number of certification test Section 8(5)(5) petitions for review or applications for enforcement in courts of appeal have increased markedly in recent years: from an average of 8.33 per year in Fiscal Years 2008 through 2010 to an average of 15.33 per year in Fiscal Years 2011 through 2013. Given the lack of a record, these issues will almost certainly 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 issues require analyzing the jobs and testimony of individual employees, threatens the tranquil and peaceful nature of the workplace. Data recently received from the Board shows that elections in the health care field, which tend to have relatively large proposed units, are especially prone to disputed ballots. For instance, in Fiscal Year 2013, the two representation cases with the greatest number of challenged ballots were both hospitals, with

⁵ The Board's December 2011 responses to AHA, ASHHRA and AONE's (and other parties') comments regarding the 20 Percent Rule are unconvincing (*See* 76 Fed. Reg. 80,168). First, the Board in December 2011 explicitly noted that it decided "not to adopt the 20-percent rule at this time" (*id.*), rendering moot parties' arguments about confusion among voters where unit issues could not be determined prior to an election. Second, the Board's assertion that "the question [of whether particular individuals are supervisors] exists only at the margin" (*id.*), ignores the significant day-to-day realities on supervisory issues faced by countless hospitals (*See* Section IV.B, *supra*).

104 and 309 challenged ballots, respectively. 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, based on only Statements of Position, offers of proof, and no other evidence, 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” (79 Fed. Reg. 7,358 (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* 79 Fed. Reg. 7,329), is a flawed and unrealistic substitute for contested case hearings, live testimony, and cross-examination of witnesses which afford parties a full opportunity to develop the record.

Further, the Board is using “summary judgment” standards to determine whether issues will be litigated prior to an election. In civil litigation, however, 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)). Moreover, Rule 56 contains an escape clause that states, in pertinent part, “[i]f a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may ... give an opportunity to properly support or address the fact” (Fed. R. Civ. P. 56(e)(1)). With the NPRM however, the Board is affording no escape clause and a significantly reduced time period. By 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, the Board’s proposal is flawed, arbitrary, and capricious. Even an experienced and fully qualified hearing officer may be unprepared to make these summary determinations on less evidence and in less time than would be provided federal court judges.

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* 79 Fed. Reg. 7,358 (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, and subject to any other limitations imposed by, the hearing officer (79 Fed. Reg. 7,358 (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 caselaw, there is no valid reason that they should be making rushed determinations without the benefit of the parties' legal research and arguments. Accordingly, 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. But while the AHA, ASHHRA and AONE have significant concerns about many of the proposals as individual changes, we are also concerned about how the representation case procedure will operate as a whole.

As the Board acknowledges in its Notice (*see* 79 Fed. Reg. 7,319-21) 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. But, even then, the process has not been revised since 1977 (*Id.* at 7,320). While we agree that measures could be taken to improve the representation process, particularly as discussed below with respect to blocking

charges, rewriting the entire process tests the boundaries of what is reasonable for the Board to accomplish through its rulemaking authority.

The NPRM essentially prohibits a careful and thorough consideration of how a petition will be processed during the entire representation procedure. For instance, one hypothetical that is likely to occur in the health care field raises a number of issues that could arise under the proposed rule. Assume that a union petitions for a unit with over 500 putative unit members.⁶ The employer objects to the inclusion of 100 charge nurses and submits an offer of proof establishing that the nurses are Section 2(11) 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* 79 Fed. Reg. 7,358 (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* 79 Fed. Reg. 7,331).

While the charge nurses would be permitted to vote subject to challenge (*id.*), and then subject to post-election objections, it is unclear whether, and if so, when, eligibility of their votes will ever be addressed. Because the election has occurred with at least 100 ballots subject to challenge, the union must win by that 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 actually achieved. In that case, in light of the 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 actually 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 is high, delaying the actual commencement of bargaining.

Of course, 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.⁷ 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, if possible, and the alleged benefit of the proposed rule is lost.

