

V. Dissenting View of Member Brian E. Hayes

MEMBER HAYES, dissenting,

Today, my colleagues undertake an expedited rulemaking process in order to implement an expedited representation election process. Neither process is appropriate or necessary. Both processes, however, share a common purpose: to stifle full debate on matters that demand it, in furtherance of a belief that employers should have little or no involvement in the resolution of questions concerning representation. For my part at least, I can and do dissent.

First, the rulemaking process:

The last substantive rulemaking effort of comparable scale involved the determination of appropriate bargaining units in the health care industry. The need for this effort was obvious, based on years of litigation highlighting specific problems and differences among the Board, the courts of appeals, and health care industry constituents. The initial July 2, 1987 notice of proposed rulemaking was followed by a series a four public hearings, the last one held over a 7-day period, in October 1987. Thereafter, the written comment period was extended. Another rulemaking notice followed on September 1, 1988. It reviewed the massive amount of oral testimony (3545 pages and 144 witnesses) and written comments (1500 pages filed by 315 individuals and organizations) received during the prior year and announced a revised rule with another 6-week period for written comment. The final rule was published on April 21, 1989, almost 2 years after the initial notice.

In marked contrast to the health care unit rulemaking, my colleagues put forth proposals on their own initiative, not in response to any petition for rulemaking or in response to any specific problems defined by prior litigation. The need for their proposed electoral reform, which directly affects every employer and employee in every industry subject to Board jurisdiction, is far from obvious. The proposed revisions largely reflect the narrow concerns and proposals of a few academicians.⁶² Rather than proceeding with the preparation and publication of rules responsive to just this one small and ideologically homogenous group, it was incumbent on the Board to have a far more inclusive public discussion of the need for electoral reform *before* determining what rule revisions to propose formally in the Federal Register.⁶³ In this regard, President Obama’s Executive Order 13563 specifically states that “[*b*]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.⁶⁴ While this Order is not binding on the Board, as

⁶² E.g., Charles Craver, *The National Labor Relations Act at 75: In Need of a Heart Transplant*, 27 Hofstra Lab. & Emp. L.J. 311 (2010); William B. Gould, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F.L. Rev. 291 (2008); Charles J. Morris, *Renaissance at the NLRB – Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board*, 23 Stetson L. Rev. 101 (1993).

⁶³ I disagree with my colleagues’ characterization of the proposed rule revisions as “almost entirely” procedural in nature. Accordingly, I find that the notice and comment procedure is mandatory, not discretionary.

⁶⁴ E.O. 13563, 76 FR 3821, 3821-23 (Jan. 21, 2011) (emphasis added).

an independent agency, “such agencies are encouraged to give consideration to all of its provisions, consistent with their legal authority.”⁶⁵

It was both “feasible and appropriate” for the Board to seek the views of those likely to be affected before issuing the notice of proposed rulemaking. At the very least, the proposals should have been previewed for comment by the Board’s standing Rules Revision Committee, a group of agency officials specifically identified as responsible for considering and recommending modifications in existing rules and proposed new rules,⁶⁶ and by the Practice and Procedures Committee of the American Bar Association, a group representative of the broad spectrum of private and public sector labor-management professionals that frequently serves as a sounding board for revisions of our Rules. I believe the Board should also have exercised its discretion to hold an open meeting under the Government in Sunshine Act⁶⁷ when voting to authorize a rule revision proposal.⁶⁸ Alternatively, the Board could have undertaken negotiated rulemaking.⁶⁹ Any of the

⁶⁵ Office of Management and Budget Memo 11-10, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies: Executive Order 13563, “Improving Regulation and Regulatory Review” (February 2, 2011), available at www.whitehouse.gov/omb/memoranda.

⁶⁶ See May 23, 2011, letter from Board Executive Secretary submitting the Board’s Preliminary Plan to Review Significant Regulations to the OMB Office of Information and Regulatory Affairs in response to Section 6 of Executive Order 13563, available at <http://www.slideshare.net/whitehouse/national-labor-relations-board-preliminary-reform-board>.

⁶⁷ Government in the Sunshine Act, 5 U.S.C. 552b.

⁶⁸ My point is not that the process followed to date is impermissible. It is that a more open public process would be far more preferable and consistent with Executive Order guidelines.

