

BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

IN RE: NOTICE OF PROPOSED )  
RULEMAKING, REPRESENTATION ) VOLUME I  
CASE PROCEDURES )

Public proceedings before the National  
Labor Relations Board, MARK GASTON PEARCE, Chairman,  
held at 1099 Fourteenth Street, N.W., Washington,  
D.C., the Margaret A. Browning Hearing Room,  
commencing at 9:27 a.m., Thursday, April 10, 2014,  
before Keith A. Wilkerson, a notary public of and  
for the District of Columbia.

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<p>1 APP EAR A N C E S:</p> <p>2 National Labor Relations Board Members:</p> <p>3 MARK GASTON PEARCE, Chairman</p> <p>4 PHILIP A. MISCIMARRA, Board Member</p> <p>5 KENT Y. HIROZAWA, Board Member</p> <p>6 HARRY I. JOHNSON, III, Board Member</p> <p>7 NANCY SCHIFFER, Board Member</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 2</p> <p>1 interested persons to provide their views on this</p> <p>2 important matter. This remarkable group of</p> <p>3 practitioners, academics and advocates asked to make</p> <p>4 presentations, and the Board was able to accommodate</p> <p>5 everyone. Each speaker has submitted a summary of</p> <p>6 his or her remarks, and those summaries will be made</p> <p>7 a part of the record. We are grateful for the</p> <p>8 effort that all our speakers have made to be with</p> <p>9 us. The purpose of the meeting is to hear from and</p> <p>10 question individual presenters. The Board has</p> <p>11 grouped the speakers by topic solely for</p> <p>12 administrative convenience to make the meeting run</p> <p>13 more efficiently and be more useful for the Board.</p> <p>14       Although presenters are encouraged to</p> <p>15 reply to the extensive prior written commentary</p> <p>16 submitted in this rulemaking, this meeting is not a</p> <p>17 forum for group discussion. Speakers should address</p> <p>18 the Board, not other speakers in the group.</p> <p>19       Before we start let's cover some</p> <p>20 housekeeping items. There is considerable public</p> <p>21 interest in this proceeding, and we expect a pretty</p> <p>22 full house. I believe that we have been able to</p> <p>23 accommodate all requests to attend the meeting in</p> <p>24 person. In addition, we have streamed these</p> <p>25 proceedings live over the Internet, so I hope you're</p>
<p>1           P R O C E E D I N G S</p> <p>2        MR. PEARCE: Good morning. Welcome to</p> <p>3 this open meeting of the National Labor Relations</p> <p>4 Board. My name is Mark Gaston Pearce. I'm the</p> <p>5 chairman. To my right is Kent Hirozawa, Board</p> <p>6 Member, and Philip Miscimarra, Board Member, and to</p> <p>7 my left is Harry Johnson and Nancy Schiffer, Board</p> <p>8 Members.</p> <p>9        Now, on February 6th, 2014 the NLRB</p> <p>10 published a notice of proposed rulemaking to amend</p> <p>11 the rules and regulations governing the filing and</p> <p>12 processing of petitions relating to representation</p> <p>13 of employees for purposes of collective bargaining</p> <p>14 with their employer.</p> <p>15       The notice of proposed rulemaking set out</p> <p>16 a procedure for filing written comments for that</p> <p>17 proposal. Those written comments were due this past</p> <p>18 Monday, April 7th. The Board will also consider all</p> <p>19 written comments submitted in connection with its</p> <p>20 previous notice of proposed rulemaking -- that</p> <p>21 notice was in 2011 -- along with all the testimony</p> <p>22 presented at the open meeting held in June of that</p> <p>23 year.</p> <p>24       Today and tomorrow at this open meeting</p> <p>25 the Board is providing another opportunity for</p>	<p>Page 3</p> <p>1 all looking good.</p> <p>2       When you were checked in you were given a</p> <p>3 badge. That badge is pretty important because, as</p> <p>4 in your favorite nightclub, if you don't have the</p> <p>5 badge you don't get back in. Please keep the badge</p> <p>6 with you at all times. If you leave the room you</p> <p>7 must take your badge, you'll not be allowed to</p> <p>8 return to the room without your badge, and if you</p> <p>9 are a speaker this morning and you wish to return</p> <p>10 for the afternoon session you've got to have your</p> <p>11 badge with you. When you leave the building for the</p> <p>12 day make sure and return your badge to retrieve your</p> <p>13 ID, or else you'll be driving without a license.</p> <p>14       Please note that there are two exits to</p> <p>15 this room, the main doors to my left which you</p> <p>16 entered and the door to my right. You may use</p> <p>17 either door to exit the room, but you may only enter</p> <p>18 through the main door to the left. No food or</p> <p>19 beverages are allowed in this room, although we may</p> <p>20 all want a drink at some point. Bathrooms are</p> <p>21 located outside the hearing room to the left and to</p> <p>22 the right. We have staff in the hallway to direct</p> <p>23 you to the restrooms or escort you back to the first</p> <p>24 floor in the elevators.</p> <p>25       We ask that you not go into other areas</p>

<p style="text-align: right;">Page 6</p> <p>1 of the building. Today's meeting will be divided 2 into two sessions, morning and afternoon, in 3 addition to a lunch break that will be approximately 4 at 12:30. We will take a brief midmorning and 5 midafternoon break. I would ask that if at all 6 possible you try not to leave the room except during 7 those times. If you absolutely must leave the 8 meeting, please move quietly to the nearest exit and 9 an usher will assist you. If you are a speaker, you 10 are welcome to leave after you've made your 11 presentation if you wish.</p> <p>12 Now, let me review the guidelines for our 13 speakers. We will follow the order of speakers that 14 is set out in the schedule that was released earlier 15 and is set forth on the website. Each person making 16 an oral presentation will be given five minutes to 17 present his or her remarks.</p> <p>18 Executive secretary Gary Shinners, who is 19 sitting below me to the right, will be our 20 timekeeper along with members of his staff. And 21 though you may not see them, there are big, burly 22 people in the background that will begin forcing the 23 time. There are lights on the podiums to assist 24 you. Your five minutes to speak after you introduce 25 yourself and anyone you have with you, so talk fast.</p>	<p style="text-align: right;">Page 8</p> <p>1 now pending before the Board. That is not only 2 improper, but it will be very confusing to us. 3 I will ask everyone to please silence 4 your cell phones or other electronic devices. We'll 5 now hear from our first speaker, Mr. Joseph Torres, 6 followed by Mr. Alvin Velazquez.</p> <p>7 MR. TORRES: Thank you. My name is 8 Joseph Torres. I'm a partner in the labor and 9 employment relations department of Winston &amp; Strawn 10 based in their Chicago office.</p> <p>11 Chairman Pearce and members of the NLRB, 12 thank you very much for the opportunity to address 13 the Board today regarding its proposed election rule 14 changes. This morning I would like to address the 15 Board's consideration of permitting the use of 16 electronic signatures to satisfy the showing of 17 interest necessary to file a petition.</p> <p>18 This proposal should not be adopted, 19 because it will increase the risk of false or 20 inaccurate showings of interest, given the well 21 documented ease by which e-signatures can be 22 manipulated and misused and given the limited facial 23 review that the Board permits of material submitted 24 by a petitioner.</p> <p>25 As the Board noted in its notice of</p>
<p style="text-align: right;">Page 7</p> <p>1 At that point a green light will come on, the yellow 2 light will come on that you have one minute 3 remaining, and the red light will indicate that your 4 time has expired. As may be the case, the red light 5 may come on, and if there are burning questions that 6 the Board has we will show some latitude as best as 7 we can.</p> <p>8 Board members may wish to question you 9 during or after the remarks. For that reason, I 10 will be somewhat generous, not too generous, but 11 somewhat generous with the time for the speakers. 12 But in order to keep on our schedule I'll say this 13 to my colleagues as well as to the speakers. At 14 some point I will need to indicate that it is time 15 for the next speaker to begin, as all the speakers 16 should get a fair opportunity.</p> <p>17 Please note that this meeting is limited 18 to issues related to the proposed amendments to the 19 Board's rules governing representation-case 20 procedures, so any philosophical discussions about 21 the meaning of life we should refrain from, even 22 though I might be interested later on. No other 23 issues will be considered at this meeting.</p> <p>24 I want to particularly caution our 25 speakers that they should not discuss other matters</p>	<p style="text-align: right;">Page 9</p> <p>1 proposed rulemaking, one of its obligations is to 2 ensure accurate vote determinations. That 3 obligation does not only begin when the first ballot 4 is cast, it cannot take a back seat to any policy 5 considerations the Board might believe will promote 6 more expeditious resolutions of questions concerning 7 representation.</p> <p>8 Current policy prohibits litigation 9 regarding the adequacy of a showing of interest, and 10 current policy also limits the regional offices to 11 conducting no more than a facial review of that 12 showing of interest. In addition, the collection of 13 signatures that petitioners present in supporting a 14 showing of interest occur in an unregulated and 15 unsupervised process.</p> <p>16 Given this backdrop, permitting any type 17 of electronic showing of interest would further 18 degrade the existing minimal safeguards currently in 19 place, and any purported ease that permitting such 20 showings of interest would provide to employees or 21 labor organizations is far outweighed by the further 22 reduction in credibility that would attach to the 23 Board's election procedures if showings of interest 24 based on e-signatures were permitted.</p> <p>25 Each day brings additional press reports</p>

<p style="text-align: right;">Page 10</p> <p>1 regarding how electronic commerce is rife with      2 intended and unintended misuse of electronic      3 information. While e-commerce may be a natural and      4 inevitable consequence of our global economy, it      5 provides no support for permitting employees'      6 fundamental rights under the National Labor      7 Relations Act to choose to engage in or refrain from      8 engaging in protected concerted activity to be put      9 at risk from misuse from intended or unintended      10 manipulation as part of the Board's election      11 process.</p> <p>12 Any type of e-signature carries these      13 risks: a responsive e-mail that an employee signs by      14 including his name, reproduction of physical      15 signatures, an electronic acceptance which the      16 employee clicks to signify acceptance. Equally      17 problematic are the numerous mediums, websites,      18 e-bulletin boards, Facebook pages, et cetera, by      19 which requests for support can be requested and      20 transmitted.</p> <p>21 An example of these concerns can be found      22 in a recent court decision that refused to enforce      23 private arbitration agreements that the employees in      24 question electronically accepted.</p> <p>25 In that case the course declined to</p>	<p style="text-align: right;">Page 12</p> <p>1 there are safeguards attendant to submitting      2 information to the government that are not available      3 in the private gathering of e-signatures.      4 The Board also cited the signatures in      5 the Global and National Commerce Act. Again,      6 e-commerce occurs in a regulated environment where      7 the ability to detect and challenge inaccurate      8 signatures can be addressed by the parties to the      9 transaction. No such checks and balances would      10 apply in these instances.</p> <p>11 The Board also cited its own advances in      12 providing for e-filing and issuance of decisions and      13 remedial notices electronically. None of those      14 laudable advances provide any parallel support for      15 e-signatures in this instance. E-filing and      16 electronic service of pleadings carries compliance      17 with ethical obligations or sanctions for misuse of      18 those systems.</p> <p>19 While embracing technology is laudable,      20 the Board in this instance should not embrace      21 possible technological advances where the potential      22 risk degrades the ability to ensure accurate vote      23 determinations.</p> <p>24 Thank you very much.</p> <p>25 MR. PEARCE: Joe, what about the security</p>
<p style="text-align: right;">Page 11</p> <p>1 enforce the agreement because it found there was no      2 evidence of any security around the passwords      3 employees used to enter the site, there was no      4 evidence of processes in place to restrict access to      5 the screen where an employee was deemed to have      6 accepted the agreement, and there was no process in      7 place to verify the authenticity of the signature      8 and no evidence that the employee in question      9 actually opened the e-mail and accepted it.</p> <p>10 Given all of these potential issues,      11 there is simply no reasonable way to ensure that the      12 electronic collection of showings of interest can be      13 conducted in a manner that does not raise serious      14 questions about the integrity of the process,      15 particularly given the limited oversight that the      16 Board policy provides for that part of the election      17 procedures.</p> <p>18 These risks far outweigh any of the      19 purported reasons cited by the Board in its notice      20 of proposed rulemaking. The Board cited the      21 Government Paperwork Elimination Act. And while I'm      22 sure we all agree that reducing the tidal wave of      23 paper engulfing the federal government is a laudable      24 goal, requiring e-signatures in that circumstance is      25 distinguishable, because in those circumstances</p>	<p style="text-align: right;">Page 13</p> <p>1 piece? Suppose a proposal provides the security      2 that was suggested existed in government e-filings      3 like the filing of e-signatures for taxes and      4 e-filings in the courts? Would that resolve the      5 issue?</p> <p>6 MR. TORRES: I'm not sure how you could      7 mandate those types of processes on to a private      8 party. I think that's the problem. If you've got      9 organizations and individuals out there soliciting      10 signatures, it's hard to imagine how you could      11 fashion a system that could consistently ensure that      12 all of those solicitations are occurring through      13 some process that might be used where there's a      14 unified portal for individuals, for example, to file      15 petitions with the Board or to file a complaint with      16 the federal court. I just don't see how the Board      17 could impose that type of process in the myriad of      18 instances where individuals are being solicited to      19 sign authorization cards.</p> <p>20 MR. MISCIMARRA: Mr. Torres, there is a      21 significant array of financial transactions that's      22 done currently electronically. Is there anything      23 special about showing of interests that you think      24 would require a different treatment or counsel      25 towards a different treatment?</p>

<p style="text-align: right;">Page 14</p> <p>1       MR. TORRES: Again, I think the parties 2 to a financial transaction have the ability to look 3 at both sides of that transaction if there is an 4 issue regarding the validity of that transaction. 5 Here, the employer who's being subjected to the 6 petition has no way under the current Board policy 7 to say, "Wait a minute, I've got a question as to 8 whether this transaction was actually legitimate." 9 And the Board has made determination they're not 10 going to permit litigation of those issues and they 11 conduct a very limited facial review, so I think 12 there is a distinction there as to a financial 13 transaction where both sides obviously can, if 14 necessary, get to the other side of the transaction 15 and see what actually happened.</p> <p>16       MR. JOHNSON: In the 2014 comments 17 submitted by the AFL-CIO, which you may or may not 18 have had a chance to read, there is a piece in there 19 about electronic signatures where the suggested 20 proposal is basically that the union, the employee, 21 provides their home address and phone number and 22 some sort of indicia of signature in an e-mail, and 23 the union confirms back to the employee in an 24 e-mail, thereby getting their consent that 25 essentially we're going to use this as an electronic</p>	<p style="text-align: right;">Page 16</p> <p>1 advance for the no collateral attack rule, the point 2 of the rule was basically, "Look, we just simply 3 want to safeguard against frivolous proceedings, we 4 don't want to have indiscriminate institution of 5 representation proceedings by parties who have 6 nowhere close to any employee support."</p> <p>7       Assuming that that's what our rationale 8 is, A, why can't that be satisfied by the procedure 9 suggested by the AFL-CIO? Or, B, do you want us to 10 open up the no collateral attack rule so that now 11 the respondent will have a chance to basically 12 attack the showing of interest because, as the 13 articles that you cited by Dr. Lopez 14 Hernandez-Ardieta suggested, basically we have to go 15 behind the evidence here and see if it is really 16 evidence of non-repudiation, as he says?</p> <p>17       MR. TORRES: Well, given all of the 18 numerous ways in which the professor notes that 19 e-signatures can be manipulated, I do think that if 20 the Board is going to allow a process where the 21 regional offices are going to start questioning the 22 means by which things are being transmitted, it 23 would be only fair for employers to have an ability 24 to look at this process and evaluate whether they 25 believe it's being done in some proper manner.</p>
<p style="text-align: right;">Page 15</p> <p>1 signature. That gets forwarded to the Board agent. 2 Then the Board agent is able to call up the employee 3 at the phone number, and to the extent that there is 4 a personal e-mail address in there they can e-mail 5 them back and then verify that. Would that satisfy 6 you in terms of the checks and balances that you're 7 envisioning?</p> <p>8       MR. TORRES: I think there's two points 9 there. One, I think the Board would have to modify 10 its current policies, because in the current 11 instance the Board has to accept at face value that 12 what's being provided to them is legitimate. That 13 would require a whole new level of oversight.</p> <p>14       Second, the cost associated with the 15 Board physically calling people in, let's say, a 16 2,000 person bargaining unit, I just don't know that 17 administratively the cost and expense is going to be 18 manageable. I just don't see the Board dedicating 19 those sorts of resources to this. Given the 20 thousands of petitions that are filed, I just don't 21 see that could be workable solution.</p> <p>22       MR. JOHNSON: Well, don't you think that 23 would be able to smoke out mass fraud, though? If 24 you go back to the cases like Bakelite in the 1940s 25 and H.G. Hill, where the rationale was first an</p>	<p style="text-align: right;">Page 17</p> <p>1       Again, if the Board is going to really go 2 down that road, I don't think you can just on the 3 one hand open up the process for the regional 4 offices and still preclude employers from being able 5 to comment on that process, given the numerous ways 6 that the professor indicates that these processes 7 can be manipulated.</p> <p>8       MR. JOHNSON: But he doesn't say that it 9 is an impossible proposition to rely on 10 electronic signatures. He basically says the 11 reliability of a signature as evidence in a legal 12 proceeding will highly depend on the capability to 13 find and prove the existence of a vulnerability in 14 the process. So if we had that capability, it seems 15 like that would remove your objection.</p> <p>16       MR. TORRES: Perhaps. But, again, I 17 don't think that you can only have half a loaf in 18 that instance. Again, you're tying the hands of 19 employers to just accept that whatever processes the 20 Board decides to adopt to check on these beyond 21 simply a facial showing is adequate.</p> <p>22       I think the professor's point is that 23 there is some mutually acceptable means by which the 24 parties are verifying that the signature is 25 acceptable, not just a unilateral process that one</p>

<p style="text-align: right;">Page 18</p> <p>1 party decides to propose and declares to be 2 acceptable.</p> <p>3 MR. JOHNSON: Do you agree that the 4 digital signature standard supported by the 5 Department of Commerce in 2013 would be adequate 6 enough to show an electronic signature?</p> <p>7 MR. TORRES: Subject to verification, 8 yes.</p> <p>9 MS. SCHIFFER: There is a lot of 10 technology, and certainly technology has grown by 11 leaps and bounds. I know I almost never sign my 12 signature on anything anymore, and there is a whole 13 variety of ways, and I have no idea what the 14 verifications are when I sign it. I don't verify 15 what they're doing on their end of it. Sometimes I 16 sign it and sometimes it's a click. There are a lot 17 of different ways.</p> <p>18 As this technology moves along, doesn't 19 it seem to not contemplate the possibility of using 20 technology in this area as well, which puts us back 21 to when the Act was first drafted and where we still 22 have in the Act that service can be made by 23 telegram?</p> <p>24 MR. TORRES: Well, certainly the 25 technological advances provide opportunities for</p>	<p style="text-align: right;">Page 20</p> <p>1 MR. VELAZQUEZ: My name is Alvin 2 Velazquez, and I'm currently associate general 3 counsel for the SEIU. In that role I practice 4 business law and also electronic social media law. 5 I've presented to the American Bar Association on 6 many occasions regarding social media and social 7 media topics. I want to thank the Board today for 8 giving me the opportunity to speak on electronic 9 signatures and the use of the showing of interest.</p> <p>10 I think that, to begin, it's really 11 important to kind of take a step back and appreciate 12 what the Board's done here insofar as it's bringing 13 up to date its practices with current commercial 14 practice. In other words, the proposal to accept 15 e-signatures, first of all, brings it in compliance 16 or in line with what the Board is doing with regard 17 to accepting position papers. Position papers are 18 always signed by attorneys and sometimes by 19 non-attorneys with an electronic signature. When 20 you go to shop on line we also understand that those 21 are electronic signatures.</p> <p>22 I think that if you look at other 23 agencies, the FEC, HUD, the EPA, FERC, agencies of 24 all sizes and dealing in all sorts of industries, 25 they also accept electronic signatures for all sorts</p>
<p style="text-align: right;">Page 19</p> <p>1 streamlining and making things more efficient, and 2 all of us are perhaps every day knowingly or 3 unknowingly signing things electronically. The 4 point here is, though, that we have a process that 5 in its current framework is unregulated, and so your 6 ability to verify, if questioned, the validity of 7 your signature allows for bilateral process, and 8 that bilateral process currently is not permitted 9 under the Board's rules.</p> <p>10 So to the extent we embrace technology, 11 as I was saying to Member Miscimarra, there 12 typically is a bilateral ability to challenge and 13 check on whether those signatures are valid. It may 14 be 20 years from now or 30 years from now that we're 15 at a place where the strength of those types of 16 submissions are even less subject to manipulation, 17 but just seeing what happened with the major 18 retailers over Christmas shows you that the amount 19 of mischief that can happen with respect to 20 electronic transmissions suggests that we are far 21 from a place where these processes are safeguarded 22 enough that we could assume that an unregulated 23 process could occur without any real risk of there 24 being some manipulation, intended or otherwise.</p> <p>25 MR. PEARCE: Mr. Velazquez?</p>	<p style="text-align: right;">Page 21</p> <p>1 of various requirements. They can go for things as 2 simple as just updated regulatory filings to much 3 more sensitive things like your personal taxes.</p> <p>4 Similarly, electronic signatures are 5 typically accepted, again, in buying things off of 6 Amazon all the way to things as sensitive as your 7 last wills and testaments. I think it's very 8 important to kind of take a step back and realize 9 that what the Board is doing here is coming up to 10 speed with what the rest of the world is doing.</p> <p>11 Secondly, I want to just point out that 12 the Board has also come into compliance with 13 congressional law and federal law. The Government 14 Paperwork Elimination Act, the GPEA for short, and 15 the E-Sign Act both require the acceptance of 16 electronic signatures. If you read the E-Sign Act 17 it says: Notwithstanding any other statute, a 18 signature, contract or other record relating to any 19 transaction may not be denied legal effect, validity 20 or enforceability solely because it is in electronic 21 form.</p> <p>22 That language by Congress is fairly 23 categorical, and that was enacted several years ago.</p> <p>24 Similarly, the GPEA asked that the OMB issue 25 guidance requiring acceptance of electronic</p>