⁶ Such large units are fairly common in the health care field. Based on the 2014 edition of *AHA Hospital Statistics*, there were 4,999 U.S. Registered Community Hospitals—defined as nonfederal, short-term general and other special hospitals—in 2012. The average hospital employed 1,116 full-time and part-time employees. RNs made up a significant portion of these employees. In the over 570 hospitals with between 200 and 299 beds, the average number of RNs was 471 nurses. The 272 largest hospitals averaged 1,722 registered nurses per hospital.

⁷ 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.

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,” and instead prolongs contentious and critical 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. This will raise the risk of inadvertent ULPs and objectionable conduct, primarily because the NPRM removes an opportunity for the parties to obtain guidance from the Regional Director regarding supervisory status disputes. The rule does not indicate when, if ever, and if so, how, these disputes will 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, focusing on those few contested cases, proposes a wholly-new process carrying ramifications which, particularly 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, ASHHRA 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 fourteen to seven days does not provide sufficient time to gather evidence supporting those challenges or objections (*See* 79 Fed. Reg. 7,360 (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 (79 Fed. Reg. 7,360 (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 (79 Fed. Reg. 7,361 (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 to 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” (79 Fed. Reg. 7,361 (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* 79 Fed. Reg. 7,360 (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. However, 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* 79 Fed. Reg. 7,361 (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” (79 Fed. Reg. 7,331).

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, yet 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).⁸

As discussed elsewhere in these Comments, 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. As also discussed elsewhere, 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 makes even small 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 to 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 providing for only discretionary review before the Board, decisions rendered by hearing officers and regional directors will be effectively insulated from pre-election review by the Members of the Board⁹ (79 Fed. Reg. 7,359 (to be codified at 29

⁸ That the Board noted in its December 2011 final rule that such bargaining already occurs in some cases (*see* 76 Fed. Reg. 80,174), says nothing about whether the practice is harmful to employees or contrary to the Act.

⁹ 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" (79 Fed. Reg. 7,321). 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.

C.F.R. § 102.67(c)). The Board should not abdicate its statutory responsibilities by making review of all pre-election regional decisions discretionary, particularly given the discretion given to hearing officers under other proposed rule changes. 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. 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, again, to 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 (79 Fed. Reg. 7,361 (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.

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,¹⁰ 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 (79 Fed. Reg. 7,354 (to be codified at 29 C.F.R. § 102.62(b))).

¹⁰ 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 percent of representation cases, or 41 elections, involved consent elections, while 51.6 percent, or 1,370 cases, involved stipulated elections.)

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” (79 Fed. Reg. 7,323), 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. As discussed below, proposing specific changes on employer responses in contested election cases—approximately 8 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. The Board’s response in the December 2011 final rule to the AHA’s proposal for revision of the blocking charge rule noted that the agency “is not required to address all procedural or substantive problems at the same time” (76 Fed. Reg. 80,150). While this is true, the fact that the Board is declining to revise one of the biggest hurdles to timely elections, and at the same time proposing extensive revisions to other aspects of the process that have not proven to hold up elections (*see* Section II, *supra*), leaves the Board open to questions about its motives in issuing the NPRM.

At least one study 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 of the cases, involved blocking charges (*Id.*).

The cases involving blocking charges experienced significant delays in holding elections. The median and average number of days from petition to election in unblocked cases was 38 and 39 days, respectively, in 2008 (*Id.*). However, in the 284 blocked petitions, the median number of days from petition to election was 139 days (*Id.*). Comparatively, cases that involve contested hearings—approximately 8 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/nlrp-proposal-modest-and-will-help-to-reduce-unnecessary-election-delays.shtml>).

Based on the statistics contained in Professor 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 Professor Estreicher’s findings. The data obtained from the Board shows that, for Fiscal Years 2011 through 2013, there were an average of 106 blocked cases per year with an average of 220 days from petition to election. This information, coupled with the data cited in Professor 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* 79 Fed. Reg. 7,334-35). 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, such as in situations in which the eligible voting group has been significantly changed by the employer's alleged unlawful conduct. 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, ASHRA 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 and the votes counted. 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” (79 Fed. Reg. 7,326). 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)). Thus, 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 issue that would have to be resolved pre-election, counter to the Board’s goals of eliminating election delay.

Gary Shinnors

April 7, 2014

Page 31 of 31

Because there is not a demonstrated need to allow modify the Board's current practice and accept allow 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, ASHHRA 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.