⁶⁹ See Negotiated Rulemaking Act, 5 U.S.C. 561 et seq.

suggested processes could have encouraged consensus in rulemaking, rather than the inevitably divisive approach my colleagues have chosen by publishing their proposed rules with no advance notice or public discussion of their purpose or content.

The limitation on public participation in this process continues with my colleagues' choice of a 60-day written comment period, a 14 day reply period, and one public hearing for discussion about the proposed rules. Again, the contrast with health care unit rulemaking is marked. While I do not suggest that the proposed rulemaking process needs to last 2 years, I think it manifest that 2 and a half months in the dead of summer is too little time, and written comment with a single hearing is too limited a method, for public participation in discussing the myriad issues raised. There needs to be a more extended comment period and a full opportunity for broad stakeholder input through multiple public hearings on proposed rules of this magnitude.

It is utterly beside the point, and should be of little comfort to the majority, that its actions may be in technical compliance with the requirements of the Administrative Procedure Act (APA) and other regulations bearing on the rulemaking process. President Obama's Memorandum on Transparency and Open Government, issued on January 21, 2009,⁷⁰ makes clear that independent agencies have an obligation to do much more than provide minimum due process in order to assure that our regulatory actions implement the principles of transparency, participation, and collaboration. As explained in the subsequent directive from the Director of the Office of Management and Budget, these

⁷⁰ 74 FR 4685, 4685-86 (Jan. 26, 2009).

principles “form the cornerstone of an open government.”⁷¹ Sadly, my colleagues reduce that cornerstone to rubble by proceeding with a rulemaking process that is opaque, exclusionary, and adversarial.⁷² The sense of *fait accompli* is inescapable.

Now, to the proposed rules themselves:

Parts of what my colleagues propose seem reasonable enough. On the other hand, the whole of proposed reform is much, much more than the sum of its parts and out of all proportion to specific problems with the Board’s current representation casehandling procedures. While the preamble frequently refers to the Board’s interest in the expeditious resolution of questions concerning representation, there is no certainty that the rule revisions even address the problems that have caused undue delay in a very small number of representation cases or that they will shorten the *overall* timeframe for processing an election case from the filing of a petition until final resolution. What is certain is that the proposed rules will (1) substantially shorten the time between the filing of the petition and the election date, and (2) substantially limit the opportunity for full evidentiary hearing or Board review on contested issues involving, among other things, appropriate unit, voter eligibility, and election misconduct. Thus, by administrative fiat in lieu of Congressional action, the Board will impose organized labor’s much sought-

⁷¹ Office of Management and Budget Memo 10-06, Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive (February 2, 2011), available at www.whitehouse.gov/omb/memoranda.

⁷² The majority suggests an inconsistency between my dissenting position in *Specialty Healthcare and Rehabilitation Center of Mobile*, 356 NLRB No. 56 (2010), and in the present rulemaking scenario. In both instances, I find that the majority has provided an insufficient explanation for reexamining extant law and procedure. In *Specialty*, an adjudicatory proceeding, I further objected to the expansion of inquiry far beyond the issues specifically raised by the parties. That inquiry, if undertaken, should have entailed the rulemaking process.

after “quickie election” option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition. Make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer’s legitimate opportunity to express its views about collective bargaining.

It may be best to begin a substantive analysis of the proposed rules with an accounting of the Board’s current representation casehandling procedures. The Acting General Counsel’s summary of operations for Fiscal Year 2010 took special note of facts that: (1) 95.1 percent of all initial elections were conducted within 56 days of the filing of the petition; (2) initial elections were conducted in a median of 38 days from the filing of the petition; and (3) the agency closed 86.3 percent of all representation cases within 100 days, surpassing an internal target rate of 85 percent.⁷³ The Acting General Counsel described the achievement of these results as “outstanding.”⁷⁴

The Board’s total representation case intake for Fiscal Year 2010 (including all categories of election petitions) was 3,204, a 10 percent increase from the Fiscal Year 2009 intake of 2,912. For all petitions filed, the average time to an election was 31 days. Voluntary election agreements were obtained in 92 percent of the merit petitions. In contested cases, Regional Directors issued 185 pre-election decisions after hearing in a median of 37 days, well below the target median of 45 days. In 56 cases, post-election

⁷³ General Counsel Memorandum 11-03 at “Introduction” (Jan. 10, 2011), available at <http://www.nlr.gov/publications/general-counsel-memos>. Agency performance has continued at essentially the same level for the first 3 months of fiscal year 2011. See GC Memo 11-09, supra at 18.