<p style="text-align: right;">Page 22</p> <p>1 signatures by various agencies and to come into 2 compliance with that in 2003. So we definitely 3 appreciate that the Board is bringing up to date its 4 standards in terms of the proposed rulemaking.</p> <p>5       The other thing I want to talk a little 6 bit about is the issues of fraud. I think that's a 7 very important issue to address. There are a couple 8 ways to address that. First of all, we did some 9 research on all the E-Sign cases. We looked at all 10 the GPEA and the E-Sign. Not once in those cases is 11 fraud ever alleged. No one ever says, "Somebody 12 else took my signature and faked it." You have 13 questions of what the terms of a contract mean, and 14 those are pretty typical business disputes. Those 15 are pretty typical standard contract disputes.</p> <p>16       The other thing, too, is that the Board 17 can put in very simple guidelines regarding the 18 showing of interest that are in compliance with, for 19 example, the working group that the ABA established 20 on contracting practices, electronic commerce and 21 the cyberspace law committee. This was issued in 22 around 2002-2003. I don't remember the date 23 exactly. They gave a bunch of kind of just very 24 basic types of protections for people who are going 25 on web pages and shopping. For example, when you're</p>	<p style="text-align: right;">Page 24</p> <p>1 of our way and get our credit card to buy something 2 takes effort. It means you want to do it. 3       The same thing with somebody who wants to 4 be a union member. If they're going to take the 5 time to put their address, their date of birth and 6 sign and click, that actually takes effort, it means 7 they actually want to be a union member, and it is 8 less susceptible to fraud for that reason.</p> <p>9       MR. PEARCE: Well, isn't there a 10 difference between an electronic signature when 11 you're making a submission on your behalf that you 12 would be subject to taking responsibility for it? 13 We're talking about a submission that would be a tax 14 return, a legal brief, a mortgage application or 15 what have you. You have kind of a personal 16 accountability. These electronic signature 17 proposals deal with a union asserting that this 18 signature was made by a constituent, someone that 19 they solicited, so it's kind of a third-party 20 assertion that these signatures were legitimately 21 made.</p> <p>22       That's kind of one step removed and 23 creates a little bit of a concern about authenticity 24 that is distinguishable from these commercial 25 examples that you raised, don't you think?</p>
<p style="text-align: right;">Page 23</p> <p>1 using PayPal you're using Amazon. 2       What are some of those? Some of those 3 are using clear words of assent, that you're 4 agreeing for example to be a union member, that you 5 want to be a union member. You can have language 6 like that on the page and require showing on the 7 page that the union is using it in order to show a 8 showing of interest. In other words, it's the same 9 as a card.</p> <p>10       When a Board agent looks at a card 11 they'll see the language saying, "I want to be a 12 union member and I am authorizing the union to 13 represent me and serve as my exclusive bargaining 14 agent." It's the same thing with electronic 15 practices. You can require that similar type of 16 language on a web page and use that as the union's 17 form.</p> <p>18       The third thing I want to talk about is 19 just that it takes more effort to put in information 20 than it does to not do anything. Here's what I 21 mean. If you have a card, some people could just 22 sign it and say "I'm done," and the Board agent is 23 left to compare signatures. When somebody goes on 24 line -- there's a truism about being on line: we are 25 inherently lazy on line. For us to actually go out</p>	<p style="text-align: right;">Page 25</p> <p>1       MR. VELAZQUEZ: No, not necessarily. And 2 the reason why is because if you look at the current 3 standard practice in the commercial world, you 4 disclose what you're selling and the terms at which 5 you're selling it. With union membership, if you 6 look at an authorization card it talks about 7 accepting the rights and responsibilities of union 8 membership, in that way making it clear that if you 9 want to be a union member you're going to engage in 10 certain responsibilities and that you're going to 11 enjoy certain rights as a result of being a union 12 member once the union certifies.</p> <p>13       The way you can use the card, like I was 14 saying before, is you have language that is 15 typically on an authorization card, and then at the 16 end you have the click saying "I agree to be a union 17 member." That gives a worker and a potential member 18 the opportunity, just like we were talking about in 19 the financial world, to actually look at what 20 they're entering into, and, not only that, but to 21 affirmatively accept. In other words, it's no 22 different.</p> <p>23       MR. MISCIMARRA: Mr. Velazquez, I'll 24 preface this by saying between the two of us one of 25 us has deep expertise with respect to technology</p>

<p style="text-align: right;">Page 26</p> <p>1 issues, and that's not me.</p> <p>2 MR. VELAZQUEZ: Thank you.</p> <p>3 MR. MISCIMARRA: Here's the question that</p> <p>4 I have. I'm looking at Google News, and there are</p> <p>5 three headlines: Critical Security Bug Heartbleed</p> <p>6 Hits Up to 66 Percent of the Internet, Heartbleed</p> <p>7 Online Security Bug Isn't Easily Fixed, After</p> <p>8 Catastrophic Security Bug the Internet Needs a</p> <p>9 Password Reset.</p> <p>10 I have a practical question. If one</p> <p>11 assumes a showing of interest was authentic and</p> <p>12 accurate and if one subsequently discovers a</p> <p>13 potential security flaw -- and again my assumption</p> <p>14 is the showing of interest was sufficient -- then</p> <p>15 what would be the appropriate treatment of the</p> <p>16 petition if it turned out one couldn't really verify</p> <p>17 that the showing of interest was in fact affected by</p> <p>18 the potential security flaw? And then after that,</p> <p>19 if you could tell me whether I have to change all of</p> <p>20 my online passwords by the end of the day, I'd</p> <p>21 appreciate that, too.</p> <p>22 MR. JOHNSON: You can do that piece off</p> <p>23 the record.</p> <p>24 (Laughter.)</p> <p>25 MR. VELAZQUEZ: I think there is an</p>	<p style="text-align: right;">Page 28</p> <p>1 industry compliant standards per our vendor contract</p> <p>2 and other things -- so the likelihood of that</p> <p>3 happening as I see it is very slim, so I would</p> <p>4 caution the Board against taking an exception and</p> <p>5 making the rule.</p> <p>6 MR. MISCIMARRA: And that would be a</p> <p>7 mistake, to work to the exception or work to the</p> <p>8 worst case.</p> <p>9 MR. JOHNSON: Do you agree with the</p> <p>10 principle, though, that the reliability of a</p> <p>11 signature as evidence in a legal proceeding will</p> <p>12 highly depend on the capability to find and prove</p> <p>13 the existence of a vulnerability in the process,</p> <p>14 which is the thesis of Dr. Hernandez Ardieta?</p> <p>15 MR. VELAZQUEZ: Well, I haven't read that</p> <p>16 article, so I can't answer exactly to the article.</p> <p>17 MR. JOHNSON: It's pretty dense.</p> <p>18 MR. VELAZQUEZ: Well, I read dense</p> <p>19 electronic material pretty regularly. I just</p> <p>20 haven't gotten to that. I'll say this: Again, if</p> <p>21 we're looking at worst case scenarios, then we might</p> <p>22 as well not do online banking. We might as well not</p> <p>23 buy anything on line. You might as well just say to</p> <p>24 your teller, "I'll start going to the bank again and</p> <p>25 taking out money."</p>
<p style="text-align: right;">Page 27</p> <p>1 important distinction here between security and the</p> <p>2 actions of a third party who's not involved with the</p> <p>3 Board process. For example, in retailing you have</p> <p>4 two sets of contracts. You have one as between the</p> <p>5 retailer and a customer, and then you have a</p> <p>6 third-party hacker or miscreant or whatever word you</p> <p>7 want to use going in and taking that information</p> <p>8 despite the best security protocols. There is not</p> <p>9 much they can do at that point.</p> <p>10 Now, I think in the Board processes you</p> <p>11 have two protections against that. The first</p> <p>12 protection is very simple and is something that</p> <p>13 employers have been saying for a very long time,</p> <p>14 which is, "Well, we have to have an election because</p> <p>15 a showing of interest may not actually represent the</p> <p>16 will of the workers." So if the employer requests</p> <p>17 that, per their rights, then in that case we'll know</p> <p>18 what the members and the workers in the bargaining</p> <p>19 unit are actually thinking about union</p> <p>20 representation. That's the first thing.</p> <p>21 The second thing is that, with regard to</p> <p>22 actual security breaches, the threat is simply</p> <p>23 overblown insofar as regards this process. As far</p> <p>24 as I see it -- at least speaking for the SEIU, we've</p> <p>25 never had a major security breach, and we use</p>	<p style="text-align: right;">Page 29</p> <p>1 MR. JOHNSON: So do you think the E-Sign</p> <p>2 model is one we should use basically for the showing</p> <p>3 of interest?</p> <p>4 MR. VELAZQUEZ: Well, to be honest, I</p> <p>5 don't think you have a choice because E-Sign</p> <p>6 requires it, and if not E-Sign, then GPEA requires</p> <p>7 it.</p> <p>8 MR. JOHNSON: I think in that model,</p> <p>9 though, the consumer has to give their consent the</p> <p>10 electronic signature is being used qua electronic</p> <p>11 signature. And it seems like, at least from your</p> <p>12 comments, when, for example, on page 11 you got</p> <p>13 approval from FEC to do payroll deduction</p> <p>14 authorizations, it looks like you got employee</p> <p>15 consent to get an electronic signature. Would that</p> <p>16 be part of the model that you're suggesting?</p> <p>17 MR. VELAZQUEZ: There is various ways to</p> <p>18 get consent. The actual card and having somebody</p> <p>19 sign on line is consent, especially when you make</p> <p>20 clear to them the terms of being union members.</p> <p>21 MR. JOHNSON: Right. So multiple levels</p> <p>22 of attestation and multiple clicks to you is</p> <p>23 consent. You don't have to have an interaction</p> <p>24 actually between the union and the employee, with</p> <p>25 the union e-mailing the employee, "By the way, we're</p>

<p style="text-align: right;">Page 30</p> <p>1 using this as an electronic signature?"</p> <p>2       MR. VELAZQUEZ: Well, given the process 3 that we use at the FEC and what we're using here, 4 they're somewhat different processes in terms of 5 just the regulatory structure of what governs the 6 FEC versus what governs the Board. I wouldn't say 7 it's quite apples and oranges. You still have 8 electronic signatures there.</p> <p>9       But in terms of what the Board can 10 actually practically think about, it's just saying, 11 "Okay, what type of clicks, how many clicks are we 12 going to require, here's why." Just like I said 13 earlier, when you actually go ahead and enter 14 information, that's an affirmative action, so you're 15 already having information being entered that's an 16 affirmative action. You're already saying, "I want 17 to sign up and be a member, I've read everything." 18 That takes care of all the concerns and issues. And 19 not only that, but it's the direction the case law 20 has been going, too, in the commercial sphere.</p> <p>21       MS. SCHIFFER: Is there a difference in 22 the technologies that would make a difference with 23 respect to the considerations for signing a showing 24 of interest in terms of one being better than 25 another and what kind would be more appropriate for</p>	<p style="text-align: right;">Page 32</p> <p>1 So you not only have the legal regulatory issue with 2 that, but you also have a prudential issue, which is 3 that you want to make sure that whatever rules you 4 enact today, especially given all the proceedings, 5 that they are flexible enough to withstand the test 6 of time.</p> <p>7       MR. PEARCE: Thank you very much. The 8 next topic would be scheduling pre-election 9 hearings. Could Maury Baskin, Jonathan Fritts and 10 Caren Censer approach, please? You may proceed.</p> <p>11       MR. BASKIN: Good morning. My name is 12 Maury Baskin. I'm a shareholder with the national 13 labor and employment law firm Littler Mendelsohn and 14 Littler's Workplace Policy Institute. I'm here 15 representing Associated Builders and Contractors, 16 ABC, the national trade association of merit shop 17 construction, and with me is Lauren Williams from 18 the ABC staff.</p> <p>19       ABC strongly opposes many aspects of the 20 proposed rule. I think it's fair to say that the 21 credibility of this Board as a neutral administrator 22 of the Labor Act is at stake here. As we said in 23 our written comments, these are the most radical and 24 sweeping proposed changes to the Board's election 25 case handling regulations in at least 50 years, and</p>
<p style="text-align: right;">Page 31</p> <p>1 this; in other words, doing it through e-mail and 2 actual signing on a screen and other various forms?</p> <p>3       MR. VELAZQUEZ: Well, regarding the 4 various forms, I think the OMB guidance makes it 5 very clear that you have to look at the various 6 forms of signatures and accept all of them. You're 7 not allowed to discriminate based on a signature. 8 For example, if you have a back slash S Alvin 9 Velazquez versus a facsimile of my signature that I 10 take on the MS Word clip art and clip it on to the 11 end of a document, there is no discretion in the Act 12 to actually discriminate once versus the other. You 13 have to accept them all.</p> <p>14       I think there is prudential consideration 15 there, and that is that technology is quickly 16 evolving, it's always evolving, and so you want to 17 make sure you have flexibility to accept whatever 18 types of signatures are being developed in commerce. 19 In other words, we don't know, for example, if 20 tomorrow we can do an e-signature through Google 21 glasses where you can look and it will automatically 22 affix a signature if you hit a button on your Google 23 glasses.</p> <p>24       We don't know where technology is going 25 to go because it's dynamic and it evolves quickly.</p>	<p style="text-align: right;">Page 33</p> <p>1 since no serious problems with the current system 2 have been identified employers understandably think 3 there is a nefarious purpose behind these proposals, 4 so we urge you to withdraw them entirely.</p> <p>5       But with that introduction let me focus, 6 as you requested, on a single proposal that is the 7 subject of this panel: namely, the Board majority's 8 proposal to shorten the time between union election 9 petitions and the statutorily required pre-election 10 hearing.</p> <p>11       The proposed new rule says hearings shall 12 be scheduled within seven days of petition filing 13 except for undefined special circumstances. There 14 has been some confusion about exactly what's 15 intended by that. There's some reference to 16 codifying current law, but that is definitely not 17 the current practice. The current practice is 18 hearings are held anywhere between seven and 19 fourteen days, and requests for postponement on 20 sufficient grounds are routinely granted, as they 21 should be, because seven days has been the bare 22 minimum, and in many if not most cases employers 23 simply cannot prepare intelligently for the types of 24 issues that are going to be raised at these hearings 25 in just the seven days.</p>

<p style="text-align: right;">Page 34</p> <p>1        And I should add that, looking around the 2 federal government, fourteen days seems to be 3 becoming the standard for notice of hearings in 4 other contexts. One need only look at your own 5 regulations. Fourteen days is the minimum for 6 unfair labor practice hearings, and of course we 7 know they're usually noticed much farther away than 8 that.</p> <p>9        The U.S. Department of Labor's Office of 10 Administrative Law Judges, which conducts hearings 11 under 60 some federal laws, they've announced a 12 proposal, an interim final rule, going to fourteen 13 days. The definition of fair hearings under such 14 laws as Medicaid and Social Security, they're going 15 with fourteen days.</p> <p>16       So our recommendation is that you should 17 go with the 14 days. It certainly should not be 18 shortening the process if that's what's intended by 19 the proposed rule, which is what most people think 20 you intend, and if you don't intend just say so and 21 we'll all go home. But people think that, because 22 otherwise why make the changes at all? Why are you 23 proposing changes from a system that seems to be 24 working okay?</p> <p>25       We see no reason for the Board to be a</p>	<p style="text-align: right;">Page 36</p> <p>1 They have more resources, but they have more 2 projects. They have people all over the place. And 3 in the construction industry, recognized by the 4 Labor Department as having uniquely fluid and 5 temporary ever-changing workforce, it is much harder 6 to keep track of, and we'll hear more about that 7 when we discuss things like the voter eligibility 8 list and the statement of position.</p> <p>9       It all boils down to the fact that seven 10 days is the bare minimum for the contractor. For 11 employer that's ready, fine, but in most cases they 12 are not ready, they can't even reach their lawyer, 13 the lawyer's not ready, has other things that are 14 about to happen, and it should not stand in the way 15 of some arbitrary minimum time like this. It should 16 not stand in the way of protecting the rights of 17 employers, employees and unions to a fair due 18 process in the hearing. That's what I've got to 19 say.</p> <p>20       MS. SCHIFFER: Do you think that there 21 should be a timeline for scheduling a hearing?</p> <p>22       MR. BASKIN: Well, the way it's been 23 working is ten to fourteen days, ten to start, and 24 in seven sometimes some of the regional directors 25 are doing it and setting it to 14 days. We think</p>
<p style="text-align: right;">Page 35</p> <p>1 rogue agency that gives employers so little notice 2 of pre-election hearings. I would say, further, 3 that we represent a lot of small employers, but also 4 big ones, and they both have problems preparing for 5 these hearings. The smaller ones, particularly in 6 the construction industry, they don't have the 7 resources, they don't have HR directors, they don't 8 have lawyers on staff or even on speed dial, and 9 maybe they're members of ABC, the smart ones, but 10 even there they have to know that they even need a 11 lawyer. They have to know that there is a National 12 Labor Relations Board, and many of them know that 13 much, but they don't know what's involved in this 14 process, the issues that affect construction 15 contractors in particular.</p> <p>16       Many other types of employers have these 17 very complicated unit issues, just more so in the 18 construction industry in terms of single employers 19 and multi sites and crafts. And then you've brought 20 in this Specialty Healthcare concept which may not 21 even apply to the construction industry, but we're 22 seeing regional directors starting to apply it, so 23 it's a question and an issue that should be raised. 24 The contractors don't know it.</p> <p>25       The larger contractors also have issues.</p>	<p style="text-align: right;">Page 37</p> <p>1 when the need arises it should be extended beyond 2 that. There is no need to rush to judgment, which 3 is what a lot of these rules seem to be about.</p> <p>4       MS. SCHIFFER: Do you think that it 5 should just be based on whatever that regional 6 director does and have that sort of difference among 7 the regions across the country?</p> <p>8       MR. BASKIN: Actually, I'm not a big fan 9 of differences of regions around the country.</p> <p>10      MS. SCHIFFER: So uniformity could be 11 good?</p> <p>12      MR. BASKIN: It could be.</p> <p>13      MS. SCHIFFER: You've mentioned a couple 14 different sort of standards, if you will, for when 15 there should be more time. Do you think there 16 should be a standard that should be applied in all 17 cases where an extension could be granted?</p> <p>18      MR. BASKIN: Well, there have been 19 standards of sufficient cause, sometimes called good 20 cause. The "special circumstances" I've never seen 21 before. But sufficient cause has been working, to 22 my knowledge, to my experience, and I've never 23 really had a reasonable request for a postponement 24 turned down, so that's a good standard.</p> <p>25      MS. SCHIFFER: So what your experience</p>

<p style="text-align: right;">Page 38</p> <p>1 has been is in some regions seven and in some 2 regions fourteen.</p> <p>3 MR. BASKIN: Seven has been the starting 4 point. I'm searching my brain trying to remember 5 one that actually went forward to a hearing in seven 6 days. I can't think of one. There has always been, 7 if a case was really going to a hearing, there's 8 been a need for more time to get everyone's act 9 together to be able to present a credible record, 10 first to recognize the issues and determine what the 11 facts are, and then present a record that the Board 12 can make an intelligent decision from.</p> <p>13 MS. SCHIFFER: And just for the record, I 14 would like to point out that I do not have a 15 nefarious purpose. I don't know which one of us or 16 all of us you are accusing of that, but I don't have 17 one.</p> <p>18 MR. BASKIN: Well, I'm just saying that 19 that's how the rules as they're proposed can be 20 read. In fact, some might say it's the only way it 21 can be understood because, as I say, there is no 22 good reason for doing it.</p> <p>23 MR. MISCIMARRA: Mr. Baskin, can you 24 comment on -- I mean, there is a tradeoff here, 25 which is we've got people who have sentiments</p>	<p style="text-align: right;">Page 40</p> <p>1 them. They have to educate the advisor, the 2 attorney, of what their business is like because 3 every contractor operates differently, which is one 4 of the reasons why the Board has to hold the 5 hearings, in order to learn what their processes are 6 like.</p> <p>7 We also find, and sometimes this is with 8 the larger employers as much as the smaller ones, 9 they don't know enough about their business. They 10 know enough about their business to build things and 11 get things done, but in the peculiar way that the 12 Board looks at it and what the Board is looking for 13 in these hearings, the contractors have often given 14 very little thought to how that workforce shapes up 15 in comparison to that. So when you start asking 16 them questions you get a blank look, you know, 17 "We'll have to research that," they themselves, 18 about the employee interchange or what their craft 19 workers do and which sites they're on, and in fact 20 recently, and this was a little surprising to me, 21 even who their employees were.</p> <p>22 It was a joint employer situation. The 23 union seemed to be a little confused, too, because 24 they named a supervisor working for a different 25 employer, which caused confusion in the service of</p>
<p style="text-align: right;">Page 39</p> <p>1 regarding unit representation or not, and it's in 2 the interests of those people for things to proceed 3 more quickly and in an orderly way. But then there 4 is a tradeoff in terms of the type of hearing that 5 we then inherit when reviewing difficult questions 6 about the unit composition and whether someone is a 7 supervisor. Many of our cases require a record that 8 doesn't just get into how things work. We often 9 require specific examples about how things have 10 worked.</p> <p>11 In your own preparation and in your 12 experience as a labor attorney, what's involved in 13 your preparation with clients who have not 14 previously had experience with the Act in preparing 15 for a hearing?</p> <p>16 MR. BASKIN: Thank you for that good 17 question, because there may not be a full 18 understanding without walking through -- every case 19 is different, first, but first it requires 20 significant education of most clients as to what is 21 involved first with the Labor Act, the Labor Board 22 and the hearing process, what are the issues that 23 may affect, just taking the construction industry, 24 and we listed quite a large number in our comments. 25 So it's educating them. Then it's finding out from</p>	<p style="text-align: right;">Page 41</p> <p>1 the notice, confusion as to who was even involved, 2 and everyone was confused.</p> <p>3 This is not atypical. It takes a while 4 to sort these things out, to educate the client, 5 have the client educate you and themselves, and then 6 find people who can testify intelligently about 7 what's happening and what's expected in 8 cross-examination, that we're not here about whether 9 the union is good or bad, that we're just here 10 trying to figure out what people do and what their 11 benefits are and supervision and all these other 12 questions that come up.</p> <p>13 And not everybody has all that 14 information. Very few people have that at their 15 fingertips. So that's just really the tip of the 16 iceberg. It is a significant undertaking to go 17 through one of these hearings. That's probably why 18 more than 90 percent reach a stipulation, and we 19 reach many stipulations, but when you have to go 20 forward because there are serious issues it's a 21 significant undertaking to get the job done.</p> <p>22 MR. PEARCE: Thank you.</p> <p>23 MR. FRITTS: Good morning, Chairman 24 Pearce and members of the Board. I'm Jonathan 25 Fritts with Morgan, Lewis &amp; Bockius. I'm here on</p>

<p style="text-align: right;">Page 42</p> <p>1 behalf of the Coalition for a Democratic Workplace, 2 which is a coalition of hundreds of employer 3 associations, individual employers and other 4 organizations that represent millions of businesses 5 of all sizes. They employ tens of millions of 6 individuals working in every industry in every 7 region of the United States.</p> <p>8 I'd like to focus my remarks on how the 9 scheduling of the pre-election hearing affects the 10 negotiation of an election agreement. The Board is 11 well aware there is no pre-election litigation in 90 12 percent of cases under the current rules, and that's 13 because in 90 percent of cases there is an election 14 agreement. If the purpose of the proposed rule is 15 to avoid litigation, the Board should make sure that 16 there is enough time for the parties to negotiate an 17 election agreement, and to do so in an intelligent 18 way that doesn't produce disputes after the fact.</p> <p>19 The proposed rule provides that the 20 pre-election hearing would be scheduled seven days 21 after the notice of the hearing is served absent 22 special circumstances. The proposed rule would 23 limit the discretion that regional directors 24 currently have to schedule the hearing more than 25 seven days after the petition is filed. And as</p>	<p style="text-align: right;">Page 44</p> <p>1 in half what in practice is the standard fourteen 2 days with a postponement request down to seven days 3 absent special circumstances, and seven days is just 4 not that much time to negotiate a stip.</p> <p>5 Before an employer can even begin to 6 negotiate a stip a lot of things must happen. 7 First, the petition is filed, but it has to get to 8 the right person in the company who knows what to do 9 with it. That can take a couple of days or it can 10 take more, and it doesn't matter if it's a small 11 business or a large corporation, but getting it to 12 the right person sometimes consumes a couple of 13 those days and sometimes more of that initial seven 14 day period.</p> <p>15 The company then has to retain counsel. 16 Once counsel is retained, they quickly drop 17 everything that they're doing and start to gather 18 information about the bargaining unit, the petition, 19 whether the unit's appropriate, whether there are 20 other employees who should be included, whether 21 there are issues of supervisory status and whether 22 there is an issue of bar to the election. Once 23 counsel has figured all of that out, then he or she 24 can start the process of intelligently negotiating 25 an election agreement.</p>
<p style="text-align: right;">Page 43</p> <p>1 Maury discussed, I think the practice is somewhere 2 in that seven to ten day period that discretion is 3 currently exercised. But I think, even more 4 significant than that, is that the proposed rule 5 seems to limit a regional director's discretion to 6 postpone the hearing, but the rule isn't clear about 7 that. There is nothing that I see in the proposed 8 rule about postponements and whether the current 9 standard and discretion would change.</p> <p>10 Under current procedures, regional 11 directors do generally grant postponement requests 12 up to fourteen days after the petition is filed, and 13 these postponement requests are frequently 14 productive and provide more time for the parties to 15 negotiate a stip. I don't think that time is 16 typically to prepare for a hearing, to prepare for 17 litigation, and it may be, but I think in the vast 18 majority of cases that time is used to negotiate a 19 stip. And so if the proposed rule can be read, and 20 I think it can be read to limit a regional 21 director's discretion to postpone the hearing at 22 least to that fourteen day mark, I think that's 23 going to be a problem in terms of providing the 24 parties enough time to negotiate a stip.</p> <p>25 As I read the proposed rule, it would cut</p>	<p style="text-align: right;">Page 45</p> <p>1 The ground rules for this panel said that 2 we should assume that no position statement is 3 required, but I will note that if that requirement 4 is imposed, then that position statement, the list 5 that would go with it, would just give counsel more 6 to do during that initial seven day period, which 7 means even less time to negotiate the stip.</p> <p>8 CDW urges the Board to maintain the 9 current practice of allowing regional directors 10 discretion to schedule the hearing more than seven 11 days after the petition is filed and to maintain the 12 discretion that they have now to postpone the 13 hearing up to fourteen days after the hearing is 14 filed and sometimes more in extraordinary 15 circumstances. This is time well spent, and in the 16 vast majority of cases it's going to lead to an 17 election agreement. Thank you.</p> <p>18 MR. JOHNSON: A few follow-ups. First of 19 all, it sounds like, and tell me if this is not an 20 accurate characterization of your position after I 21 read your comments, whether or not there is going to 22 be a formal statement of position that's produced, 23 you have to think through the issues ahead of time 24 to produce a stipulated election agreement.</p> <p>25 MR. FRITTS: Yes. I think the issue is</p>

<p style="text-align: right;">Page 46</p> <p>1 that there is a significant amount of time and 2 effort that goes into just figuring out what the 3 unit is. Counsel may not even know the business, it 4 may be a new client, and so you have to understand 5 the business, you have to understand the unit, and 6 you have to understand what other issues there may 7 be. I think that has to happen before you negotiate 8 a stip, or otherwise you're just not negotiating 9 with any information or intelligence.</p> <p>10 MR. JOHNSON: Well, is it possible or is 11 it usual to be able to negotiate a stipulation and 12 think through these issues in less time than it 13 would take for an actual hearing to have happen 14 under, let's just say, the Croft Metal standard?</p> <p>15 MR. FRITTS: I think it's hard to say 16 that negotiating a stip would necessarily take less 17 time than preparing for the hearing, if that's the 18 question you're asking. I think everything that 19 precedes the negotiation, at least in my experience, 20 is something that you would do to identify the 21 issues that may be subject to litigation. And so if 22 you're going to negotiate a stip I think you have to 23 know what the issues are that you might go to 24 hearing on, and then you have to decide if you can 25 resolve them. The process of identifying those</p>	<p style="text-align: right;">Page 48</p> <p>1 I think it's just not going to give enough time to 2 do that, and you're going to back into situations 3 where you have a hearing or you're going to have 4 very rushed negotiations where mistakes are going to 5 get made and disputes are going to happen down the 6 road because you haven't intelligently negotiated a 7 stip.</p> <p>8 MS. SCHIFFER: And is there some optimal 9 time between the seven and the fourteen, or is it 10 just that's what it is so that's what you base it 11 on?</p> <p>12 MR. FRITTS: Well, our position is that 13 the current practice provides discretion at seven to 14 fourteen days. I think in practice fourteen days is 15 usually the standard. And I think fourteen days, 16 while tight, I'm not saying it's easy to get it done 17 even in fourteen days, but I think that's the 18 current standard, and in 90 percent of cases you get 19 a stip in that period of time.</p> <p>20 MR. MISCIMARRA: In follow-up to that, if 21 you talk to some federal court judges, they might 22 say that the quickest way to get a settlement of a 23 complicated case, and in fact I think some judges 24 have said this, is to take a complicated case and 25 say, "You're going to trial next week." So if you</p>
<p style="text-align: right;">Page 47</p> <p>1 issues, what the evidence is, what the circumstances 2 are, that's going to happen I think regardless of 3 whether you go to a hearing or whether you go to a 4 stip. It's only once you've done all that that you 5 really begin the process of negotiating a stip.</p> <p>6 So I don't think there is a real 7 difference, if I'm understanding the question, in 8 terms of what the standard should be whether you're 9 going to have a stip or whether you're going to have 10 a hearing, and I don't think the time necessary is 11 necessarily all that different.</p> <p>12 I think when the postponement request is 13 made for up to fourteen days, I think at least in my 14 experience in many cases it's because you're trying 15 to negotiate a stip. You may also be preparing for 16 the hearing as a fall-back if you don't get a stip, 17 but in many cases that's additional time that you 18 need to go back and forth with the Board agent and 19 with counsel for the union to work it out.</p> <p>20 MS. SCHIFFER: Has it been your 21 experience that the date of the hearing provides a 22 deadline, if you will, for getting that stip?</p> <p>23 MR. FRITTS: It does, it certainly does, 24 and the morning of the hearing. But I think the 25 concern is that if you tighten it down to seven days</p>	<p style="text-align: right;">Page 49</p> <p>1 assume hypothetically that seven days is an 2 artificially tight deadline for preparing for a 3 hearing, why would that be a bad thing? A, would 4 that really create an incentive to have more 5 stipulations? And B, you made reference to problems 6 that might exist if the parties rush to a 7 stipulation, and what do you mean by "problems?"</p> <p>8 MR. FRITTS: Well, the first part of the 9 question I think is really about whether there is 10 enough time to figure out what the issues are and 11 determine what you might litigate. I think if 12 you're going to negotiate from a standpoint where 13 you know what the issues are, you know what you're 14 prepared to go to hearing on and you know how strong 15 your case is and that informs your negotiating 16 position, I think you're going to figure all that 17 out first and then decide what can you sort of pare 18 back with, what can you concede on. You've got to 19 work with the client, of course, on that.</p> <p>20 But I think that process, if it's seven 21 days, I would say it's going to be difficult to have 22 the back and forth in that seven days necessary to 23 work all the issues out, and so I think you end up 24 defaulting to whatever the lawyer has prepared to do 25 on that seventh day in terms of presenting evidence</p>

<p style="text-align: right;">Page 50</p> <p>1 and identifying the issues.</p> <p>2 I think it becomes a situation where, if 3 the time is too short, yes, it's an incentive to 4 negotiate something. But the default position for 5 employers at least, and I would think for unions as 6 well, is we're going to be prepared to go on that 7 seventh day, so if we don't get it done by the 8 seventh day then we're going to a hearing. That's 9 the concern.</p> <p>10 MR. JOHNSON: One quick question on more 11 or less ambiguity produced during rushed 12 negotiations for a stipulation.</p> <p>13 MR. FRITTS: Thank you, Member Johnson. 14 I think that was the second part of 15 Member Miscimarra's question. I think the problem 16 that I was articulating is there are some issues 17 where you may either decide, in the course of 18 negotiating a stip, to defer certain issues until 19 after the election. You may intentionally not 20 resolve those issues as part of negotiating a stip.</p> <p>21 Typically, if it's less than 10 percent 22 of the proposed unit you can do that, but there may 23 be mistakes as to the scope of that. And it may 24 turn out that you then have more challenges post 25 election because there were issues that you didn't</p>	<p style="text-align: right;">Page 52</p> <p>1 their desire one way or the other. It is not an 2 agency designed to, although in some ways it is, to 3 balance the interest between management and unions, 4 but really the core purpose of the Act is to protect 5 the Section 7 rights of employees. And however we 6 go about doing that in the most efficient way is 7 what we should be looking at, not necessarily what 8 is best for employers, what is best for unions, but 9 what is best for workers, who are the underlying 10 population that is intended to be served by this 11 Act.</p> <p>12 The seven day setting is fairly common 13 everywhere in the west. It is the notice that I get 14 on a regular basis that the hearing will be held in 15 seven days. As indicated by Mr. Baskin, frequently 16 the employer requests it, even over union objection, 17 and is provided an extension for that time. Whether 18 that time actually serves any purpose that gets us 19 more stipulations or just results in more litigation 20 is somewhat open. Maybe others might have 21 statistics on that, I certainly don't, but seven 22 days is enough to secure the most basic issues that 23 the employers have been talking about.</p> <p>24 Employers all across the country are 25 subject to state and federal law regarding wage and</p>
<p style="text-align: right;">Page 51</p> <p>1 flesh out, didn't resolve, or maybe it's just a 2 situation where you were doing it so quickly that 3 the parties were talking across each other and there 4 wasn't really a meeting of the minds on certain 5 issues and someone seeks to withdraw from the stip. 6 So I think those are the types of problems that can 7 arise.</p> <p>8 Either it's an intentional deferral of 9 issues until after the election, or it's simply that 10 mistakes were made during the negotiation process 11 that caused disputes to arise that have to be 12 resolved through litigation as opposed to everyone 13 sort of knowing what they agreed to and they move 14 forward under the election agreement.</p> <p>15 MR. PEARCE: Thank you, Mr. Fritts.</p> <p>16 MS. SENCER: Thank you for allowing me 17 this opportunity to address you. My name is Caren 18 Sencer. I'm a shareholder at Weinberg, Roger &amp; 19 Rosenfeld. I'm based in our Alameda office, which 20 is our main office, and we represent a wide array of 21 clients and a wide array of trades and other unions.</p> <p>22 I want to start from a different 23 proposition: that the idea here for a seven day 24 election and that the idea for the Board is not to 25 be neutral but to be able to help workers express</p>	<p style="text-align: right;">Page 53</p> <p>1 hour, regarding employment, regarding employment 2 discrimination, and so they have access to or 3 contacts with counsel who can be called on to 4 provide guidance in labor relations issues as well. 5 If that counsel can't, they certainly know who can, 6 and so the ability to secure counsel, counsel of 7 their choosing, is I think kind of a red herring 8 when it comes to these issues.</p> <p>9 As noted from the list of organizations 10 that are represented through speakers at these 11 meetings, many employers are part of a trade 12 organization or more than one trade organization. 13 Those organizations have tools for their members and 14 access to counsel for their members, thus again 15 lessening the impact of a seven day notice period.</p> <p>16 And as technology changes and in fact 17 even as the Board's technology changes, there is 18 more information available publicly on the web and 19 other sites. Your own site says "Who We Are and 20 What We Do" and kind of explains the process, and I 21 expect that that continues to grow and continues to 22 be updated. As a result of this proposed rulemaking 23 and hopefully the outcome of this proceeding, there 24 will be a slew of employer publications about how 25 you have to act under the new rules, how these rules</p>

<p style="text-align: right;">Page 54</p> <p>1 will affect your business, what services you can 2 purchase now so that you have labor counsel on 3 retainer in the event that you get hit by a union 4 petition. We can expect those things coming.</p> <p>5 Finally, on that point, employers know 6 about organizing campaigns before they happen. If 7 they choose to put their head in the sand and not 8 seek counsel before a hearing or until the last 9 moment they have no one to blame for that but 10 themselves, and the employer's choice to be ignorant 11 of the law on this issue is not a reason to delay an 12 employee having a right to a free choice and fast 13 election. The seven day standard moves us closer to 14 that goal by providing one less hurdle to get over.</p> <p>15 Sometimes there are in fact concerns of 16 particular counsel, and particular counsel I think 17 is less of a concern than the employers would like 18 you to believe. Both of the gentlemen to my left 19 are at big firms with deep benches, with lots of 20 people who can represent an employer on any given 21 issue regarding a hearing to be prepared for.</p> <p>22 And these hearings are not as complex as 23 they had been. Specialty Healthcare and other 24 guidance has limited the issues that go to hearing. 25 There are two issues that most commonly come up in</p>	<p style="text-align: right;">Page 56</p> <p>1 its employees do.</p> <p>2 MR. PEARCE: Do you see any problems with 3 having a hearing that is fourteen days or later in a 4 schedule?</p> <p>5 MS. SENCER: Fourteen days or later just 6 adds to all of the steps of delay in the process. 7 My concern is not the hearing itself but what that 8 does to the actual election date. To represent my 9 clients most effectively, we want them to be able to 10 help the employees get to an election in the most 11 reasonable and timely way possible.</p> <p>12 The difference between seven and fourteen 13 days is just one more week where there is 14 uncertainty for the employees, where there is 15 disruption to the workforce, and where there are 16 things that could be resolved that would help the 17 employees have their question of representation 18 answered.</p> <p>19 MR. PEARCE: In your experience, are you 20 provided with the issues that are going to be 21 presented at a hearing in advance?</p> <p>22 MS. SENCER: In some cases yes; in some 23 cases no.</p> <p>24 MR. PEARCE: Has that affected your 25 ability to prepare for the hearing one way or the</p>
<p style="text-align: right;">Page 55</p> <p>1 my practice: community of interest, which obviously 2 Specialty Healthcare informs, and supervisory 3 status. Supervisory status rarely affects more than 4 10 percent or the proposed 20 percent of a 5 bargaining unit and therefore should not be a reason 6 to push off the hearing date for more research to be 7 performed.</p> <p>8 Community of interest sometimes can raise 9 issues of more than 20 percent. But because we 10 generally know how those cases are going to come 11 out, because we do have so many cases on it because 12 for 50 years or more the decisions are published on 13 how the Board decides these issues of community 14 interest, the idea that there is so much work to be 15 done before that makes it impossible to have a 16 hearing in seven days I don't think references the 17 current technology where all of this information is 18 at your fingertips.</p> <p>19 The current technology of employers, 20 where these lists of employees are so easily pulled 21 from their own databases, their own payroll systems 22 and other electronic information are such that 23 either employers large enough have all of this 24 information already inside its system or it's small 25 enough that it knows exactly what it is that each of</p>	<p style="text-align: right;">Page 57</p> <p>1 other?</p> <p>2 MS. SENCER: Unless an employer tells me 3 that they're not raising an issue, I assume that all 4 of those issues will be raised and prepare myself on 5 all of those issues. And the resources are out 6 there to do so fairly easily. Between the guide for 7 hearing officers and the outline on law and 8 representation cases, you know what it is that the 9 hearing officer is going to be looking for to put 10 into the record for the reading of the record, and 11 you can prepare for those.</p> <p>12 MR. PEARCE: Have you had any challenges 13 in your preparation with the amount of time allotted 14 in order to do this?</p> <p>15 MS. SENCER: I would say the most 16 difficult problem is sometimes freeing up my 17 schedule. I'm outside counsel, just like they're 18 outside counsel, and in that situation I either 19 rearrange my schedule or one of my other 20 shareholders or associates steps into it, because 21 the goal is for us to keep those things on schedule 22 so that it continues to move forward.</p> <p>23 MR. MISCIMARRA: Ms. Sencer, two things. 24 One, I want to thank you for reminding us about the 25 reference point of employee interests rather than</p>

<p style="text-align: right;">Page 58</p> <p>1 focusing this on kind of an employer or a union      2 interest, although they're all important. The      3 second thing is: Have you personally or your      4 colleagues in any instances agreed to a hearing      5 taking place longer than seven days, and what were      6 some of the considerations if those cases arose that      7 would have prompted that to occur under our current      8 practice?</p> <p>9       MS. SENCER: Sometimes we know that the      10 employer's counsel is in fact truly unable to      11 rearrange their schedule and is not at a firm that      12 has the ability to back-fill that. If we think      13 there is an issue that truly needs to be resolved in      14 advance, for example as happens on the contraction      15 and expansion of unit cases, we agree for the      16 hearing to be put off of the seven days so that      17 those issues can be fully litigated in advance,      18 because that's important and you can't do it      19 afterwards. It's a question of whether or not that      20 election should occur. The same thing on joint      21 employer kind of issues.</p> <p>22       But when it comes to just a regular      23 community of interest or supervisory status, what      24 can end up as individual eligibility questions,      25 generally when the request is made it's granted over</p>	<p style="text-align: right;">Page 60</p> <p>1 or unfair in the situation where you have an      2 overwhelming burden to limit a party to seven days      3 to come up with its case?</p> <p>4       MS. SENCER: I understand why there's an      5 idea that it could be unfair. It is a lot of      6 evidence. It is on the union's timeline. When they      7 file the petition the employer doesn't always know      8 exactly what's going on maybe. I think the      9 employers do know what's going on. I think the      10 employers for the most part are preparing in      11 advance.</p> <p>12       You'll have testimony, I'm sure, because      13 Professor Bronfenbrenner is here, regarding what is      14 actually happening in these cases. But the amount      15 of evidence is dependent on what the employer wants      16 to fight about. Specialty Healthcare and other      17 cases make clear what actually is the standard on      18 this.</p> <p>19       If the employer did not want to fight an      20 appropriate unit for the unit that they wanted,      21 which may also be an appropriate unit, if they would      22 accept the union's appropriate unit when the unit is      23 appropriate, and the unions are pretty skilled at      24 identifying them at this point, that burden isn't      25 all that onerous. And I don't think that it is that</p>
<p style="text-align: right;">Page 59</p> <p>1 our objection.</p> <p>2       MR. JOHNSON: Just really quickly, first,      3 say hi to David for me. And second, you're an      4 experienced litigator. Let's just assume the Board      5 doctrine assigned you the burden within the seven      6 days to produce an overwhelming community of      7 fill-in-the-blank, we'll create some legal doctrine.      8 Is it fair or unfair to believe that you're going to      9 have to marshal a lot of evidence to surmount that      10 burden?</p> <p>11       MS. SENCER: I'm not really sure that      12 it's always a lot of evidence, because one of the      13 things that I see most frequently in these cases      14 that are actually litigated on these issues, for      15 example supervisory status, is a disconnect between      16 upper level management and the people actually      17 performing the job. Instead of talking to upper      18 level management in preparation, if attorneys were      19 speaking to the people actually doing the job they'd      20 have a lot less preparation time and lot better      21 evidence going in.</p> <p>22       MR. JOHNSON: Right. But let's take the      23 world as is. There's going to be a lot of bad      24 attorneys out there who are inefficient and start      25 talking to the wrong people. Do you think it's fair</p>	<p style="text-align: right;">Page 61</p> <p>1 onerous to prepare in seven days, particularly given      2 the communications that go back and forth, the fact      3 that these communications happen outside of business      4 hours, that a lot of this is electronic, that this      5 information can be pulled and that telephone      6 conversations can be just as good as face-to-face      7 meetings.</p> <p>8       A part of the reason for this seven days      9 and this idea of a burden is because there's an      10 education component going on to the client and the      11 client's employer that that should be happening      12 beforehand. It's not up to the employees to be      13 sitting and waiting so that the employer can get      14 itself educated. The employees have the right to      15 move forward.</p> <p>16       MR. JOHNSON: If we had a super short      17 timeline for the employer, and let's just say two      18 days or three days or seven days, however you wanted      19 to look at this, if we switch to like a Section 8(g)      20 model to take care of all the employer notice      21 concerns in terms of finding counsel and all that,      22 would you approve of that? In other words, if the      23 union was thinking about filing a petition they      24 would send the employer a letter, and then the union      25 would get the benefit of a shorter timeline, like</p>