⁷⁴ GC Memo 11-03, supra at “Introduction.”

objections and/or challenges were filed that required an investigative hearing. Decisions or Supplemental Reports issued in those cases after hearing in 70 median days from the election or the filing of objections. In 32 cases, post-election objections and/or challenges could be resolved without a hearing. Decisions or Supplemental Reports in those cases issued in 22 median days. The General Counsel's goal in hearing cases is 80 median days and 32 days in non-hearing cases.⁷⁵

It is not at all apparent from the foregoing statistical picture why my colleagues have decided that it is now necessary to (1) eliminate pre-election evidentiary hearings, as much as is statutorily permissible (or arguably well beyond that point), (2) eliminate pre-election requests for review and defer decision on virtually all issues heretofore decided at the preelection stage in the small percentage of contested cases, (3) impose pleading requirements and minimal response times on election parties, most notably on employers, who risk forfeiture of the right to contest issues if they fail timely to comply with these requirements, and (4) eliminate any automatic right to post-election Board review of contested issues.

I absolutely agree that the Board should be concerned about unreasonable delay in any case, particularly in those involving questions concerning representation. It should never take 424 days from the filing of a petition to resolve pre-election issues, as happened with respect to one case in Fiscal Year 2010;⁷⁶ nor should it take years to

⁷⁵ GC Memo11-09, supra at 18.

⁷⁶ *Kansas City Repertory Theatre*, 17-CA-12647.

resolve post-election objections, as it did in a trio of recently-decided Board cases.⁷⁷ However, as measured by the Board and General Counsel's own time targets and performance goals, such delay is the exception rather than the norm. Notably, my colleagues make no reference to these time targets while drastically departing from them when reducing the number of days from petition filing to an election. Further, the majority makes no effort whatsoever to identify the specific causes of delay in those cases that were unreasonably delayed. Without knowing which cases they were, I cannot myself state with certainty what caused delay in each instance, but I can say based on experience during my tenure as Board member that vacancies or partisan shifts in Board membership and the inability of the Board itself to deal promptly with complex legal and factual issues have delayed final resolution far more often than any systemic procedural problems or obstructionist legal tactics. That was the situation in each of the aforementioned extremely delayed cases, and in none of those cases would the majority's current proposals have yielded a different result.

Further, it is far from clear that shortening the time period from the filing of a petition to the conduct of an election will have the corresponding effect of shortening the median time from filing to final resolution, which should be the primary goal of any revision of the rules. Again, the majority provides no explanation. By impeding the process of timely resolving pre-election issues and eliminating any right to automatic Board review of regional decisions, the proposed revisions seemingly discourage parties from entering into any form of election agreement, thereby threatening the current high percentage of voluntary election agreements. In addition, at least in those cases where

⁷⁷ *Jury's Boston Hotel*, 356 NLRB No. 114 (2011), *Mastec/Direct TV*, 356 NLRB No. 110 (2011), and *Independence Residences, Inc.*, 355 NLRB No. 153 (2010).

the union wins the election, the deferral of pre-election issues seems merely to add time from the pre-election period to the post-election period, with no net reduction in overall processing time. This will not save time or money for the parties or the Board. Finally, the proposed rule revision permitting up to 20 percent of individuals whose eligibility is contested to cast challenged ballots casts a cloud of uncertainty over the election process. Employees who do belong in the bargaining unit may be so misled about the unit's scope or character that they cannot make an informed choice, instead basing their vote on perceived common interests or differences with employee groups that ultimately do not belong in the unit.⁷⁸

The oft-repeated aim of the Board to resolve questions concerning representation expeditiously does not mean that we must conduct elections in as short a time as possible. In truth, the "problem" which my colleagues seek to address through these rule revisions is not that the representation election process generally takes too long. It is that unions are not winning more elections. The perception that this is a problem is based on the premise, really more of an absolute article of faith, that employer unfair labor practices