<p style="text-align: right;">Page 62</p> <p>1 seven days before the hearing because the employer 2 couldn't say anything like, "We had no idea this was 3 coming, we couldn't find counsel?"</p> <p>4 MS. SENCER: Maybe I'm biased, coming 5 from the west. We have in California the 6 Agricultural Labor Relations Act. That runs on a 7 really tight time frame. Elections are held in a 8 week. Unions have access to the employers' premises 9 during that week. The employer has to produce a 10 list in two days, and somehow their world is not 11 falling apart. They still have fair hearings, they 12 still resolve their issues, and they still get to 13 the question of the employee choice quickly and for 14 the most part without litigation, so I don't think 15 that it's too much of a burden.</p> <p>16 MR. JOHNSON: Thank you.</p> <p>17 MR. PEARCE: Thank you. We are going to 18 take five minutes, and then we will have the topic 19 of the requirement for written statements. The 20 speakers will be Kuusela Hilo, F. Curt Kirschner, 21 Elizabeth Bunn, Maneesh Sharma and Ronald Meisburg.</p> <p>22 (Recess.)</p> <p>23 MR. PEARCE: I want to thank the speakers 24 and my colleagues for adhering to the time 25 limitations. For this next topic we actually have</p>	<p style="text-align: right;">Page 64</p> <p>1 outside lawyer frequently communicated about the 2 petition, but the company's counsel never told our 3 lawyer or the Board what were their issues with our 4 petition.</p> <p>5 This meant that we had to prepare for any 6 possible issue that could be raised at a hearing, 7 from finding RNs from every unit and every shift -- 8 we are a 24 hour facility in the hospital -- to 9 taking the day off of work, to driving hours in rush 10 hour Los Angeles traffic, and possibly being seen by 11 UHS identifying the depth of their involvement in 12 the campaign.</p> <p>13 Once we got to the hearing the company 14 finally identified a few concerns, but the union was 15 willing to agree to all of them. This meant that 16 all the work spent identifying witnesses and our 17 tremendous effort to be prepared was all in vain. 18 And despite the agreements on all issues, the 19 company successfully insisted on the hearing so that 20 it could state its evidence for the charge nurses 21 being supervisors. The union had already agreed to 22 stipulate to this.</p> <p>23 Then there were transcript errors that 24 delayed the region in being able to issue a decision 25 and the direction of the election after the hearing.</p>
<p style="text-align: right;">Page 63</p> <p>1 three groups and a total of ten speakers. We may 2 not have time for every Board member to questions of 3 participant, of every speaker, so I'd ask my 4 colleagues to keep that in mind and to choose 5 carefully who they wish to speak to. And please 6 don't go strictly by popularity or we'll be speaking 7 with Ron Meisburg all day. In our effort to try to 8 get through and give everybody a fair shot we will 9 exercise that kind of restraint. We know that's a 10 lot to ask of attorneys. That being said, welcome, 11 panel, and you may proceed.</p> <p>12 MS. HILO: Good morning. My name is 13 Kuusela Hilo, and I am an organizer with the United 14 Nurses Associations of California, the Union of 15 Healthcare Professionals. I strongly support the 16 Board's proposal to require written statements 17 raising issues and providing initial disclosures of 18 relevant information. When my union UNAC/UHCP filed 19 an election for a registered nurse only unit at 20 Universal Health Systems, Incorporated in Corona, 21 California, we had great difficulty getting to a 22 stipulated election agreement even though there were 23 not any disputed issues.</p> <p>24 In the week leading up to the 25 pre-election hearing, our lawyer and the company's</p>	<p style="text-align: right;">Page 65</p> <p>1 It took many weeks before we knew the election 2 dates. One of the requirements the company had 3 before it would finally enter into a stipulated 4 election agreement was that we withdraw our initial 5 petition and refile a new petition. This led our 6 election to occur 56 days after originally filing 7 the election petition, but statistically the 8 election looked like it occurred well within the 42 9 day period because we were forced to withdraw the 10 original petition to finally secure an election 11 date.</p> <p>12 Again, I strongly support the Board's 13 proposal to require written statements raising 14 issues and providing initial disclosures of relevant 15 information so that we can have a more efficient and 16 modernized process and so that workers can have a 17 free, fair and timely vote. Thank you.</p> <p>18 MR. PEARCE: Was this your first 19 experience filing a petition, or was this one of 20 several?</p> <p>21 MS. HILO: This is one of several.</p> <p>22 MR. PEARCE: Have you had similar 23 experiences in the past?</p> <p>24 MS. HILO: Having these delays? 25 MR. PEARCE: Yes.</p>

<p style="text-align: right;">Page 66</p> <p>1 MS. HILO: No. It was with this 2 particular company, UHS. 3 MR. PEARCE: Thank you. 4 MR. MEISBURG: Mr. Chairman, members of 5 the Board, I am Ronald Meisburg. I'm representing 6 the United States Chamber of Commerce here today. 7 MR. PEARCE: Who are you again? 8 MR. MEISBURG: My mother would say I'm 9 Ronny. 10 (Laughter.) 11 MR. PEARCE: We'll note that. 12 MR. MEISBURG: We do appreciate the 13 opportunity to participate in the hearing today. 14 The topic for the panel of course is that after a 15 petition has been filed the regional director is 16 issued a notice of hearing that the employer shall 17 file and serve on the parties a statement of 18 position by the date specified in the notice. 19 Failure to raise issues or otherwise completely 20 respond to matters required in the statement of 21 position will foreclose contests of the omitted 22 matters except for Board jurisdiction and some voter 23 challenges. Importantly, this proposed statement of 24 position with its accompanying implications is an 25 entirely new requirement, and therefore is a</p>	<p style="text-align: right;">Page 68</p> <p>1 these interests may not eclipse those of other 2 parties, but they are certainly substantial and 3 legitimate. 4 Second, it remains the case that many if 5 not most employers involved in these representation 6 proceedings are relatively small employers. This is 7 strongly suggested by the Board's statistics showing 8 that the median size of units in representation 9 proceedings has ranged between 23 and 28 over the 10 past decade, and of course that means half the 11 elections involve even smaller units. And the 12 Chamber's membership drives one of the reasons the 13 Chamber is very interested in this, because 96 14 percent of the Chamber's members are small 15 businesses with 100 or fewer employers, and 70 16 percent of the Chamber's members have ten or fewer 17 employers. 18 Small employers are the very ones least 19 likely to have full-time counsel or the human 20 resources staff with the familiarity to deal with 21 the kinds of issues raised when the union files an 22 election petition. This can operate as a very great 23 handicap for these small employers in an extremely 24 short deadline period of seven days or less. 25 Most of us at this hearing are familiar</p>
<p style="text-align: right;">Page 67</p> <p>1 dramatic departure from current Board procedure. 2 The Chamber remains particularly 3 concerned about this proposal which, in practice, 4 would routinely require employers to file position 5 statements within seven days set for the hearing. 6 The Chamber has expressed those concerns in our 7 written comments filed in 2011, in our oral 8 testimony in 2011, and expressed its other concerns 9 also in our written testimony filed this year and 10 again today. 11 We believe meaningful consideration of 12 the Chamber's position with respect to this issue 13 requires acknowledgment of several points. The 14 first is that employers have legitimate and 15 substantial interest in NLRB representation 16 proceedings and the rules that govern them. The 17 Chamber believes this to be unassailable. Employers 18 undertake the numerous and substantial business 19 risks required to start and maintain the enterprise, 20 like raising and borrowing capital, developing 21 business plans for the production, marketing and 22 delivery of products or services, making commitments 23 to vendors and suppliers and customers along the 24 way, and of course hiring, training and supervising 25 the employees necessary for the enterprise. So</p>	<p style="text-align: right;">Page 69</p> <p>1 with the arcane labor law terms and rules and 2 concepts involved in representation matters, and yet 3 even we can sometimes struggle with their meaning 4 and application. The Board must not lose sight of 5 the fact that a small employer faced with perhaps 6 its first and only election petition or organizing 7 campaign would not have anything like the 8 familiarity we have with the expertise of a trained 9 and experienced labor relations counsel or advisor. 10 Instead, the employer will have to locate 11 and retain counsel, perhaps other advisors, and that 12 takes resources and time within this seven day 13 deadline which is denied to the employer. While the 14 stated goal of the proposed rule is to streamline 15 the election process, the due process rights of 16 employers and particularly small employers should 17 not be sacrificed in order to do so. 18 Third, it has to be acknowledged that 19 unions already carry substantial advantages into a 20 representation proceeding. Prevailing wisdom seems 21 to be that the employer holds all the cards because 22 purportedly it can, without regard to the demands on 23 managing its business, communicate constantly with 24 its employees about union organization, but this 25 simply ignores reality. The principal focus of the</p>

<p style="text-align: right;">Page 70</p> <p>1 employer is the satisfaction of customers' needs and 2 the efficient management of their business. 3        By contrast, it's the very business of 4 unions to organize and represent employees. They 5 can do their organizing for weeks or months without 6 the employer even knowing about it. They can frame 7 the election issues, communicate with employees, 8 determine what unit it wants to seek, file the 9 petition at a time when it seems that it is most 10 advantageous for them to do so, and it will have the 11 resources it needs in place to handle any of the 12 issues that come up. 13       So believe that the Board must evaluate 14 the proposed regulations, and particularly what 15 we're here talking about now, through the lens of 16 these facts. Otherwise, there is a very significant 17 legal and substantial risk that employers will 18 effectively be denied important legal and due 19 process rights and be forced to either unknowingly 20 waive important legal rights because they were not 21 counseled or raise every issue, even those that 22 would not have been raised, in an effort to avoid 23 any waivers. We frankly think this does not serve 24 the purposes of the Act or free and fair elections 25 and that it will reduce the efficiency of the</p>	<p style="text-align: right;">Page 72</p> <p>1 issue, but it doesn't happen within seven days. 2       MR. MISCIMARRA: I have a follow-up 3 question to that. In our unfair labor practice 4 cases we permit the provisions of the complaint to 5 be amended in many cases even after the hearing. 6 What would be your position to the extent that the 7 Board were to adopt a written position statement 8 requirement but not to regard it as a waiver of 9 positions that were unexpressed in the statement of 10 position? 11       MR. MEISBURG: Well, I certainly think 12 that would be an improvement, but we had a number of 13 other objections to the statement of position that 14 we're not addressing here in this oral testimony 15 today. So while that may be an improvement, I don't 16 know that it would be the complete answer to the 17 issues that we're concerned about. 18       Let me just mention one other thing. It 19 was interesting to me when General Counsel Feinstein 20 issued his best practices memo back in 1998, in that 21 best practices memo, which is really the basis for 22 very much of what the Board's practices are today, 23 the best practice was to start the hearing ten to 24 fourteen days after the petition. 25       But in that best practices memo they</p>
<p style="text-align: right;">Page 71</p> <p>1 election process and not increase it. 2        MR. PEARCE: Wouldn't you say that in 3 federal litigation, or even state litigation, that 4 the party that is being sued, the defendant, if they 5 don't know the issues, the bases for the litigation, 6 that they would be at a decided disadvantage during 7 the course of the litigation? Wouldn't you agree? 8        MR. MEISBURG: I think it depends. 9 That's really going to be depending on the 10 particular piece of litigation. Member Miscimarra 11 asked a question a while ago about the quickest way 12 to settle a complex lawsuit for a judge would be to 13 say, "We're going to trial in seven days," and that 14 focuses everybody's attention very quickly. 15       I think the problem there is leading up 16 to a lawsuit first you'll have a history in most 17 cases where somebody has written a demand letter 18 saying "Here's what I want done or else I'll sue 19 you." Then you have a complaint which has to lay 20 out the statements for which you're being sued, the 21 claims for which you're being sued. You have an 22 opportunity for an answer and you have an 23 opportunity for discovery, and so all of this takes 24 far longer than seven days and permits the parties 25 to have a keen appreciation of exactly what's at</p>	<p style="text-align: right;">Page 73</p> <p>1 talked about the importance of trying to get these 2 election agreements that the last panel talked 3 about, and in there they made a very interesting 4 statement. This is when they were going to start 5 the hearing ten to fourteen days later. They were 6 talking about trying to get a telephonic conference 7 call, which back in that day was more of a 8 technological novelty, to discuss the possibility of 9 getting an election agreement, and they said 10 approximately two days prior to the hearing to try 11 and do that. 12       But then they said one of the 13 difficulties in utilizing a conference call was that 14 scheduling a time when the parties' representatives, 15 and this is really two days before the hearing, are 16 sufficiently knowledgeable about the issues to take 17 a position. 18       I think it was acknowledged in GC 19 Memorandum 98-1, the best practices memorandum, that 20 it's not unusual at all that the parties might not 21 be knowledgeable even when the hearings were to be 22 set ten to fourteen days away, much less the seven 23 days we're talking about. 24       MS. SCHIFFER: Are there particular 25 pieces of the statement of position that are</p>

<p style="text-align: right;">Page 74</p> <p>1 objectionable, or is it the whole concept of it, the 2 fact that it has to be in writing, the fact that it 3 has to be submitted?</p> <p>4 MR. MEISBURG: Member Schiffer, I 5 appreciate that question. I don't want to put a 6 gloss on our written comments. We've devoted about 7 ten pages out of our document to pointing out which 8 parts of the position statement, some of which we 9 didn't object to but other parts of it which we did. 10 I find it difficult to say that we have sort of a 11 conceptual disagreement with the notion of a 12 position statement but that there is no proposal on 13 the table that's acceptable, and we stand by the 14 objections we've voiced in the written comments.</p> <p>15 MR. JOHNSON: Can I just jump in for a 16 sec? Is there a real objection by the Chamber of 17 Commerce about having a statement of position that 18 would be binding at the end of the hearing?</p> <p>19 MR. MEISBURG: That's not something that 20 we've considered, and I don't have an answer for 21 that question other than what we have said in our 22 position statement.</p> <p>23 MR. JOHNSON: I know this is kind of a 24 combination of oral argument and speed dating, and 25 sometimes it's more like speed dating.</p>	<p style="text-align: right;">Page 76</p> <p>1 further delays in the process of getting parties to 2 a representative status.</p> <p>3 In our view, this is one of several 4 examples in the NPRM where the Board appears to be 5 sacrificing a fair process to achieve the goal of 6 faster elections. This is an imbalanced position, 7 in our view, in light of the congressional mandate 8 to hold an appropriate hearing under Section 9(c), 9 but it also presents a substantial risk that more 10 representation hearings will actually be held under 11 the proposed scheme than under the current scheme 12 and, therefore, that actual bargaining relationships 13 will be delayed as a result.</p> <p>14 The current rules result in stipulations 15 without a hearing in over 90 percent of all 16 petitions being filed. The NPRM proposes 17 significant rule changes to virtually every aspect 18 of the representation process. The net result of 19 all of these overlapping changes happening at the 20 same time is impossible to predict, and it's easy to 21 see that the confluence of all of these different 22 changes occurring at once would result in more 23 petitions going to hearing and more delays in the 24 process.</p> <p>25 The NPRM proposes a requirement that the</p>
<p style="text-align: right;">Page 75</p> <p>1 MR. KIRSCHNER: Good morning, Chairman 2 Pearce and distinguished members of the Board. My 3 name is Curt Kirschner. I'm a partner with Jones 4 Day. I'm testifying this morning on behalf of the 5 American Hospital Association and two of its 6 affiliated personal membership groups, the American 7 Society of Healthcare Human Resource Association and 8 the American Organization of Nurse Executives. With 9 me today is Carla Luggiero of the AHA.</p> <p>10 Thank you for the opportunity to speak 11 this morning about the requirements for a written 12 statement of position contained in the Board's 13 notice of proposed rulemaking. A more thorough 14 discussion of the AHA's arguments with respect to 15 the NPRM is included in the written comments 16 submitted earlier this week to the Board.</p> <p>17 Drawing on the experience of its member 18 hospitals that are routinely involved in NLRB 19 elections, the AHA believes that the NPRM's proposed 20 requirements that a statement of position including 21 various employee lists that accompany that to be 22 submitted within seven days of a petition being 23 filed or risk waiver of any sort of number of issues 24 is inconsistent with the Act and unreasonable in the 25 real world and in fact could backfire, resulting in</p>	<p style="text-align: right;">Page 77</p> <p>1 non-petitioning party, which is almost nearly always 2 the employer, shall state several things, including 3 a description of the most similar unit that the 4 employer concedes is appropriate if the petition 5 unit isn't appropriate, also identifying any 6 individual's occupying classifications which the 7 employer intends to condition test along with the 8 basis for that contention, and a description of all 9 other issues that the employer intends to raise at 10 the hearing.</p> <p>11 Along with the statement of position, the 12 employer must produce both the requested list of the 13 petition as well as, if the employer contends that 14 the unit is not appropriate, another list of the 15 employees who would fit within the appropriate unit.</p> <p>16 The penalties for failure to comply with 17 these numerous requirements are significant. If the 18 employer fails to furnish the employee list with the 19 statement of position in a timely manner the 20 employer shall be precluded from contesting the 21 eligibility or inclusion of any individuals at the 22 pre-election hearing, including by presenting 23 evidence or argument or by cross-examination of 24 witnesses. In addition, the NPRM includes a 25 preclusion penalty regarding evidence or argument</p>

<p style="text-align: right;">Page 78</p> <p>1 for any issue that the party failed to include in 2 the statement of position. 3       The Board's proposal to preclude 4 employers from raising issues of unit 5 appropriateness as a penalty for failing to provide 6 an employee list in the expedited manner is 7 particularly troublesome. Many of the Board 8 standards for determining unit eligibility and 9 supervisory status are fact-intensive and 10 time-consuming. Many of these cases arise from the 11 hospital sector, and the AHA's members have great 12 experience going through the fact-intensive 13 time-consuming process of determining whether any 14 particular set of employees such as charge nurses 15 are or are not supervisors under the Board's current 16 standards. 17       In addition, hospital bargaining units 18 are oftentimes quite large, given the existing acute 19 care rules, and having employer hospitals trying to 20 determine who is, for example, a technical employee 21 rather than a service employee can be a very 22 time-consuming process. It will take some time to 23 go through large units and determine who's in which 24 unit and who's not, and the penalty for getting that 25 wrong is significant under the proposed rules.</p>	<p style="text-align: right;">Page 80</p> <p>1 than actually trying to reach an agreement with the 2 union about what an appropriate unit is. Thank you. 3       MS. SCHIFFER: Do you think that it is -- 4 well, let me raise very specifically, with respect 5 to the proposed rules requirement that the employer 6 identify a most similar unit, whether it helps the 7 process of either stipulation or the process of 8 hearing that the employer actually take a position 9 on the unit that's petitioned for. 10       MR. KIRSCHNER: Speaking on behalf of the 11 American Hospital Association, where we have 12 prescribed unit rules, in my experience I think it 13 is commonplace for hospital employers to identify 14 whether the petition for classifications are those 15 that fit within a service unit or in a technical 16 unit or some other RN unit, for example, and 17 oftentimes it should be incumbent on the union to 18 identify which of those prescribed units they are 19 seeking to represent. 20       MS. SCHIFFER: Presumably that's in the 21 petition. I'm just asking does it help the stip or 22 the hearing for the employer to take a position on 23 what it believes the unit should be? 24       MR. KIRSCHNER: I would also assume that 25 the prescribed unit would be somewhere within the</p>
<p style="text-align: right;">Page 79</p> <p>1       The proposed statement of position would 2 require interested parties to articulate a fixed 3 position with respect to the scope of the putative 4 unit per the introduction of any evidence. We 5 believe that is unfair and unrealistic in the real 6 world, given that the hospitals's HR systems are not 7 set up to align with the Board's current rules for 8 bargaining units. 9       In fact, this could have an unintended 10 consequence of prompting fewer election agreements 11 and more contested hearings because during the 12 timeline before the hearing, whether that's seven 13 days or even longer, employers will be focused 14 instead on providing and preparing the statement of 15 position and the employees list, thereby taking the 16 time away from trying to negotiate the stipulations 17 that currently exist and that are reached in 90 18 percent of cases. 19       So by having this obligation, which we 20 think is onerous, the risk is that employers will be 21 focused on putting together everything they can in 22 the statement of position. They'll be treating it 23 like an answer in civil litigation, putting in every 24 defense they can think of or risk waiver, and 25 thereby using all the time to focus on that rather</p>	<p style="text-align: right;">Page 81</p> <p>1 petition. Sometimes it's not. Sometimes they 2 actually do just list classifications that they 3 believe comprise the prescribed unit. So it is 4 helpful still to get further information from the 5 union. 6       At the time of the hearing and once the 7 evidence is known about what the union is seeking, 8 then I think it is appropriate for the employer to 9 articulate a position with respect to what the 10 appropriate unit would be under the acute care rules 11 because they are prescribed. 12       MS. SCHIFFER: But not during the 13 stipulation discussions or at the beginning of the 14 hearing? 15       MR. KIRSCHNER: In my experience, given 16 that virtually all petitions result in stipulations 17 you do have that discussion with opposing counsel 18 during that timeline leading up to the hearing. You 19 couldn't reach a stipulation in an acute care 20 petition unless you are putting out there what you 21 think the appropriate unit would be. I think that 22 during that process it's commonplace under the 23 current rules for the parties to talk in advance of 24 the hearing about what the appropriate unit would 25 be.</p>

<p style="text-align: right;">Page 82</p> <p>1 MS. SCHIFFER: I don't think I got an 2 answer to the question. Should the employer take a 3 position before the start of the hearing during stip 4 discussions and at the beginning of the hearing?</p> <p>5 MR. KIRSCHNER: I believe that taking a 6 position would be appropriate if the employer has 7 been given sufficient information from the union 8 with respect to what unit or units they are seeking 9 to represent.</p> <p>10 MR. MISCIMARRA: That's the technical 11 legal proposition, what's sauce for the goose is 12 sauce for the gander. Is that right?</p> <p>13 MR. KIRSCHNER: Correct.</p> <p>14 MR. MISCIMARRA: Here's one question that 15 I have, and I'll be brief. Have you encountered any 16 situations where you understood going into the 17 hearing that a particular healthcare facility had 18 classifications that operate one way and where in 19 the course of the hearing you discover that the 20 various job classifications actually interact in 21 some different way?</p> <p>22 MR. KIRSCHNER: There are several 23 examples particularly in trying to determine whether 24 employees are service employees or technical 25 employees. You can have employees who work in a</p>	<p style="text-align: right;">Page 84</p> <p>1 depends on how much time you have before the 2 hearing, which then intersects with some of the 3 other proposed rules about whether it's seven days 4 as a hard deadline. But I think that many of those 5 topics are relevant to preparing for the hearing. 6 Many of those topics are also relevant to 7 negotiating the stipulation, which I think should be 8 the emphasis during that time leading up to the 9 hearing.</p> <p>10 My concern is that, by having extensive 11 obligations imposed on the employer and requiring 12 them to provide answers on every possible issue that 13 you could potentially raise during the hearing, the 14 attention is going to be off the ball of trying to 15 reach a stipulation. Instead, you're just going to 16 be preparing a statement of position with the 17 attendant employee list that is going to ensure that 18 you're not inadvertently waiving anything. I think 19 that is one of the real concerns. The statement of 20 position coupled with the waiver issue makes this 21 proposal particularly concerning.</p> <p>22 MR. PEARCE: Thank you very much.</p> <p>23 MR. SHARMA: My name is Maneesh Sharma. 24 I'm associate general counsel at the AFL-CIO. On 25 behalf of the federation and its affiliates, we</p>
<p style="text-align: right;">Page 83</p> <p>1 lab, for example, where sometimes they do 2 phlebotomy, and phlebotomy would typically be seen 3 as a service position. However, they may have 4 additional duties on top of that that may or may not 5 be reflected in a job description which would put 6 them in the technical classification.</p> <p>7 The Board has these prescribed rules, but 8 there are positions that are on the bubble and could 9 go either way depending on how the hospital actually 10 uses them. So it is not an easy answer for 11 hospitals, particularly when faced with large 12 bargaining units, to determine who are the people 13 who are within one unit or the other. It takes 14 sometimes evidence being put on at a hearing, and 15 sometimes the union has it wrong as well because 16 they misunderstood what people are doing.</p> <p>17 MR. HIROZAWA: I have just one question 18 for Mr. Kirschner, not so much as a representative 19 of the American Hospital Association but as a very 20 experienced practitioner. Wouldn't most of the 21 information that's called for in the proposed 22 statement of position be information that you would 23 ascertain as a matter of course in preparing for a 24 hearing?</p> <p>25 MR. KIRSCHNER: Yes, it should. And it</p>	<p style="text-align: right;">Page 85</p> <p>1 would thank you for the opportunity to speak here 2 today. I'll be splitting my time, as you can see, 3 with Elizabeth Bunn, who is director of organizing 4 at the AFL-CIO, and because I'm splitting my time I 5 just want to focus on a few things.</p> <p>6 As you're aware, the AFL-CIO does not 7 directly represent unions in our case proceedings. 8 Therefore, in order to assist the Board in its 9 rulemaking process we thought it would be useful to 10 provide insights from union side lawyers who 11 practice in regions across the country.</p> <p>12 To do so, we conducted a survey of 13 attorneys with extensive experience representing 14 affiliates in representation proceedings. 57 15 attorneys in that pool responded. And as part of my 16 testimony I wanted to highlight some of the aspects 17 of that survey and also discuss some vivid examples 18 that were provided by attorneys to illustrate the 19 benefits of these proposed changes. The survey is 20 discussed in more detail in our comments and the 21 full results are appended to our comments.</p> <p>22 First, I just want to note that there is 23 wide consensus among experienced union side 24 attorneys that the current rules fail to provide 25 workers with free and fair elections. As it relates</p>

<p style="text-align: right;">Page 86</p> <p>1 specifically to the statement of position, 69      2 percent of the attorneys who responded said that      3 they had been involved in cases where the employer      4 refused to identify the issues it planned to raise      5 at the pre-election hearing until the proceedings      6 went on the record. Additionally, 44 percent      7 reported involvement in a case where the employer      8 did not identify its issues prior to presenting      9 testimony.</p> <p>10 One attorney reported to us in a recent      11 R-Case for an RN unit that she called the employer's      12 counsel after the petition was filed to ask them to      13 identify what issues they might have and to see if      14 the parties might be able to reach a stip. The      15 attorney refused and stated, "There are always      16 issues." The company then litigated the supervisory      17 status of every charge nurse in the proposed unit.</p> <p>18 Luckily, the union expended the time and      19 resources to prepare for this potential issue before      20 the hearing and was able to properly respond, but in      21 many cases the union is not in a position to respond      22 to a company's argument, as it has no notice that      23 this will raised at a hearing. This type of      24 hide-the-ball litigation serves no purpose but to      25 avoid reaching agreement, create delay, and leave</p>	<p style="text-align: right;">Page 88</p> <p>1 formal practice. As our survey and examples show,      2 the practice has varied widely and permits strategic      3 behavior, sometimes very explicitly and sometimes      4 abusively, where employers refuse to take a position      5 or change their position in order to prevent      6 agreement and create litigation, and for that reason      7 we support the requirement for a written statement      8 of position. I yield any time I have remaining to      9 my colleague, Ms. Bunn.</p> <p>10 MS. BUNN: Good morning. My name is      11 Elizabeth Bunn, and I'm the organizing director of      12 the AFL-CIO, a position I've held for about four      13 years. Prior to that, my background includes      14 working with the enforcement litigation division of      15 the Board after law school, and 25 years first as an      16 attorney and then as senior staff and an officer at      17 the UAW. I oversaw the union's organizing program      18 in the non-manufacturing sectors there, so I have      19 many, many years of experience in helping workers to      20 organize.</p> <p>21 To Maneesh's compelling argument I would      22 just add one small point. We suggest changing      23 slightly the proposal concerning the employer's      24 response to the scope of the bargaining unit. We      25 recommend that an employer who objects to the</p>
<p style="text-align: right;">Page 87</p> <p>1 the union in a position to waste resources by      2 preparing for any and all potential arguments.      3 Also, the additional requirement that      4 employers must include a list of employees with      5 classification, shift and work location information      6 is integral to this proposed change. The list aids      7 the hearing officer and the parties in understanding      8 issues and allows the union to investigate      9 eligibility and inclusion issues so it is not forced      10 to challenge voters unnecessarily or allow      11 ineligible voters to vote.</p> <p>12 One attorney provided us an example in      13 which the union provided received an Excelsior list      14 that included more names than the union believed      15 should have been in the unit. The pro-union      16 workers, who unfortunately were fairly      17 unsophisticated, failed to challenge at least six      18 voters who ended up having no connection whatsoever      19 to the petition for a unit. If the union had the      20 list of employees purportedly in the unit at the      21 time of the pre-election hearing they could have      22 explored those issues and resolved them then.</p> <p>23 It should also be noted that the      24 requirement for a written statement of position      25 merely codifies the standard that is an existing and</p>	<p style="text-align: right;">Page 89</p> <p>1 workers' proposed bargaining unit set forth with      2 specificity who they contend must be added or      3 subtracted in order to support their contention that      4 the unit proposed is not appropriate.</p> <p>5 We think such a proposal makes all the      6 sense in the world. It prevents an employer from      7 merely objecting for the sake of objecting in order      8 to cause delay and gamesmanship, and it allows both      9 the employer and the workers' representative the      10 opportunity to problem solve their disagreement,      11 hopefully satisfactorily.</p> <p>12 MR. PEARCE: Ms. Bunn, have you had      13 specific experience with respect to the problems      14 that you suggest exist in the current hearing      15 process?</p> <p>16 MS. BUNN: My own experience is that many      17 employers, too many employers, not all, but too many      18 employers, in fact seek to delay the holding of the      19 election, and they'll do that through raising      20 unnecessary objections, challenges and frivolous      21 legal arguments.</p> <p>22 We'll talk later on as part of other      23 proposed rules that the goal is delay, just pure and      24 simple. And since the purpose of the pre-election      25 hearing is to decide whether or not there should be</p>

<p style="text-align: right;">Page 90</p> <p>1 an election, to the extent that the Board,      2 consistent with due process, can delay litigation of      3 issues that are unnecessary to that question of      4 whether there should be an election is appropriate.      5 But yes, unnecessary delay has been our experience      6 in many, many organizing campaigns.</p> <p>7       MR. PEARCE: Are there circumstances      8 where the position of the employer being presented      9 only at the hearing or sometime during the midst of      10 the hearing creates any kinds of issues with respect      11 to the petitioner?</p> <p>12       MS. BUNN: Right. It is difficult.      13 Again, since the purpose of the hearing is to decide      14 whether there's a question concerning      15 representation, it's important for the workers and      16 their representative to understand what the      17 employer's position is, and to walk into a hearing      18 without having that information is unnecessary and      19 unhelpful.</p> <p>20       MR. SHARMA: I would add to that just      21 that one of the consistent responses that we receive      22 from union side attorneys is how difficult it is to      23 prepare for a hearing when you have no idea what the      24 positions the employer will take at that hearing      25 are.</p>	<p style="text-align: right;">Page 92</p> <p>1 those issues, then the union is in a better position      2 to respond to those. I don't think they need four      3 to seven days necessarily to respond to those      4 issues.</p> <p>5       MR. MISCIMARRA: But presumably notice of      6 frivolous positions is as useful in advance of the      7 hearing as notice of non-frivolous positions. Is      8 that a correct proposition?</p> <p>9       MR. SHARMA: I would absolutely agree      10 with that, but I wouldn't say that you necessarily      11 need an extended period of time to prepare a defense      12 to those or a response to those.</p> <p>13       MR. JOHNSON: Vis-a-vis the timing here,      14 would you support looking at this on a variable      15 scope in terms of deadlines and what should be in      16 the statement of position depending on the size of      17 the petition for a unit?</p> <p>18       MS. BUNN: I think that the crafting of      19 these rules in many ways is extraordinarily      20 elegant -- and hats off to all of you who put time      21 and energy into this -- and I think that the      22 exception allowing for exceptional circumstances      23 would cover any particularly difficult situations.</p> <p>24       MR. JOHNSON: Do you think we should      25 define exceptional or special circumstances more</p>
<p style="text-align: right;">Page 91</p> <p>1       MR. MISCIMARRA: Along those lines, if      2 one assumes that seven days is an adequate time for      3 an employer's counsel to plug into a particular      4 situation and identify the relevant issues, because      5 of this preparation issue and also the benefits of      6 trying to negotiate a stipulation, would you      7 support, for example, an alternative? If the Board      8 required some written statement position at day      9 seven, would there be utility if the union then had      10 another four to seven days thereafter to take that      11 into account in its preparation for the hearing or      12 in the negotiation of a stipulation?</p> <p>13       MR. SHARMA: I would say that that's not      14 necessarily the case. Again, the union has a fairly      15 good idea of what it believes the issues are at the      16 time that it files a petition and is in a position      17 in many cases to respond to those. Rather, it's the      18 tactic of raising issues that are completely      19 unforeseeable, because, as is often the case, they      20 tend to be frivolous arguments that blindside the      21 union and are issues that the union is not prepared      22 to respond to.</p> <p>23       Those don't necessarily need a whole lot      24 of time to prepare for. It's just that if you had      25 notice prior to the commencement of the hearing of</p>	<p style="text-align: right;">Page 93</p> <p>1 thoroughly?</p> <p>2       MS. BUNN: I actually don't. That      3 reminds me early on when someone said, "Let's define      4 'just cause' in the contract." Sometimes it's      5 easier to have the general concept and work through      6 it that way.</p> <p>7       MR. JOHNSON: And one last quick thing.      8 On the premise that it will help the parties sort      9 through the bona fide real issues and perhaps lend      10 toward whatever other reforms we might be thinking      11 about, would you support actually asking the      12 petitioning union to come up with a statement of      13 position that more fleshes out the legal issues      14 rather than just simply the petition itself, such      15 as, for example, why the readily identifiable group      16 was chosen, what the community interest and factors      17 are that support it and why certain positions were      18 excluded?</p> <p>19       MR. SHARMA: I would say that I think for      20 many of those issues the Board has fleshed out      21 general principles that are fairly straightforward      22 and that guide on those. The structure, as I      23 understand it, is that the petition is filed, the      24 statement of position provides a response, and then      25 the union has to provide a response to those issues</p>

<p style="text-align: right;">Page 94</p> <p>1 raised in the statement of position, therefore      2 joining those issues. At that point I think that      3 you have a situation where both parties will be      4 knowledgeable enough to know why positions are taken      5 and be able to articulate their positions and that      6 the Board will be in a position to knowledgeably      7 respond to those.</p> <p>8       MR. PEARCE: We'll have to move on.      9 Thank you very much. In order to simulate your most      10 exclusive fine dining experience, we're going to      11 have a second seating, Melinda Hensel, Maury Baskin      12 and Robert Godinez. You may proceed.</p> <p>13       MS. HENSEL: My name is Melinda Hensel.      14 I'm an in-house counsel for the International Union      15 of Operating Engineers, Local 150. I've held that      16 position for about twelve years, and prior to that I      17 worked for a private firm on the union side. I'd      18 like to thank the Board very much for having me here      19 today and giving me an opportunity to present my      20 views on what I think are some very, very important      21 changes that the Board is considering making.</p> <p>22       MR. PEARCE: Ms. Hensel, can you bring      23 your mic a little closer?</p> <p>24       MS. HENSEL: I'm sorry. That's a problem      25 I routinely have. I'm very soft spoken.</p>	<p style="text-align: right;">Page 96</p> <p>1 notions when a simple statement of what each side      2 intended to present would narrow it and have it      3 finished in two days.</p> <p>4       I would say that due process is the      5 cornerstone of every legal proceeding in the United      6 States, or at least it should be. I feel that, in      7 this context, the employer not having to take a      8 position is one of the ways in which due process is      9 not served.</p> <p>10       You've heard some of my colleagues say      11 that it's incredibly difficult to prepare for a      12 hearing when you don't know what they're going to be      13 proposing. I think that from my own perspective it      14 does seem universally agreed that this Act is about      15 protecting employee rights. It's not necessarily      16 about me and it's not necessarily about      17 Mr. Employer. It's about a group of employees who      18 want to have a vote, they've expressed their intent      19 to do so by signing the authorization cards, and at      20 that point it becomes the Board's job to get that      21 petition to a vote.</p> <p>22       The dissent to the rules specifically did      23 point out that having a question concerning      24 representation is very disruptive to the workforce.      25 Indeed it is. I've worked with these people. I</p>
<p style="text-align: right;">Page 95</p> <p>1       MR. PEARCE: Aren't we all?      2       MS. HENSEL: Well, some of us.      3       (Laughter.)</p> <p>4       MS. HENSEL: This proposed rule that a      5 respondent party to a petition provide a position      6 statement on a pre-election issue is hardly some      7 radical policy shift, but it is a commonsense      8 approach to streamline and increase the efficiency      9 in the Board procedures.</p> <p>10       A requirement that parties state a      11 specific position is in line with the obligations      12 that are imposed under the Federal Rules of Civil      13 Procedure in 26(a). When you start a piece of      14 litigation you're required to identify your      15 witnesses who you have knowledge of. That gives the      16 opposing party the opportunity to investigate the      17 claims made by the opponent. We make position      18 statements before various other administrative      19 agencies, we take positions in arbitration, and      20 taking a position is not an imposition.</p> <p>21       In addition, in litigation we also file      22 pre-trial orders before we head to trial because the      23 judge wants to narrow the issues. The judge wants      24 to expedite the case. There is no reason to spend      25 twelve days litigating irrelevant and ridiculous</p>	<p style="text-align: right;">Page 97</p> <p>1 have experienced the disruption myself as part of an      2 organizing campaign. It is incredibly disruptive,      3 and therefore the Board is not serving the employees      4 that the Act is meant to serve when it allows an      5 employer to play games.</p> <p>6       Inclusion of the rule requiring the      7 position statement will allow the parties to      8 determine ahead of time if there is some genuine      9 issue that is in dispute. It's going to require a      10 party to give some serious thought before they get      11 to hearing of what it is that they're going to be      12 presenting as opposed to, "Well, I'll just get there      13 and make it up as I go," because I literally have      14 seen that situation.</p> <p>15       Another way demonstrating that the      16 written position statement can reduce delay, I had a      17 case a few years back in which the employer didn't      18 refuse to state its positions, but it vaguely said,      19 "Well, we have various reasons why the petition      20 should be dismissed." It was all based on paper.</p> <p>21       I sent a letter to the Board agent as      22 well as the employer asking for a conference ahead      23 of time, saying, "Can't we reduce the scope and      24 length of the hearing if we can't get together, and      25 I understand what your positions are, but present</p>

<p style="text-align: right;">Page 98</p> <p>1 the paper and maybe we can stipulate, and then we 2 don't have to put on a witness to say, 'Yes, indeed, 3 the settlement agreement was signed.'" We did that. 4 And guess what? I think we cut at least a day off 5 of that hearing.</p> <p>6 It didn't stop the employer from showing 7 up the day of hearing and announcing that the day 8 prior it had recognized another union, so requiring 9 the written position statement the day of hearing 10 doesn't take away the elements of surprise. Of 11 course, that is still there.</p> <p>12 Requiring the written statement will also 13 go a long way towards making it easier to deal with 14 the case handling manual prohibition against 15 harassment. When you don't know -- I'm sorry. My 16 time is up. I have just a couple of very quick 17 points, if I may.</p> <p>18 MR. PEARCE: Go ahead.</p> <p>19 MS. HENSEL: Harassment. If I don't know 20 what the issues are, of course I'm going to have to 21 subpoena everybody I possibly can because I don't 22 know who I'm going to need to rebut whatever 23 evidence it is that they choose to put on. And that 24 also goes for documents. Why would I subpoena any 25 given document that may not be relevant and I don't</p>	<p style="text-align: right;">Page 100</p> <p>1 the unit. After six days of hearing, and you can 2 imagine the record must look like this (indicating), 3 after six days of hearing, on the last day it backed 4 off on its multi-plant unit and it's back to a 5 single plant unit. That kind of wishy washy cannot 6 and should not be allowed.</p> <p>7 MR. PEARCE: Thank you.</p> <p>8 MR. JOHNSON: First of all, thanks for 9 coming. Just two quick questions. The Federal 10 Rules of Civil Procedure model and civil procedure 11 models in terms of civil litigation generally allow 12 an amendment before some pleading that is going to 13 bind a party goes into force. For example, you get 14 a free amendment as of right with your complaint in 15 many jurisdictions. What's your position on 16 allowing the employer one free amendment or an 17 amendment on one issue or two issues or three 18 issues?</p> <p>19 MS. SCHIFFER: Before you answer, that 20 was exactly what I was going to ask, but I was going 21 to ask it a little bit differently. Based on what 22 you've said, should there be a period of time to 23 change the statement of position, should there be a 24 standard, and what should it be?</p> <p>25 MS. HENSEL: Actually, I would encourage</p>
<p style="text-align: right;">Page 99</p> <p>1 know what it is that the employer is going to be 2 disputing?</p> <p>3 I would like to just give a quick example 4 of why this position statement is necessary.</p> <p>5 MR. PEARCE: If you can do it in a 6 minute.</p> <p>7 MS. HENSEL: I can do it in less than a 8 minute. Just this past week my office handled an 9 R-Case. Prior to the hearing the employer simply 10 disputed the unit, didn't agree and didn't really 11 say why. A day before the hearing he said, "Well, 12 this is a multi-plant unit, we don't agree with your 13 single plant." The union said, "Okay, fine." Or 14 I'm sorry. They backed off of the multi-plant and 15 said, "If you'll include this particular 16 classification." The union said, "Fine, that 17 classification doesn't exist at the single plant, so 18 include it, we don't care, we can bargain about it 19 later."</p> <p>20 On Monday, when the hearing started, the 21 employer renewed its multi-plant facility argument 22 and tried to include the classification that didn't 23 exist at the unit at the plant that it had already 24 agreed to, and thereafter introduced multiple issues 25 of supervisors and individuals who didn't belong in</p>	<p style="text-align: right;">Page 101</p> <p>1 the Board to consider requiring the position 2 statement come in maybe the day before the hearing. 3 I suppose, if it's coming in the day of, we're still 4 facing the idea that if they haven't previously 5 articulated what the issues are, you know, we're 6 still in that position when we show up with the 7 statement the day of.</p> <p>8 I suppose, you know, amendments -- the 9 hearing officer and the regional director have of 10 course the discretion to define the scope of the 11 hearing. And if as the evidence comes in it becomes 12 apparent that there is an issue that wasn't raised 13 in the position statement, you know, it's the 14 Board's job to make sure that an election direction 15 does conform to the law and that the unit is in fact 16 appropriate. I think the amendments come that way.</p> <p>17 The employers had a lot of time to review 18 its position prior to getting to the hearing. They 19 know what their workforce is. I think what I see 20 the waiver going to is prohibiting an employer from 21 playing these games, from changing its position from 22 day to day just to confuse the issues, confuse the 23 hearing, and add to the delay before the election 24 can be held.</p> <p>25 MR. JOHNSON: And one quick thing on the</p>

<p style="text-align: right;">Page 102</p> <p>1 heels of Nancy's great point there. What if there's      2 a day six position statement instead of day seven,      3 but day ten hearing to allow, or day eleven or day      4 twelve or whatever we end up deciding on, so that      5 the position statement actually rolls out in some      6 intermediate area that allows the parties to talk      7 about a stipulated election agreement? What's your      8 thoughts on that?</p> <p>9       MS. HENSEL: At the risk of upsetting      10 anybody here, the two regions I primarily practice      11 in are 13 and 25, and we have a pretty hard and fast      12 ten day rule in both regions. I would not actually      13 object to that, because I think it would be more      14 beneficial to have that position to have a short      15 opportunity to prepare for it. As my colleague      16 said, we don't need four days, we don't need seven      17 days, but the ten day rule I haven't had a problem      18 with. And when they say only for good cause are      19 extensions granted, they mean it. I've seen people      20 re-juggle their schedules in Herculean ways in order      21 to accommodate these hearings, and I'm not opposed      22 to a ten day.</p> <p>23       MR. JOHNSON: Thank you.</p> <p>24       MR. PEARCE: Just one question. Have you      25 had any experience with having to obtain witnesses</p>	<p style="text-align: right;">Page 104</p> <p>1 discussion brings out is the interrelation among the      2 different provisions. Much of what I said      3 previously, and I don't want to repeat it, about the      4 difficulties of the time limits, applies to this      5 aspect of the statement of position, and it also      6 goes to this notion about doing the statement of      7 position earlier than the hearing itself.</p> <p>8       The concerns that we have, among many,      9 about this: doing it in writing is a concern because      10 that has time costs, and committing to it before the      11 hearing is more challenging, particularly if it's      12 locked in stone. The earlier question was whether      13 it's the writing that people object to or the      14 waiver, and the answer is, "Yes, both."</p> <p>15       What is it about being locked in and why?      16 Because the hearing is about the union's petition.      17 The union knows what it wants from the get-go, and      18 the employer does not. There have been several      19 references to how the employer knows its workforce.      20 First, that's not true many times, but it also does      21 not know how that relates to the testimony that is      22 going to be brought in at the hearing. And it is,      23 we would submit, unfair to require the employers in      24 all instances, as this does, to be committed to a      25 position that may in fact change once testimony</p>
<p style="text-align: right;">Page 103</p> <p>1 in response to a position that the employer has      2 taken at a hearing?</p> <p>3       MS. HENSEL: That has occurred. It's      4 usually in the context of the employer not wishing      5 to state its position prior to getting to hearing.      6 There has been at least once where I know I      7 subpoenaed the entire bargaining unit, and of course      8 the region raised a question. And I said, "Fine,      9 I'm willing to stagger how these people are going to      10 appear, but I need to have them on deck so that if I      11 need to rebut something I can do it."</p> <p>12       That raises the cost for the union, too.      13 I can't serve a subpoena without a check. Right?      14 And if I don't end up calling the witness, I don't      15 go back to that witness and say, "Give me my \$50      16 back, please." These tactics unnecessarily raise      17 the cost and the length and the time.</p> <p>18       MR. PEARCE: Thank you.</p> <p>19       MR. BASKIN: Thank you, and thank you for      20 allowing me to appear a second time. I'm still      21 representing Associated Builders and Contractors.      22 We're still opposed to this rule in its entirety.      23 Nothing in the last hour has changed that.</p> <p>24       (Laughter.)</p> <p>25       MR. BASKIN: But one thing that this</p>	<p style="text-align: right;">Page 105</p> <p>1 comes in that is presented by the union.</p> <p>2       And that's why some employers are saying      3 they don't want to take a position. They're not      4 gaming the system. They are not sure what the      5 position is. They're not sure what the evidence      6 will show because the hearing hasn't begun yet and      7 because there's been no discovery. That's one      8 reason why the analogies to the Federal Rules of      9 Civil Procedure don't hold up at all. We have said      10 in our comments why Rule 26(a) does not apply.</p> <p>11       In general, the Federal Rules provide for      12 a lengthy period for a first time to answer, 60 to      13 90 days in some instances just to answer. Then you      14 go into the discovery process. It takes months      15 before you reach the trial. It's a totally      16 different environment than what we're talking about      17 here, where the employer is largely in the dark,      18 other than that they have this one piece of paper      19 that says the union has a petition and wants to go      20 forward to an election.</p> <p>21       I think it is significant that when we      22 had the earlier statement by Ms. Censer -- and      23 she'll be back and will have the last word, and I      24 don't think I'm misquoting her -- but when the      25 chairman asked, "If you don't know, is it harder for</p>