⁷⁸ As stated by the Fourth Circuit in *NLRB v. Beverly Health and Rehabilitation Services, Inc.*, No. 96-2195, 1997 WL 457524, at *4 (4th Cir. 1997):

Where employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character from the proposed bargaining unit, the employees have effectively been denied the right to make an informed choice in the representation election. *See NLRB v. Parsons Sch. of Design*, 793 F.2d 503, 506-08 (2d Cir.1986); *Lorimar Productions*, 771 F.2d at 1301-02; *Hamilton Test Sys.*, 743 F.2d at 140-42. Thus, the Board may not "inform employees that they are voting for representation in [one] unit and later ... consider the ballot as a vote for representation in a [different] unit." *Hamilton Test Sys.*, 743 F.2d at 140; *see also Lorimar Productions*, 771 F.2d at 1301 (quoting *Hamilton Test Sys.*).

greatly distort the representation election process. This leads to the conclusion that the more limited a role an employer has in this process, the less opportunity it will have to coerce employees, and the greater the prospect that the election results will reflect employees' "true" choice on collective-bargaining representation, which will presumably mean a much higher percentage of union election victories. Inasmuch as unions prevailed in 67.6 percent of elections held in calendar year 2010 and in 68.7 percent of elections held in calendar year 2009,⁷⁹ the percentage of union victories contemplated by the majority in the revised rules must be remarkably high.

One way to limit employer participation is to shorten the time from petition filing to election date. Of course, limiting the election period does not operate selectively to deter unlawful coercive employer speech or conduct.⁸⁰ It broadly limits all employer speech and thereby impermissibly trenches upon protections that Congress specifically affirmed for the debate of labor issues when it enacted Section 8(c) in 1947. As the Supreme Court stated in *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008):

From one vantage, § 8(c) "merely implements the First Amendment," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), in that it responded to particular constitutional rulings of the NLRB. See S.Rep. No. 80-105, pt. 2, pp. 23-24 (1947). But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management." *Linn v. Plant Guard Workers*, 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have

⁷⁹ "Number of NLRB Elections Held in 2010 Increased Substantially from Previous Year," Daily Lab. Rep. (BNA), No. 85, at B-1 (May 3, 2011).

⁸⁰ Indeed, the "quickie" election procedure may not deter such conduct at all. Employers who are wont to use impermissible means to oppose unionization will simply be encouraged to act at the first hint of organizational activity, prior to the filing of an election petition.

characterized this policy judgment, which suffuses the NLRA as a whole, as “favoring uninhibited, robust, and wide-open debate in labor disputes,” stressing that “freewheeling use of the written and spoken word ... has been expressly fostered by Congress and approved by the NLRB.” *Letter Carriers v. Austin*, 418 U.S. 264, 272-73, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

Admittedly, the Court recognized the Board’s right to police “a narrow zone of speech to ensure free and fair elections,”⁸¹ but neither the Court’s reasoning nor the congressional intent to encourage free debate can be squared with my colleagues’ proposal generally to limit the opportunity for employers to engage in a legitimate pre-election campaign opposing unionization.

Another way to limit employer participation is to reduce opportunities for litigation of contested issues before the Board. That is the transparent purpose of the proposed rules’ transformation of discretionary questionnaires into mandatory pleading requirements and the imposition of limitations on full evidentiary hearings, briefing, and Board review. All of these revisions are focused on preventing parties, primarily employers, from litigating issues in representation proceedings, even when legitimate issues are raised and a full record and Board review would seem to be essential.

It is difficult to identify which proposed rule change is most egregious, but a solid candidate for that dishonor might be the expanded, mandatory “questionnaire” process. As described by the majority,⁸² the proposed Statement of Position Form would require an employer to state its position on

the appropriateness of the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the existence of any bar to the election; the type, dates, times, and location of the election; and any other issues that a party intends to raise at

⁸¹ *Chamber of Commerce v. Brown*, supra at 74.

⁸² The form itself is not appended to the notice of proposed rulemaking, as one might logically expect it to be.

hearing. In those cases in which a party takes the position that the proposed unit is not an appropriate unit, the party would also be required to state the basis of the contention and identify the most similar unit it concedes is appropriate. In those cases in which a party intends to contest at the pre-election hearing the eligibility of individuals occupying classifications in the proposed unit, the party would be required to both identify the individuals (by name and classification) and state the basis of the proposed exclusion, for example, because the identified individuals are supervisors.