<p style="text-align: right;">Page 106</p> <p>1 the unions to prepare," she said that actually it's      2 still fairly easy because she assumes or she knows      3 the laundry list of issues that the employer could      4 raise, and so that does not prejudice the union's      5 position. In fairness, the gentleman from the      6 AFL-CIO seemed to take a different view, but we had      7 some disagreement on the union side about that.      8       In truth, they do know what the potential      9 issues are, and they also can in effect punish the      10 employer who doesn't come forward with its position,      11 as was suggested earlier, by subpoenas and going      12 after the whole laundry list, and so it becomes to      13 the employer's benefit if it chooses to give more      14 information.</p> <p>15       Going back to the issue of are the      16 employers playing games, there is a strong      17 disincentive to having a hearing just for a      18 hearing's sake. It costs them money to have people      19 like me and other lawyers to go through this process      20 when there is no point to it. That's why the      21 statistics show that it's only a handful of      22 elections that are contested in the first place and      23 that there's only a handful of that handful in which      24 the sort of games that are being referred to are      25 supposedly being played; that is, as that word is</p>	<p style="text-align: right;">Page 108</p> <p>1 questions.      2       MR. MISCIMARRA: I may be misremembering,      3 but I think you said before that some of our cases      4 approach these cases in a peculiar way, and I just      5 wanted you to know that I'm not offended by that      6 characterization.      7       (Laughter.)      8       MR. MISCIMARRA: Here's one question I      9 have. It strikes me that there is some utility in      10 having an articulation of the employer's position      11 because the union may in fact stipulate to it, but      12 could you think of a reason why there is any utility      13 in having an employer, if there is a position      14 statement requirement, putting aside the question of      15 waiver or preclusion and the union chooses to      16 stipulate to the relevant issues, could you think of      17 any reason why the Board should permit the employer      18 to put on evidence anyway? Wouldn't that be      19 duplicative of an agreement the parties were already      20 willing to enter into?      21       MR. BASKIN: I may be misunderstanding      22 the question, because if they have reached a      23 stipulation how would the hearing --      24       MR. MISCIMARRA: In substance, if the      25 union stipulates to a particular issue that's been</p>
<p style="text-align: right;">Page 107</p> <p>1 now defined, not being sure what your position is      2 and maybe changing that position midstream, which,      3 as I've suggested earlier, are not really games      4 necessarily, but simply going with what the evidence      5 shows.      6       So we are concerned about committing      7 employers in writing to these position statements,      8 and even worse to do it at an earlier time, because      9 the employers don't have time to come up with what      10 all the different positions should be. And to lock      11 them in we think is unfair and violates due process,      12 and we think that you should withdraw this proposal.      13       And I did not want to leave, and I'm      14 still on the yellow light, the employer lists. We      15 haven't talked about the games that will be played      16 with the required submission of these employer lists      17 at a much earlier time than previously. The unions      18 will get ahold of the list, including under your      19 rule proposal, and list the people who they haven't      20 yet petitioned for. They can, if they choose,      21 withdraw the petition now that they've received      22 information that they never had a chance to get and      23 start going after all of these employees whose names      24 they did not know. What is to prevent that from      25 happening? I'll stop there and answer any</p>	<p style="text-align: right;">Page 109</p> <p>1 identified in advance of the hearing is there any      2 utility in then having evidence presented at the      3 hearing as to substantive issues the parties are in      4 agreement about?      5       MR. BASKIN: I'm not confident enough in      6 the question -- I'm just trying to think through the      7 facts. "Never say never" is about the best I can do      8 for you on that.      9       MR. MISCIMARRA: You've got a good      10 answer. It's just a bad question.      11       MR. JOHNSON: This may be an even less      12 understandable question. I did read your written      13 comments, and there were a number of points in there      14 made about the particular characteristics of the      15 construction industry and on how Specialty      16 Healthcare is going to be exacerbated and that it's      17 more difficult for folks in the construction      18 industry to deal with a seven day deadline or      19 statement of position.      20       What I wanted to know, and you mentioned      21 the sporadic workforce -- and we've already covered      22 that and we recognized that a long time ago -- what      23 else was there that was on your mind there?      24       MR. BASKIN: Well, you have 8(f) type      25 situations. You have the disappearing units. You</p>

<p style="text-align: right;">Page 110</p> <p>1 have expanding units that are unique to 2 construction. You have craft units, multi-craft 3 units, people going back and forth.</p> <p>4 MR. JOHNSON: But what is uniquely 5 difficult in terms of preparing for a case with 6 those issues?</p> <p>7 MR. BASKIN: Well, the biggest difficulty 8 for construction contractors in my experience is the 9 people that are out in the field, those people who 10 are called field employees that are in many 11 different places and who are less accessible even to 12 the employer to know what the facts on the ground 13 are. That's why I've heard it said a couple of 14 times today that employers should just educate 15 themselves sooner.</p> <p>16 But employers are actually trying to run 17 a business, especially in the construction industry 18 with very narrow profit margins. They don't have 19 the time or resources to spend educating themselves 20 in the nuances of labor law, and so understandably 21 by and large they don't until lightning strikes and 22 the union petition arrives and now they have to.</p> <p>23 But the notion that because they know in 24 some vague way that union organizing is going on or 25 even specifically that they should do all of this --</p>	<p style="text-align: right;">Page 112</p> <p>1 a petition for a group of firefighters, and the 2 employer claimed that the firefighters were security 3 guards and therefore should be excluded from the 4 Act. It was my duty to bring this to the 5 firefighters' attention, and many of them were 6 frustrated. They all take pride in their 7 firefighter duties, and they all knew that the 8 employer had a separate department dedicated to 9 security guards. They wore different uniforms. 10 Firefighters knew the security guards, but they did 11 not perform any of the security guard functions. 12 During this process I lost contact with 13 some of the firefighters. We started with a 14 majority of support, and I believe this claim 15 actually took some wind out of the sails and the 16 momentum of the election process. 17 With that being said, at the hearing the 18 employer brought forth several witnesses, none of 19 whom could substantiate the claims that the 20 firefighters were security guards and that they 21 performed any security guard functions or policing 22 duties, and ultimately the regional director ruled 23 that the firefighters were not guards. Again, this 24 brought forth frustration with the firefighters. 25 They just couldn't believe it.</p>
<p style="text-align: right;">Page 111</p> <p>1 that they should go to law school, in effect, and be 2 ready to identify all of the issues that could be 3 affecting their workplace, I can only say that it's 4 a very small percentage of employers who think that 5 that is a valuable use of their time until they 6 absolutely have to, because it's expensive in time 7 as well as resources and costs of attorneys and 8 things like that.</p> <p>9 MR. PEARCE: Thank you, Mr. Baskin. R. 10 Godinez.</p> <p>11 MR. GODINEZ: Good morning, Mr. Chairman, 12 and members of the Board. I just want to begin by 13 saying that it's an honor and that I'm very humbled 14 to be here amongst you all and everybody in this 15 room.</p> <p>16 I'm here in support of the Board adopting 17 many of the rules, particularly the rule requiring a 18 written statement of position. As an organizer I 19 have been able to see firsthand how an employer 20 making an argument without merit can cause disarray 21 and frustration for the workers seeking to organize. 22 A case in point -- actually, first of all, my name 23 is Bobby Godinez, and I'm an organizer for the 24 International Brotherhood of Boilermakers. 25 Going back to the case in point, we filed</p>	<p style="text-align: right;">Page 113</p> <p>1 I strongly believe that the rule for a 2 written statement of position could have been a 3 buffer, that the Board could have decided that the 4 employer did not have substantial evidence to 5 proceed with this claim during the hearing, and that 6 that in theory could have actually kept the momentum 7 and kept the firefighters' willingness to go forward 8 and organize freely. 9 In closing, I strongly support the rule 10 for a written statement of position in advance of a 11 pre-election hearing specifically to safeguard the 12 rights for workers to organize freely and fairly and 13 to participate in elections. 14 MR. PEARCE: As an organizer, can you 15 describe your experience, if any, with respect to 16 getting employees to testify at a hearing once you 17 know what the issues are? 18 MR. GODINEZ: It's very difficult to get 19 the employees involved and come to a hearing. 20 However, during that process -- once again, the 21 firefighters took pride in their duties. A few of 22 them really took responsibility and said, "No, I'm 23 not going to let this happen, it's come too far, I'm 24 willing to do whatever it takes," and they came 25 forward on the union's behalf and answered</p>

<p style="text-align: right;">Page 114</p> <p>1 testimony.</p> <p>2 Basically, it was a frivolous argument on 3 the employer's part. They did not perform any 4 security guard functions. Again, it's very 5 difficult, to answer your question, to get workers 6 to come forward in a hearing setting.</p> <p>7 MR. PEARCE: Do you recall how long it 8 took between the petition and the actual election 9 that the time went?</p> <p>10 MR. GODINEZ: For that particular 11 election it was one year.</p> <p>12 MR. MISCIMARRA: Actually, I had a 13 follow-up question which was similar. Do you recall 14 what the time was from the filing of the petition in 15 the firefighter case and the start of the hearing?</p> <p>16 MR. GODINEZ: I'm sorry. I don't know 17 that. I can't give you a truthful answer on that.</p> <p>18 MR. JOHNSON: First, thanks for coming. 19 Second of all, just so I understand your point of 20 view here being on the ground as an organizer, is it 21 basically that if an employer takes a frivolous 22 position employees should know about it before the 23 hearing?</p> <p>24 MR. GODINEZ: In this particular case 25 that I'm testifying on, what it did was it took the</p>	<p style="text-align: right;">Page 116</p> <p>1 respond to a union's petition in seven days. 2 Enforcing them to do so would violate their due 3 process rights and free speech. As small and medium 4 size business owners, many if not most NGA members 5 are not equipped with legal staff, and it takes time 6 to locate, retain and consult appropriate labor 7 counsel on the significant business and operational 8 issues posed by an RC petition.</p> <p>9 As we've heard today, labor law is 10 complex, and the changes to the rules that the Board 11 proposes complicate compliance even more 12 significantly. For most grocery store owners, they 13 are the human resources department, they are the 14 compliance department, and they are the legal 15 counsel.</p> <p>16 The proposed rule would require grocers 17 to immediately stop running their businesses, 18 disrupting customer service and food delivery, and 19 instead force them to focus on analyzing how to 20 respond to the union's petition by week's end.</p> <p>21 Every employer has a protected right 22 under the National Labor Relations Act to 23 communicate with its employees about the union's 24 petition and to raise questions concerning 25 representation to the Board prior to an election.</p>
<p style="text-align: right;">Page 115</p> <p>1 wind out of the sails of the campaign. If it's a 2 frivolous issue and the employees never learn about 3 it and it was put out before the hearing, there 4 would be no need for testimony. There would be no 5 need for a hearing. I think the campaign would have 6 continued with the momentum that it had, with a 7 majority of support, and that the workers would have 8 had a better opportunity to have voted freely and 9 without bias.</p> <p>10 MR. JOHNSON: Thank you.</p> <p>11 MR. PEARCE: Thank you all very much.</p> <p>12 The next seating is Kara Maciel, Caren Censer and 13 Homer Deakins. You may proceed.</p> <p>14 MS. MACIEL: Good morning. Thank you, 15 Chairman Pearce, and distinguished Board members for 16 this opportunity to speak on the dramatic changes 17 you've proposed to the current representation-case 18 procedure. My name is Carol Maciel, from the law 19 firm of Epstein, Becker &amp; Green. I represent the 20 National Grocers Association, which is the national 21 trade association representing the retail and 22 wholesale grocers that comprise the independent 23 sector of the food and distribution industry.</p> <p>24 NGA opposes the proposed rule because 25 small and medium sized employers are not armed to</p>	<p style="text-align: right;">Page 117</p> <p>1 Limiting the employer's time to investigate, analyze 2 and raise issues to seven days would significantly 3 hamper and ultimately silence an employer's right to 4 respond to the petition.</p> <p>5 NGA strongly supports the rights of 6 employees to make an informed decision on whether or 7 not to be represented by a union, and the only way 8 for employees to make a free choice is by having an 9 election process and procedure that provides an 10 opportunity to hear the views of both the union and 11 the employer.</p> <p>12 The reality is that employers are at a 13 serious information disadvantage to unions when 14 petitions are filed. Unions are in sole control 15 over when they file a petition to trigger that seven 16 day clock. I have heard testimony from union 17 organizers in Board proceedings that they take ample 18 time to stealthily prepare for an organizing 19 campaign for months before filing a petition. Many 20 times it is not until that petition is filed that an 21 employer has an opportunity to communicate with its 22 employees about the petition.</p> <p>23 Unless employers have adequate time to 24 consult with labor counsel and evaluate the 25 significant issues raised by a petition and prepare</p>

<p style="text-align: right;">Page 118</p> <p>1 a response, employees will not be supplied with 2 balanced information prior to making a decision as 3 to unionization.</p> <p>4        Given the realities of NGA's members, 5 they would face difficulties simply investigating 6 the factual issues which are increasingly discrete 7 and that vary by each type of employer, much less 8 ensuring that every legal argument is properly 9 raised and thoroughly raised within seven days.</p> <p>10       The majority asserts the proposed rule is 11 intended to avoid needless delay. Requiring 12 employers to put every possible issue in a position 13 statement or be subject to waiver will actually 14 increase the adversarial nature of the proceeding 15 and make it less likely that grocers will 16 voluntarily resolve disputes early in the process.</p> <p>17       Under the Board's current procedure, as 18 we've all heard many times today, approximately 90 19 percent of all elections are resolved by stipulation 20 or agreement. Fearing that they may waive issues 21 not set forth in writing, grocers may be hesitant to 22 enter into a stipulated election and will, instead, 23 raise every conceivable issue prior to a hearing. 24 Thus, the proposal may actually promote the 25 adversarial process and frustrate rather than foster</p>	<p style="text-align: right;">Page 120</p> <p>1 consulting with counsel and then also spending time 2 negotiating potentially a stipulation, as most of 3 the time happens, I believe that time is better 4 spent leading up to an election than focusing on a 5 written position statement setting forth written 6 legal arguments.</p> <p>7       MS. SCHIFFER: So you think that the 8 processes are not similar.</p> <p>9       MS. MACIEL: I believe the way that 10 pre-election hearings work now are successful, with 11 over 90 percent reaching stipulated elections. I 12 think if there was a requirement of a written 13 position statement, that would take the focus away 14 from reaching those stipulated election and, 15 instead, move towards a litigation posture where 16 people are spending time with their legal counsel 17 developing written position statements in advance of 18 a hearing rather than trying to negotiate an 19 agreement.</p> <p>20       MS. SCHIFFER: And are there particular 21 issues that would be required in the statement of 22 position that the employers would not be looking at 23 anyway?</p> <p>24       MS. MACIEL: Well, I think it's a lot of 25 information they're looking at at any given time.</p>
<p style="text-align: right;">Page 119</p> <p>1 the friendly adjustment of industrial dispute that 2 lies at the heart of the Act. Due process mandates 3 thoughtful deliberation and thorough communication 4 in response to an RC petition, but this is eroded by 5 the proposed rule.</p> <p>6        I appreciate you allowing me to share the 7 National Grocers Association's views. NGA believes 8 the rule, including the requirement to include every 9 possible legal argument in a written a position 10 statement within seven days or risk a waiver would 11 limit employer free speech during a pre-election 12 period and prevent employees from receiving balanced 13 information in order to make an informed decision on 14 how to vote.</p> <p>15       Accordingly, NGA urges the Board to 16 withdraw the proposal. Thank you.</p> <p>17       MS. SCHIFFER: Thank you for conveying 18 the views. I appreciate that. I have a question 19 about the issues that you raised in terms of 20 complying with the written statement. Would it make 21 a difference if the time period was different?</p> <p>22       MS. MACIEL: Respectfully, the fact that 23 the grocers in small and medium sized businesses 24 need to be focused on responding to the petition, 25 evaluating facts, pulling things together,</p>	<p style="text-align: right;">Page 121</p> <p>1 Every employer is different, every worksite is 2 different, and so you can't really have a "one size 3 fits all."</p> <p>4       They're looking at these issues not in a 5 vacuum, but as the workforce is adjusted and what 6 type of petition has been filed and what the union 7 is contemplating. And facts change. As we've heard 8 many people testify earlier today, facts change as 9 the process goes on, more information is learned, 10 and hopefully there is an opportunity to reach an 11 agreement, but if there is not there is a right to 12 raise evidence at a hearing. And at that point 13 issues may change and develop as well. And so 14 forcing an employer to submit all of its positions 15 in writing without the opportunity to change it 16 later as evidence may develop at a hearing really 17 prevents the parties from reaching agreement and/or 18 focusing their attention elsewhere.</p> <p>19       MR. MISCIMARRA: Ms. Maciel, I have a 20 grocery store question. I spend a fair amount of 21 time in grocery stores because my children insist on 22 eating almost every day. Here's the question: Are 23 there grocery stores, and let's say smaller stores, 24 where the owners or the supervisors when times are 25 busy actually do cashier worker or like on</p>

<p style="text-align: right;">Page 122</p> <p>1 Thanksgiving when things are busy do some stocking 2 of shelves?</p> <p>3 MS. MACIEL: Absolutely. Many of NGA's 4 members are small and medium size businesses where 5 the owners wear multiple hats. These are sometimes 6 single store operators. And so they are. They're 7 not only running their business, but they're filling 8 in when people call in sick. This is often a 9 seasonal workforce because of the variety of changes 10 in the industry and the scheduling, so the owners 11 and the senior management do wear a number of 12 different hats.</p> <p>13 MR. MISCIMARRA: Excluding the owners, 14 like if the supervisors are doing cashier work and 15 if some or all of them actually end up being 16 considered unit employees that are voting in the 17 election can the employer lawfully rely on those 18 people to provide information used in preparing the 19 written position statement if one were required?</p> <p>20 MS. MACIEL: I think it creates a lot of 21 confusion as to who is eligible and not eligible to 22 be included in the unit. I know that's subject to 23 further panels, but it does create a lot of 24 confusion as to what information grocers, small 25 businesses and medium size businesses, can rely upon</p>	<p style="text-align: right;">Page 124</p> <p>1 day or two before it gets in the right hands. And 2 they're not armed --</p> <p>3 MR. PEARCE: So the material might be in 4 front of them, but they may not have time to look at 5 it.</p> <p>6 MS. MACIEL: It varies. It absolutely 7 varies. It's a widespread membership. But you're 8 right. That's the realities of their businesses.</p> <p>9 MR. PEARCE: Thank you very much. Ms. 10 Sencer.</p> <p>11 MS. SENCER: Thanks again for having me. 12 I'm going to start on some of the points that 13 haven't talked about regarding the statement of 14 position.</p> <p>15 MR. PEARCE: And that's a good segue. 16 I'd like everybody to be reminded that if we have 17 multiple seatings on the same issue and a point has 18 been made, it's not necessary to repeat it. It 19 might be more valuable to go into stuff we haven't 20 heard about. Thank you.</p> <p>21 MS. SENCER: I'm going to start with the 22 proposal to include potential dates and times for 23 the election on the statement of position. It is 24 really frustrating when you go back to a bargaining 25 unit and say, "We have your decision and direction</p>
<p style="text-align: right;">Page 123</p> <p>1 in developing that. That's part of the challenges 2 that they face as small businesses in preparing for 3 the hearing.</p> <p>4 MR. PEARCE: The National Grocers 5 Association, do they have a website?</p> <p>6 MS. MACIEL: Yes, they do. It's 7 NationalGrocers.org.</p> <p>8 MR. PEARCE: And I haven't looked at the 9 website. Does the website contain information with 10 respect to labor relations and employment issues?</p> <p>11 MS. MACIEL: The trade association does 12 an excellent job of trying to educate its members on 13 their rights and responsibilities under federal law 14 and under a whole host of different requirements.</p> <p>15 The realities of the situation are, 16 however, that these people are focused on running 17 their businesses. And despite the widespread 18 education efforts, a lot of times these people 19 aren't able or don't have the time or the money to 20 participate and be educated the way they should 21 prior to an election campaign.</p> <p>22 And I think as Mr. Baskin said earlier, 23 the reality is they don't educate themselves about 24 labor law until the lightning strikes and the 25 petition is sitting on their desks, which may take a</p>	<p style="text-align: right;">Page 125</p> <p>1 of election, and now we'll start the negotiation 2 process about when your election is actually going 3 to be held." Identifying up front not necessarily 4 the actual dates but the days of the week and times 5 based on shifts at the get-go eliminates one of the 6 choke points later on in getting to an election in a 7 timely manner regardless of whether or not there is 8 a hearing.</p> <p>9 I would also say the same thing about the 10 list by requiring the employer to disclose the 11 classifications or job titles that are used by the 12 employer. Frequently we have a problem where we 13 talk past each other. The employee identifies 14 themselves as a technician. The employer 15 identifying them as an associate. We say, 16 "Technicians are in" and they say, "We have no 17 technicians, we only have associates." And we might 18 actually not have a disagreement, but we're using 19 different language to talk about the same points. 20 So simply having the classifications used by the 21 employer would allow for the easier resolution of 22 issues because everyone would know what they were 23 talking about, and we haven't really had a chance to 24 talk to those two before.</p> <p>25 I want to go back to the ability of the</p>

<p style="text-align: right;">Page 126</p> <p>1 statement of position to limit the issues that are      2 going to be raised at hearing. It allows the union      3 to tailor the witnesses that they want to bring      4 forward. The union side does recognize that it can      5 be a hardship on an employer when the union      6 subpoenas the vast majority of employees in the      7 facility, and I'm saying in the facility, not just      8 the proposed bargaining unit, because if I don't      9 know in advance that the employer is going to limit      10 their opposition or their proposals or their      11 position to whatever it may be, I have to come      12 prepared for everything.</p> <p>13       And yes, I said I can easily prepare.      14 I've been doing this a while and I've been to a lot      15 of cases, and I have a lot of support back in my      16 office that makes sure that I have that information      17 at my fingertips. But you do have to prepare. I'm      18 over-preparing when I wind up having to prepare for      19 positions that are not being taken by the employer,      20 and we're over-preparing witnesses and taking more      21 people out of the workforce and more people out of      22 the employer's facility on a daily basis than need      23 to be because we don't know the positions that are      24 going to be taken in advance.</p> <p>25       And I actually think that that's a</p>	<p style="text-align: right;">Page 128</p> <p>1 brief.      2       I see the statement of position as      3 providing a similar or analogous kind of information      4 as the step process in the grievance procedure      5 because it's putting all of those issues out there.      6 They might not all be important, they might not all      7 be raised and some of them might be resolved during      8 hearing, but at least you have at the outset what      9 the potential universe of issues are.</p> <p>10       And that goes to what my final point is.      11 Last month I testified at a hearing about the NLRB's      12 ambush election rules, as they like to call them. I      13 think the current system creates its own kind of      14 ambush where the union is walking into a hearing      15 where it does not know the issues that are going to      16 be raised, and that's easy enough to resolve. That      17 may depend and may require some tweaking of the      18 waiver or the date that the statement of position      19 needs to be provided by, but having something is      20 very helpful.</p> <p>21       As e-mail communication has increased      22 we've seen more of it in advance, and it has      23 actually become less of an ambush situation,      24 although it has not been eliminated. Board agents      25 regularly contact me, and opposing counsel, asking</p>
<p style="text-align: right;">Page 127</p> <p>1 lose/lose. It's an advantage for an employer for us      2 to only pull out from their facility the employees      3 who may actually have testimony relevant to the      4 issue at hand. It would be less disruptive for both      5 the union and the employer for everyone to be      6 focused on the witnesses who actually have some      7 information to provide on the matter.</p> <p>8       I'd like to also talk about how this      9 dovetails into the idea of oral closing arguments,      10 which I'm going to be on a panel about later. If      11 there were a position statement in advance, for the      12 employer it acts as an outline to their oral closing      13 argument. For the union it acts as a guidepost as      14 to what they need to be prepared for in their oral      15 closing argument. And that, again, allows for both      16 sides to do preparation and be properly prepared to      17 address those issues in particular.</p> <p>18       In a slightly similar kind of situation,      19 I do a lot of as well, and under some contracts we      20 only do oral closings. Both management and union      21 have committed that, in order to have the process      22 resolved on a faster basis, we are only going to do      23 oral closing. The step process of the grievance      24 procedure allows both sides to come in prepared to      25 argue the case in arbitration and then the closing</p>	<p style="text-align: right;">Page 129</p> <p>1 about particular positions by e-mail, if the      2 employer is committing in writing in advance of the      3 hearing to particular positions via their      4 communications Board agents which the union is then      5 copied on. I think that's been helpful in trying to      6 focus on what a hearing is actually about and in      7 bringing the parties closer together for      8 stipulation. Anything that we can do to move that      9 process along has value in the system. Thank you.</p> <p>10       MR. JOHNSON: I have one quick follow-up.      11 Obviously the witnesses aren't supposed to refer to      12 each other too much, so I apologize for the nature      13 of this question. But assuming that one might have      14 some sympathy for the plight the smaller employer      15 who actually doesn't know about any of this stuff up      16 front, what's your view on having some kind of      17 variable deadline set that applies to those folks?</p> <p>18       For example, in Board litigation we have      19 the Equal Access to Justice Act, so if there are      20 small parties that essentially fall victim to our      21 procedures and they win, then they can get      22 reimbursement. What about some quasi EI job      23 deadline variable proposal?</p> <p>24       MS. SENCER: I haven't thought about      25 that, but I did see in the proposed rules that there</p>

<p style="text-align: right;">Page 130</p> <p>1 is the option of an employer getting assistance from 2 the Board in filling out the statement of position. 3 I don't see any reason why we should limit that to 4 the day of hearing and therefore eliminate that 5 problem by giving them that access as early as they 6 want it.</p> <p>7       MR. JOHNSON: But the hearing officer is 8 neutral and is not really going to be a zealous 9 advocate for whatever the employer's position might 10 be. You would agree with me on that. Right?</p> <p>11      MS. SENCER: Yes.</p> <p>12      MS. SCHIFFER: This e-mail process that 13 you described, the e-mails, do they contain issues 14 that are the ones that would be the in the statement 15 of position? Is that your experience?</p> <p>16      MS. SENCER: Some of them, yes. 17 Sometimes it's as simple as, "Well, this is what we 18 call those people." Sometimes we're taking the 19 position that this is an appropriate community with 20 each other but not with the one you're seeking to go 21 into. Sometimes the e-mail will say, "Well, we 22 think that one of those people might be a 23 supervisor." And so these e-mail chains do in fact 24 get to some of the information that's in the 25 statement of position. But the use of e-mail is</p>	<p style="text-align: right;">Page 132</p> <p>1 arbitration, because we have many companies and 2 unions, you know, nearly 80 years of history or 3 more, dealing with kind of a generally worded 4 grievance that provides a roadmap for the parties in 5 grievance handling and arbitration.</p> <p>6       So I'm not trying to lock you into this 7 position, but if we were to adopt a written 8 statement of position process that was flexible, 9 similar to the role played by the written grievants 10 in most grievance arbitration situations, would you 11 agree that that would provide some reasonable 12 measure of improvement over the present situation in 13 comparison to what we have now?</p> <p>14      MS. SENCER: Yes. I would think that 15 just about anything that has the parties put the 16 position out there and that gets some of these 17 general facts out there so that everyone's playing 18 from the same information would be an improvement 19 over what we have now.</p> <p>20      MR. PEARCE: Thank you. Mr. Deakins.</p> <p>21      MR. DEAKINS: Mr. Chairman and members of 22 the Board, my name is Homer Deakins, and I am 23 appearing today on behalf of COLLE, which is the 24 Council on Labor Law Equality. It is a trade 25 association consisting of chief labor relations</p>
<p style="text-align: right;">Page 131</p> <p>1 dependent on which Board agent is going to be 2 processing the R-Cases in a particular region at any 3 given time and the willingness of the other party to 4 engage in that process.</p> <p>5       MS. SCHIFFER: But the employers are in 6 fact taking positions before the hearing.</p> <p>7       MS. SENCER: Yes, in some cases.</p> <p>8       MR. PEARCE: Just following on that, what 9 has been your position with respect to the employer 10 backing out of that position once those e-mails have 11 been sent?</p> <p>12      MS. SENCER: They generally tend not to, 13 mainly because then I make a big deal of it. I 14 think that they're very careful in the positions 15 that they take in e-mail to the Board, because the 16 Board I think -- the regions frown upon it also when 17 they then go into the hearing room and frequently 18 the person working the R-Cases is also serving as 19 the hearing officer that day, although they might 20 not be the reader of the record or the writer of the 21 decision, and they will ask them, "Is this position 22 still held," and most of the time I find that they 23 generally do.</p> <p>24      MR. MISCMARRA: I want to compliment you 25 on your analogy to the step process in grievance</p>	<p style="text-align: right;">Page 133</p> <p>1 executives from Fortune 500 companies.</p> <p>2       With respect to this particular question, 3 the written statement of position, I ask what I 4 think is obvious: Why is it that we are trying to 5 fix something that is not broken?</p> <p>6       I have been practicing law before the 7 Board for over 50 years. When I first started 8 practicing in R-Case hearings the record was sent 9 directly to the Board at the close of the hearing. 10 The average time from the petition to the election 11 was 82 days. In 2010 the average time between 12 petition and election was 31 days. And it is 13 incredible to me that in more than 90 percent of 14 cases elections occur as a result of the parties 15 consenting to the terms of the election, eliminating 16 the need for any hearing. The Board's R-Case 17 procedures are working better today than ever 18 before, and this is happening without any rulemaking 19 changes.</p> <p>20      The proposed rule requires that the 21 employer provide a detailed and comprehensive 22 statement of position within seven days or less. 23 This is especially egregious for small employers who 24 must first go out and hire a lawyer or hire a 25 consultant and educate its management on the whole</p>

<p style="text-align: right;">Page 134</p> <p>1 process.</p> <p>2       The rule says that any issue not formally 3 addressed in the statement of position will be 4 waived, and the employer will be precluded from 5 introducing any evidence or cross-examining 6 witnesses. So the statement of position not only 7 presents a substantial burden, but it also carries 8 serious consequences.</p> <p>9       Is this better than informal discussions 10 between the hearing officer and the union and the 11 employer? My experience has been that issues come 12 up through these informal discussions and during 13 hearings that the parties never thought of, and the 14 parties work those issues out without any formality. 15 Open discussions without penalties usually result in 16 consents.</p> <p>17       By imposing waivers the Board is 18 encouraging employers to be more inclined to include 19 all arguments and all positions versus trying to 20 work out issues. The Board is forcing employers to 21 focus on protecting and preserving their rights, 22 dotting all the i's and crossing all the t's rather 23 than working out an election agreement. In seven 24 days or less you cannot do both. Under the Board's 25 proposed requirements for a burdensome statement of</p>	<p style="text-align: right;">Page 136</p> <p>1 handled after the decision and direction of election 2 without any delay. Why do we have to put these 3 things ahead of the hearing?</p> <p>4       Some of the information that's being 5 required in the statement of position is not 6 information that I as a lawyer would gather before 7 the hearing. I don't need to know the names of all 8 the employees in the unit. I don't need to know the 9 date of the election and where the polling places 10 are going to be before I go to a hearing. That is 11 information that I don't need that would be included 12 in a statement of position before the hearing.</p> <p>13       Assume an employer acts in good faith in 14 not including certain information in the statement 15 of position. Is the statement of position a 16 straitjacket, or would it be fairer to say that the 17 employer would be permitted to make amendments to 18 the statement unless there was an absence of good 19 faith involved?</p> <p>20       MR. PEARCE: You're out of time. Would 21 you like some more time?</p> <p>22       MR. DEAKINS: Thank you. What assurances 23 do we have that confidential information furnished 24 in the statement will be held in confidence? The 25 rule provides no such assurance.</p>
<p style="text-align: right;">Page 135</p> <p>1 position I predict that conducting 90 percent of 2 elections based on consent will become history.</p> <p>3       On much of the information required I ask 4 the question: Do we really need the information now? 5 The employer should not be required to identify and 6 concede the appropriateness of the unit before 7 hearing any testimony that's been taken at the 8 hearing, especially in the face of the new standard 9 for unit appropriateness in Specialty Healthcare.</p> <p>10       The proposed rules require the employer 11 to submit the names of all employees in the petition 12 for unit to all the other parties and a list to the 13 regional office which contains home addresses, 14 e-mail addresses and telephone numbers.</p> <p>15       Why do the parties need names? Issues of 16 eligibility are determined on the basis of job 17 classification and not names. Why must the employer 18 be burdened with providing even more details to the 19 region which have nothing to do with eligibility?</p> <p>20 Can't these things wait until the Excelsior list is 21 filed?</p> <p>22       The rule imposes requirements such as 23 stating a position on the polling places, the times 24 for the election and so on before the unit has even 25 been determined. These issues are now easily</p>	<p style="text-align: right;">Page 137</p> <p>1       The requirement of a statement of 2 position is one of the most burdensome requirements 3 in the proposed rule. In 2011, when this same 4 proposal was advanced, the Board wisely determined 5 to leave that proposal out of the final rule, and I 6 would urge the Board to do the same thing in this 7 case. Thank you.</p> <p>8       MR. PEARCE: Mr. Deakins, it's good to 9 see you again.</p> <p>10       MR. DEAKINS: Thank you very much.</p> <p>11       MR. PEARCE: Isn't it the case that under 12 current practice the employer supplies to the Board 13 a list of names and classifications in advance of 14 the Excelsior list so that the Board can 15 administratively determine whether or not the 16 showing of interest is in compliance with the 17 standards?</p> <p>18       MR. DEAKINS: They may or may not.</p> <p>19       MR. PEARCE: I don't understand.</p> <p>20       MR. DEAKINS: As I understand it, it is 21 the option of the employer to submit such a list to 22 the Board to check the showing of interest, and in 23 many instances that is not done. I mean, if I've 24 had an election campaign going on for two years in a 25 unit of 2,000 employees I may very well not take the</p>

<p style="text-align: right;">Page 138</p> <p>1 option of checking the showing of interest because I 2 probably have a pretty good idea that they have more 3 than 30 percent. It's not a requirement. 4 And that list of course would remain 5 confidential with the Board. It would not be made 6 available to the union. Under this rule the union 7 can get the list of names of employees and then 8 withdraw, and there is no penalty, and that list is 9 not returned. The union organizer has a list to 10 work from in the future.</p> <p>11 MR. PEARCE: Now, with respect to names 12 versus classification, there are certain 13 circumstances, and it has been argued, that 14 classifications are sometimes terms that are 15 different with respect to what the employees 16 understand themselves to be and what the employer 17 defines them to be. If classifications are supplied 18 without names, isn't there a disconnect with respect 19 to whether or not the bargaining unit is the same 20 group of people that everybody is trying to discern?</p> <p>21 MR. DEAKINS: Well, you speak of a very, 22 very rare situation that might come up. But if you 23 produce the classifications at the hearing, in 99 24 percent of the cases why do you need to know the 25 names of the people who are in that classification?</p>	<p style="text-align: right;">Page 140</p> <p>1 petition and how the persuader rule may or may not 2 work out. 3 Is it your position or the position of 4 the parties that you represent that we should hold 5 this in abeyance to basically see how the persuader 6 rule works out to see what the market impact is on 7 the management of defense counsel with some 8 confidence and experience in the United States? 9 MR. DEAKINS: It makes all kinds of sense 10 to me.</p> <p>11 MS. SCHIFFER: I'd like to follow up on 12 what you just said to Member Miscimarra -- I think 13 it was to him -- that you had never in your 14 experience been required to provide the names or job 15 classifications. I'm asking that and I'm curious 16 about that because it is in the best practices that 17 was produced by the committee that included regional 18 directors and so on in the late '90s. But you're 19 saying that that's never been implemented in your 20 experience.</p> <p>21 MR. DEAKINS: It hasn't been my 22 experience, no.</p> <p>23 MS. SCHIFFER: Well, it apparently was 24 suggested, I guess, 15 years ago.</p> <p>25 MR. DEAKINS: Frankly, in my experience,</p>
<p style="text-align: right;">Page 139</p> <p>1 If the unit is a production and 2 maintenance unit in an industrial plant you never 3 even usually get into a discussion of the 4 classifications. You have the production groups. 5 You don't go into the classifications. They're all 6 production and maintenance employees, and you don't 7 have to develop that type of information. 8 I think what you speak of is an extremely 9 rare situation, but to think that you need the names 10 of employees for the purpose of the hearing is just 11 something that I've just never run into. 12 MR. MISCIMARRA: I have just one 13 follow-up. Again, I'm not asking you to endorse 14 this approach, but similar to the question I asked 15 before, if we would treat a position statement in a 16 manner more similar to the generalized way that we 17 have treated a written grievance in grievance and 18 arbitration procedures, would that be an improvement 19 in your view over the approach that's reflected in 20 the current proposed rule? 21 MR. DEAKINS: Absolutely. 22 MR. JOHNSON: Really quickly, and this is 23 following up on your 2014 written comments, 24 specifically page 10 relates to access to counsel, 25 basically access to counsel if you are faced with a</p>	<p style="text-align: right;">Page 141</p> <p>1 I can't remember the last case I've been to an 2 R-Case hearing where I have not been able to reach a 3 consent. I think that largely happens because of 4 the informality, where the hearing officer is the 5 voice between the union organizer, the union lawyer 6 and the management lawyer. And they work through 7 the issues informally much better than they're going 8 to if an employer has to take these ironclad 9 positions in a written statement. That's going to 10 almost force you to go to the hearing. 11 MS. SCHIFFER: And are the stips normally 12 reached at the hearing, before the hearing? 13 MR. DEAKINS: Most of my stips are 14 reached before the hearing. 15 MS. SCHIFFER: So within some period 16 before -- I don't know what time your hearings 17 normally are, but sometime under that hearing date 18 schedule? 19 MR. DEAKINS: Yes. That's what I'm 20 saying. I can't remember the last time I went to an 21 R-Case hearing. 22 MS. SCHIFFER: So somewhere between seven 23 and fourteen days you're reaching a stip. 24 MR. DEAKINS: Yes. 25 MS. SCHIFFER: And then the parties</p>

<p style="text-align: right;">Page 142</p> <p>1 basically are closing down all the other issues.</p> <p>2       MR. DEAKINS: Correct.</p> <p>3       MR. PEARCE: Thank you, everybody. It is</p> <p>4 lunchtime. I would ask that the topic debrief panel</p> <p>5 for "Issues for litigation at the pre-election</p> <p>6 hearing" be seated at 1:45. That would include</p> <p>7 Brenda Crawford, Homer Deakins again, Peter Ford,</p> <p>8 Martin Hernandez, Elizabeth Milito and Jonathan</p> <p>9 Fritts. I will see you after lunch.</p> <p>10     (Recess.)</p> <p>11      MR. PEARCE: We're back in session, and I</p> <p>12 hope everybody had a good lunch. We are getting</p> <p>13 started with this seating on issues for litigation</p> <p>14 at the pre-election meeting. I assume that we're</p> <p>15 going to be speaking in the order that you're</p> <p>16 seated, so Ms. Crawford, you can proceed.</p> <p>17      MS. CRAWFORD: Good afternoon. My name</p> <p>18 is Brenda Crawford. I am a registered nurse, and I</p> <p>19 have been a registered nurse for 26 years and an</p> <p>20 employee of Universal Health Services, UHS, for 20</p> <p>21 years. However, I'm here today to share my and some</p> <p>22 of my colleagues' points of view regarding the NLRB</p> <p>23 elections. I am not representing UHS in any way.</p> <p>24      Last year RNs at my hospital and a sister</p> <p>25 hospital moved to organize a union without success.</p>	<p style="text-align: right;">Page 144</p> <p>1 management. On multiple occasions per week we have</p> <p>2 regular staff RNs who choose to step in to perform</p> <p>3 the role of charge nurse. The relief charge nurses,</p> <p>4 in other words temporary charge nurses, perform the</p> <p>5 same duties as the charge nurse. If nurses can be</p> <p>6 designated relief charge nurses at any time, how can</p> <p>7 charge nurses be considered management? Regardless</p> <p>8 of whether or not the charge nurses have the</p> <p>9 training or the background to manage a unit, they</p> <p>10 still do not have the ability to make changes</p> <p>11 without the manager's approval.</p> <p>12      In 2012-2013, when we organized to become</p> <p>13 unionized the company had opened the charge nurse</p> <p>14 positions, and every charge nurse who was interested</p> <p>15 was required to either apply or reapply for a</p> <p>16 position. Administration said they were</p> <p>17 restructuring. Prior to the union election the</p> <p>18 company hired and/or promoted a large number of</p> <p>19 nurses to charge positions. Immediately after the</p> <p>20 election administration claimed they had too many</p> <p>21 charge nurses, so every nurse who was interested had</p> <p>22 to reapply and go through the process again. In my</p> <p>23 department alone they cut the charge nurse position</p> <p>24 down by 33 percent, and to the best of my</p> <p>25 recollection the other units had a larger number of</p>
<p style="text-align: right;">Page 143</p> <p>1 Please allow me to share with you how the current</p> <p>2 process could be changed to be fair and equitable to</p> <p>3 all employees.</p> <p>4       I strongly support the Board's proposed</p> <p>5 20 percent rule. Just over a year ago we filed our</p> <p>6 petition for the registered nurses to be represented</p> <p>7 by UNAC/UHCP. We believed our charge nurses are not</p> <p>8 supervisors. They can't hire, fire, write</p> <p>9 evaluations, grant time off or discipline, but</p> <p>10 merely help facilitate the floor operations,</p> <p>11 including providing same patient care and</p> <p>12 participating daily in the patient's plan of care.</p> <p>13 They work side by side with RNs.</p> <p>14      Charge nurses are responsible for</p> <p>15 facilitating care for all patients and supplementing</p> <p>16 any shortages. For example, they assist in</p> <p>17 providing care to patients when the nurse/patient</p> <p>18 ratio is higher than what California state law</p> <p>19 allows. This state law mandates the maximum number</p> <p>20 of patients per nurse, so the charge nurse uses that</p> <p>21 state ratio and assigns patients to beds and to</p> <p>22 nurses.</p> <p>23      There is very little difference between</p> <p>24 staff RNs and charge nurses. Charge nurses are</p> <p>25 merely liaisons to management. They are not</p>	<p style="text-align: right;">Page 145</p> <p>1 position cuts.</p> <p>2       The message I got from this reduction was</p> <p>3 that administration wants to exclude this large</p> <p>4 number of charge nurses, my coworkers, from being</p> <p>5 allowed to vote. The charge nurses should be a part</p> <p>6 of the unit, but if we would have argued for their</p> <p>7 inclusion we knew it would have gone to hearing and</p> <p>8 the election would have been delayed.</p> <p>9       Because our charge nurses were not more</p> <p>10 than 20 percent of the unit, if we had this 20</p> <p>11 percent rule we would not have had to give them up.</p> <p>12 The 20 percent proposal would have allowed us to not</p> <p>13 give up our charge nurses who Congress intended to</p> <p>14 be covered by the Act and who deserve to be afforded</p> <p>15 the protections a union can offer. This change is</p> <p>16 necessary to have a free, fair and timely vote.</p> <p>17      Thank you for giving me the opportunity</p> <p>18 to speak today.</p> <p>19      MS. SCHIFFER: Thank you for coming and</p> <p>20 sharing that. You said that the union made the</p> <p>21 decision to exclude the charge nurses. Can you tell</p> <p>22 me sort of what the dynamic of that was, how it came</p> <p>23 to that decision?</p> <p>24      MS. CRAWFORD: To the best of my</p> <p>25 knowledge, the company requested that the charge</p>