Such matters deserve inquiry and definition, hopefully leading to resolution, in the preelection process. However, the proposed rules further mandate that a hearing be held 7 days from service of the petition and the Statement of Position Form, and they bar a party from offering evidence or cross-examining witnesses as to any issue it did not raise in its own statement or in response to the statement of another party. In effect, a party must raise issues and state its basis for raising them in a maximum of 7 days or forfeit all legal right to pursue those issues. It may be that employers of a certain size have legal counsel or labor consultants readily available to evaluate the election petition and proposed bargaining unit, identify any issues to be contested, and prepare the required statement in a week or less. However, the Board conducts many representation elections among employees of small business owners who have no such counsel readily at hand, have no idea how to obtain such counsel in short order, and are themselves unaware of such legal arcania as appropriate unit, contract bar, statutory supervisory status, and voter eligibility. The proposed rules, if implemented, will unconscionably and impermissibly deprive these small business owners of legal representation and due process.⁸³

⁸³ The majority relies in part on conformity of the proposed rules with practices under the Federal Rules of Civil Procedure, which are, of course, not binding on administrative agency proceedings and which the Board has steadfastly refused for decades to follow with respect to prehearing discovery in unfair labor practice proceedings.

There is yet another aspect of the proposed rules' impact on employers that deserves mention. Under current law, an employer's obligation to bargain with a union attaches from the election date. Thus, an employer acts at its peril when making any unilateral changes pending resolution of post-election issues if the Board ultimately certifies the union's representative status.⁸⁴ Those post-election issues have heretofore been limited to election objections and challenges. Now, with the shift of virtually all pre-election issues to the post-election phase, the majority substantially increases the potential costs to all employers who have the temerity to attempt to conduct normal business operations while contesting legitimate election issues. Of course, there is no comparable burden on unions.

The proposed rule revisions are cause enough for dissent. However, one cannot help but wonder if they are a prelude to further changes. The same academicians whose treatises have inspired the current proposal have also advocated a host of other initiatives designed to give unions greater access to employees and to limit further the opportunities for employers to communicate their views on collective bargaining representation. These initiatives include requiring an employer to provide access to employees on its premises and conducting elections off-site, by mail ballot, or by electronic vote. Finally, proceeding on a parallel adjudicatory course, my colleagues have signaled a willingness to entertain petitions for bargaining units that have heretofore not been found appropriate under Section 9(b) and 9(c)(5) of the Act.⁸⁵ The Board has not finally decided any of

⁸⁴ See *Mike O'Conner Chevrolet*, 209 NLRB 701, 703 (1974).

⁸⁵ See *Specialty Healthcare*, *supra*.

these issues, but the mere pendency of them should raise substantial concerns among those commenting on the proposed election rule revisions. There exists the possibility that the Board has only just begun an unprecedented campaign to supplant congressional action, subvert legal precedent, and return labor relations law to the supposed “golden era” of the Wagner Act’s early years.⁸⁶

In sum, the Board and General Counsel are consistently meeting their publicly-stated performance goals under the current representation election process, providing an expeditious *and fair* resolution to parties in the vast majority of cases, less than 10 percent of which involve contested preelection issues. Without any attempt to identify particular problems in cases where the process has failed, the majority has announced its intent to provide a more expeditious preelection process and a more limited postelection process that tilts heavily against employers’ rights to engage in legitimate free speech and to petition the government for redress. Disclaiming any statutory obligation to provide any preliminary notice and opportunity to comment, the majority deigns to permit a limited written comment period and a single hearing when the myriad issues raised by the proposed rules cry out for far greater public participation in the rulemaking process both before and after formal publication of the proposed rule. The majority acts in apparent furtherance of the interests of a narrow constituency, and at the great expense of undermining public trust in the fairness of Board elections. I dissent from this undertaking, and I anticipate that many public voices will join in opposing it in spite of the limited opportunity to comment.

⁸⁶ See Charles J. Morris, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace* (Cornell Univ. Press 2005).