<p style="text-align: right;">Page 146</p> <p>1 nurses be excluded because they were part of 2 management. The organizing committee and the union 3 decided that we would go ahead and go with that 4 because we didn't want any delay in the election.</p> <p>5 MS. SCHIFFER: And what would the delay 6 have been?</p> <p>7 MS. CRAWFORD: It would have gone to a 8 hearing and we would have had to wait. And during 9 that time waiting for that hearing and for that 10 decision to be made we were on a daily basis being 11 approached by management and administration, being 12 pulled from patient care, being sent to mandatory 13 meetings and receiving a lot of anti-union 14 campaigning going on there.</p> <p>15 MS. SCHIFFER: So for the purpose of 16 getting to an election sooner, you're saying.</p> <p>17 MS. CRAWFORD: Yes.</p> <p>18 MR. PEARCE: Do you recall how much time 19 it took between the petition and actually going to 20 an election?</p> <p>21 MS. CRAWFORD: No, I don't. I'm sorry.</p> <p>22 MR. JOHNSON: Were you in on the decision 23 to voluntarily drop the charge nurse position? Were 24 you involved in that decision?</p> <p>25 MS. CRAWFORD: It was brought to the</p>	<p style="text-align: right;">Page 148</p> <p>1 appropriate hearing upon due notice and virtually 2 guarantees that this rule will be contested in 3 court.</p> <p>4 I also see a conflict in what the Board 5 is saying here. For example, in describing the 6 reason for requiring employers to file a list of 7 eligible voters as a part of the statement of 8 position, the Board says it does so because it is 9 important to attempt to resolve disputes concerning 10 eligibility rather than prolong them. Why is this 11 important when it comes to giving the union an early 12 list of employee names and not when it comes to 13 actually determining employee eligibility?</p> <p>14 The most important eligibility question 15 in most cases is the supervisory status of certain 16 employees. If the employees are supervisors, the 17 employer must be sure to instruct these employees on 18 the restrictions which apply to them in the 19 campaign, including the instruction that they may 20 not engage in union activity. On the other hand, if 21 the employees are not supervisors they must be free 22 to engage in such activities.</p> <p>23 The result is that without litigation the 24 employer acts at his peril and opens himself up to 25 unfair labor practices and valid objections to the</p>
<p style="text-align: right;">Page 147</p> <p>1 organizing committee by the union, and we all agreed 2 that that would be the best thing to do.</p> <p>3 MS. SCHIFFER: Regardless of what you 4 believed the facts were?</p> <p>5 MS. CRAWFORD: Correct, just for the time 6 constraints.</p> <p>7 MR. JOHNSON: So you basically decided to 8 give up on that position?</p> <p>9 MS. CRAWFORD: Yes, because a lot of our 10 staff were feeling very stressed by the frequent 11 visits and meetings that we were forced to go to and 12 just being taken away from patient care, when as 13 nurses that's what we do, patient care, and we were 14 being pulled from that to listen to one-sided 15 arguments and being educated on one side.</p> <p>16 MR. PEARCE: Thank you very much. 17 Mr. Deakins?</p> <p>18 MR. DEAKINS: I appreciate the 19 opportunity to again appear to address the issues 20 for litigation in the pre-election hearing.</p> <p>21 The proposed rule eliminates the right of 22 the parties to litigate employee eligibility if the 23 group of employees is less than 20 percent of the 24 bargaining unit. I think this is a direct violation 25 of Section 9(c) of the Act, which calls for an</p>	<p style="text-align: right;">Page 149</p> <p>1 election if he answers the question wrong. Such an 2 issue is not rendered moot by the election results, 3 as the Board theorizes.</p> <p>4 Litigating supervisory status usually 5 does not result in any delay in the hearing. In my 6 50 years of experience I can count on one hand the 7 number of times a hearing has gone into the second 8 day because of the litigation of a supervisory 9 issue. All hearings last at least one day 10 regardless of how much the Board restricts the 11 litigation of issues.</p> <p>12 The proposed rule results in a 13 significant increase in the number of challenged 14 ballots which would cause confusion among employees 15 with the result of interfering with their right to 16 make informed judgments. Knowing your ballot is 17 going to be challenged will also discourage some 18 employees from not voting. It is a form of 19 intimidation for some groups of employees.</p> <p>20 Finally, as raised by former member Hayes 21 at the Board open meeting in 2011, if the Board does 22 not create a record of the dispute in a hearing and 23 then exercises its newly expanded discretion to deny 24 post-election review, there will be virtually no 25 record for the Board and the Court of Appeals to</p>

<p style="text-align: right;">Page 150</p> <p>1 consider in a subsequent technical 8(a)(5) case. In 2 such cases it virtually guarantees that the issues 3 will be returned to the region for fact finding.</p> <p>4 MS. SCHIFFER: At what point in the 5 process do you think it would be appropriate for the 6 determination to be made on the supervisory issue?</p> <p>7 MR. DEAKINS: I think the most 8 appropriate time for the determination to be made is 9 at the regional director's decision of direction of 10 election. The regional director, as I understand 11 it, has the discretion not to make the decision. 12 Under current standards you have a substantive 13 hearing on the issue, and then it's within the 14 discretion of the regional director as to whether he 15 will decide that in the decision of direction of 16 election.</p> <p>17 My experience has been that in most 18 instances the regional director does make a finding, 19 but it remains at his discretion. But even if he 20 doesn't, at least management is in a situation where 21 the issue has been litigated and both parties have 22 stated their position and put on their evidence, so 23 at least at that point, even though the regional 24 director does not make the decision, at least the 25 lawyer can step back and look at the record and then</p>	<p style="text-align: right;">Page 152</p> <p>1 follow you.</p> <p>2 MR. JOHNSON: Well, under the proposal 3 there is the power for a hearing officer to decide 4 whether or not something is a genuine dispute of 5 fact and gets to go to a hearing. At what point is 6 that power essentially to control the record going 7 to be a recommendation, or is it at any point going 8 to be a recommendation that a hearing officer would 9 be prohibited from making?</p> <p>10 MR. DEAKINS: Well, the hearing officer 11 under the statute has no authority to make those 12 decisions.</p> <p>13 MR. JOHNSON: Right. What I understood 14 from your comments was that at some point, once the 15 hearing officer in control of the record decides not 16 to take evidence on something no record is going to 17 be created, so there will be nothing for us to 18 review.</p> <p>19 What I understood from your position on 20 9(c)(1) was that that started to amount to a 21 recommendation that was prohibited under the 22 statute, the recommendation as to whether we get any 23 evidence or not, or do I misunderstand your 24 position? It's okay. I mean, it's fine. I can 25 basically ask someone else. What effect do you</p>
<p style="text-align: right;">Page 151</p> <p>1 express an opinion, which lawyers do on many, many 2 things. So whether the regional director acts to 3 make the decision on eligibility, it at least 4 creates the record, which I think is important.</p> <p>5 MS. SCHIFFER: So there is part of the 6 election process during which there is still no 7 determination regarding supervisory status.</p> <p>8 MR. DEAKINS: There is such a situation, 9 yes.</p> <p>10 MR. JOHNSON: But even given that window, 11 is it helpful to know whether an individual is a 12 supervisor or not?</p> <p>13 MR. DEAKINS: It puts the employee in 14 such a difficult position if he doesn't know because 15 the rights of that employee are going to be either 16 legal or illegal, depending on what the judgment of 17 the employer is in relation to what the ultimate 18 decision is.</p> <p>19 MR. JOHNSON: I have a question on -- of 20 course hearing offices are prohibited under our 21 statute for making recommendations. At what point 22 do you see a decision on whether something is a 23 genuine dispute of fact or not becoming such a 24 recommendation?</p> <p>25 MR. DEAKINS: I'm sorry. I'm not sure I</p>	<p style="text-align: right;">Page 153</p> <p>1 think this is going to have on Courts of Appeal 2 looking at basically technical 8(a)(5) cases?</p> <p>3 MR. DEAKINS: Well, I think what they're 4 going to have to do is send the record back for 5 further hearing because they're not going to have 6 the record they need.</p> <p>7 MR. MISCIMARRA: Mr. Deakins, I have just 8 one question. You talked about the employer acting 9 at its peril, and I'd like to for purposes of this 10 question just disregard that. I'd like to focus on 11 the impact on employees. They're talking on these 12 eligibility supervisory issues. There are kind of 13 two versions.</p> <p>14 One is the employer ends up treating 15 someone as a supervisor and then during the campaign 16 it turns out they were a unit employee, or, 17 alternatively, if it turns out somebody believes 18 they are a unit employee and they interact with 19 another unit employees in a way it turns out they're 20 a supervisor, in both of those instances where 21 people get it wrong, not just the employer, what's 22 the impact on the election when the election gives 23 effect to what the employee's sentiments are at the 24 end of the campaign?</p> <p>25 MR. DEAKINS: Well, a typical example in</p>

<p style="text-align: right;">Page 154</p> <p>1 my mind would be if you look at an industrial 2 establishment setting and you've got some category 3 called lead persons, those would typically be people 4 that the other employees in the bargaining unit 5 would look with favor on. They would be in some 6 leadership role whether they're technically 7 supervisors or not.</p> <p>8       If those rank and file employees think 9 that that person is going to be a part of the unit, 10 then they're thinking, "Gosh, this is a guy I really 11 have respect for, he's going to be in the bargaining 12 unit so we're going to have a strong bargaining 13 unit, and so I'd be more in favor of a union if the 14 lead person is for the union and is in the union."</p> <p>15       On the other hand, if he's not in the 16 unit I may look at it and say, "Gosh, this is really 17 going to be a weak bargaining unit." It's going to 18 impact other employees' attitudes as to whether that 19 person is or is not in the unit, and they're not 20 going to know.</p> <p>21       MR. PEARCE: Mr. Deakins, you said in 22 your experience it has been the rare case that 23 litigating a supervisory issue would go beyond or go 24 to a second day. Would that include litigation that 25 you've experienced since the Oakwood decision, where</p>	<p style="text-align: right;">Page 156</p> <p>1 to be a fairly small percentage of the employees. 2 Under this rule those issues would never be resolved 3 in the pre-election hearing. And I just think from 4 a very important standpoint it's important to 5 everybody so that they know whether that person is 6 restricted or free to act on union activity and the 7 impact it's going to have on other employees.</p> <p>8       MR. PEARCE: Thank you very much. I 9 think that in terms of the order of presentation we 10 do have a variation from your seating. I believe 11 we'll have Mr. Ford and Mr. Hernandez and then 12 Ms. Milito.</p> <p>13       MR. HERNANDEZ: My name is Martin 14 Hernandez. I am the organizing director for UFCW 99 15 in Arizona. We believe that the Board's proposed 16 changes to its election rules will make it more 17 likely that workers can have a fair and timely vote 18 and eliminate unnecessary litigation. The Board 19 might need to decide several issues before it can 20 hold an election. They include whether the Board 21 has jurisdiction over the employer or the worker's 22 employees and is there a bar to an election. But 23 the most important issue is whether the bargaining 24 unit the workers want is appropriate. If the 25 petition describes an appropriate unit, then an</p>
<p style="text-align: right;">Page 155</p> <p>1 responsible direction and all of these other factors 2 come into play in making those kind of 3 determinations? That's been your experience?</p> <p>4       MR. DEAKINS: Yes. My experience has 5 been that if you're litigating a single supervisory 6 issue, which typically would be on supervisory 7 status because it's that mid person between clear 8 supervision and rank and file, typically you're 9 talking about maybe one to two witnesses by the 10 employer and maybe one or no witnesses by the union. 11 It just doesn't take that long to litigate that 12 question. It all gets down to a question of what 13 are their duties and responsibilities.</p> <p>14       MR. PEARCE: And with respect to your 15 concern about the examples that you gave about how a 16 lead person may impact on the desires of others 17 relative to their choice of going with a unit or 18 not, wouldn't this 20 percent rule impact that 19 determination because it would be exercised, as the 20 NPRM proposes, in a situation where you have a 21 relatively small percentage of the bargaining unit 22 being placed in that category?</p> <p>23       MR. DEAKINS: Well, on the supervisory 24 question I don't think it would hardly ever rise to 25 the level of being 20 percent, so it's always going</p>	<p style="text-align: right;">Page 157</p> <p>1 election should be held in that unit.</p> <p>2       The issue that employers most often want 3 to litigate at the pre-election hearing is whether 4 workers belong in a unit. Typically the dispute is 5 about whether they are supervisors, or, if not 6 supervisors, do they share a community of interest 7 with the work as described in the petition.</p> <p>8       My unit faces these eligibility issues in 9 almost every organizing campaign. To avoid the 10 delay that results from litigating these issues we 11 agree to what the employer wants whenever possible. 12 We support the proposal to put off litigating Board 13 eligibility issues involving less than 20 percent of 14 the proposed unit until after workers have voted. 15 These issues don't need to be litigated before the 16 election.</p> <p>17       Whether there is a stipulated election 18 agreement it is often unclear if some workers are 19 supervisors. Also, the Board often lets workers 20 whose status is unclear vote by challenged ballot. 21 The proposed 20 percent rule would be similar, 22 except that many voters' eligibility disputes would 23 be litigated after the election.</p> <p>24       Local 99 recently organized a unit of 360 25 workers at ten grocery stores and a warehouse after</p>

<p style="text-align: right;">Page 158</p> <p>1 a nine year campaign. When we forced the petition 2 the company forced us to a pre-election hearing, and 3 the main issue was whether 40 to 50 department heads 4 were employees or supervisors, as we believe. After 5 several days of hearings the union agreed to include 6 the department heads to avoid further delay. We 7 never lost the election.</p> <p>8       After years of unfair labor practice 9 litigation we petitioned it again in 2011. This 10 time we stipulated the department as supervisors. 11 We lost the election by a wider margin than the 12 challenged ballots. Last year the company 13 recognized us, and we agreed on the status of the 14 department heads.</p> <p>15       With a 20 percent rule in place we could 16 have avoided the pre-election hearings and maybe our 17 workers would have had union representation a lot 18 sooner. We support the proposal as a fair, 19 practical and commonsense way to streamline the 20 election process. Thank you.</p> <p>21       MR. FORD: My name is Peter Ford, and I'm 22 assistant general counsel of the UFCW. We support 23 the Board's proposals to streamline the pre-election 24 hearing. For example, the proposal to only allow 25 parties to introduce evidence relevant to a genuine</p>	<p style="text-align: right;">Page 160</p> <p>1 percent rule would establish a bright line test that 2 would provide clear notice for when voter 3 eligibility issues would be resolved. I see my time 4 is up, so I'll stop there.</p> <p>5       MR. PEARCE: Mr. Hernandez, the example 6 that you raised where the parties came to ultimate 7 agreement on the status, what was that 8 classification that was in dispute?</p> <p>9       MR. HERNANDEZ: The classification was 10 department heads.</p> <p>11       MR. PEARCE: Ultimately were they agreed 12 to be supervisors or non-supervisors?</p> <p>13       MR. HERNANDEZ: They agreed to be 14 supervisors.</p> <p>15       MR. PEARCE: And initially the posture of 16 the employer was that they were not supervisors and 17 should be allowed to vote?</p> <p>18       MR. HERNANDEZ: Correct.</p> <p>19       MR. PEARCE: Now, in your experience as 20 an organizer when you make a determination whether 21 or not to pursue to hearing a supervisory issue, 22 what factors do you take into consideration?</p> <p>23       MR. HERNANDEZ: When it comes to 24 supervisors we believe that they're in charge, 25 taking into consideration what is their function,</p>
<p style="text-align: right;">Page 159</p> <p>1 dispute over a material fact would save time, and it 2 would bring pre-election hearing procedures in line 3 with post-election procedures and with summary 4 judgment procedures in ULP and civil cases.</p> <p>5       Requiring non-parties to submit a 6 statement of position and the petitioner to respond 7 to any issues raised would help frame any disputed 8 material factual issues relative to the ultimate 9 question: Is there a QCR? To have a QCR the 10 petition must describe an appropriate unit.</p> <p>11       Unlike disputes over the scope of the 12 unit, voter eligibility issues or disputes aren't 13 relevant to whether there is a QCR and don't need to 14 be resolved pre-election. The vote and impound 15 procedure allows individuals whose eligibility is 16 disputed to cast challenge ballots and have their 17 votes counted after the election if necessary, and 18 case law has allowed the eligibility of up to 25 19 percent of the unit to be decided post election.</p> <p>20       We support the proposal to remove from 21 the rules the basis for the Board's statement in a 22 1995 decision that the hearing officer must permit 23 full litigation of all eligibility issues in dispute 24 prior to the direction of an election absent consent 25 of all parties to defer litigation. The proposed 20</p>	<p style="text-align: right;">Page 161</p> <p>1 their regular duties and their interactions.</p> <p>2       MR. PEARCE: I understand that. What do 3 you take into consideration in deciding whether or 4 not you want to pursue it to hearing or let the 5 classification go?</p> <p>6       MR. HERNANDEZ: Often we end up agreeing 7 to whatever position the employer wants to take.</p> <p>8       MR. PEARCE: And why do you do that?</p> <p>9       MR. HERNANDEZ: Just to avoid any further 10 delays in the process.</p> <p>11       MR. PEARCE: When you agree to that do 12 you have an opportunity to litigate that point after 13 the election?</p> <p>14       MR. HERNANDEZ: Not really.</p> <p>15       MR. PEARCE: So you do it just to get to 16 the point where you can have an election?</p> <p>17       MR. HERNANDEZ: That's correct.</p> <p>18       MR. JOHNSON: A question. How many 19 department heads were at issue in your case?</p> <p>20       MR. HERNANDEZ: There were about 40 to 50 21 department heads.</p> <p>22       MR. JOHNSON: So 40 to 50 people. And 23 this is for either of you. Would you have a 24 position basically in terms of what a cut-off might 25 be if it wasn't a strict 20 percent, if it was a 20</p>

<p style="text-align: right;">Page 162</p> <p>1 percent or X number, whatever X might be, the reason 2 being, you know, 40 to 50 to people might be a very 3 big chunk of people that would influence how 4 employees would view a vote?</p> <p>5 MR. FORD: Well, the 20 percent rule 6 makes a lot of sense. I mean, they've got to come 7 up with some number to have a clear rule that will 8 put the parties on notice of what to expect and what 9 not to expect. In this case it was a fairly large 10 unit, so we're talking about probably 13 to 14 11 percent of the unit in this case.</p> <p>12 MR. JOHNSON: But that's a large absolute 13 number of people. I mean, the Warren Act, for 14 example, says that you basically inform workers 15 where it's 33 percent or 5,500, depending on what 16 standard you're looking at. Would you be averse to 17 us modifying the 20 percent principle so that, if 18 it's over X number of people, then the hearing 19 officer would be required to take evidence?</p> <p>20 MR. FORD: I think having a percentage 21 makes more sense, and the Board in adjudications has 22 generally allowed for challenges where the number in 23 dispute is as much as 25 percent.</p> <p>24 MR. JOHNSON: Right. But when we're 25 talking about an absolute number of employees, the</p>	<p style="text-align: right;">Page 164</p> <p>1 of the election.</p> <p>2 MR. MISCIMARRA: But assuming that we 3 come up with a way to have an expeditious 4 election -- and I think all of the Board members are 5 in agreement with the desired outcome and that we're 6 looking for the best way to achieve that -- but if 7 we were to arrive at a means by which we could have 8 an expeditious election, do you agree it's certainly 9 better for people to be casting votes in the 10 election knowing up front that their vote's going to 11 count and that they'll be bound by the outcome 12 rather than having them vote and not knowing those 13 things?</p> <p>14 MR. FORD: I guess, depending on what we 15 mean by expeditious, if those issues can be resolved 16 in a very short amount of time, that would be a good 17 solution.</p> <p>18 MR. MISCIMARRA: And I'm not looking to 19 lock you into a particular alternative. That's one 20 of the things that we struggle with. But with 21 respect to the 20 percent rule, if we came up with a 22 different way to try to accomplish an expeditious 23 election and/or streamline the pre-election hearing, 24 are there some alternative ways, at this point 25 without knowing what they are, that you could</p>
<p style="text-align: right;">Page 163</p> <p>1 unit scope or its shape can be very different. If 2 we're talking about a delta of 50 to 60 people, 70 3 to 80 people, something like that, wouldn't you 4 agree a unit could look fundamentally different?</p> <p>5 MR. FORD: Again, I think the percentage 6 rather than the absolute number is what makes the 7 most sense, and so we would probably oppose some 8 number as opposed to a percentage.</p> <p>9 MR. MISCIMARRA: Mr. Ford, to the extent 10 that you have, for example, an assistant store 11 manager who votes in an election, and if a union 12 wants to include that person or those persons in the 13 bargaining unit, would you agree that it's better if 14 that person as a potential unit employee casts a 15 vote in the election knowing that his or her vote's 16 going to count and that they will be affected by the 17 outcome of the election rather than having them vote 18 not knowing those things?</p> <p>19 MR. FORD: I think it's better for the 20 unit, for the workers in general, to have an 21 expeditious vote. Historically, there have been 22 these kinds of issues that have come up. Both in 23 stipulated cases and in directed cases it's often 24 the case that there are, you know, any number of 25 people whose eligibility is in question at the time</p>	<p style="text-align: right;">Page 165</p> <p>1 potentially support that may be somewhat more 2 refined than just a numerical 20 percent cutoff, or 3 is that the only way that it could be done?</p> <p>4 MR. FORD: Well, I can't think of any 5 other ways to do it at this point. You know, I 6 think we came into the rulemaking proceeding in 2011 7 with a fairly open mind on a lot of issues, and I 8 think our comments reflect that, so we would 9 consider any reasonable alternatives.</p> <p>10 MR. MISCIMARRA: And the word 11 "reasonable" I understand is sometimes in the eye of 12 the beholder.</p> <p>13 MR PEARCE: Thank you. Ms. Milito.</p> <p>14 MS. MILITO: My name is Elizabeth Milito, 15 and I'm here today on behalf of the National 16 Federation of Independent Business. NFIB is the 17 nation's leading small business advocacy 18 organization, with a national membership of 350,000 19 independently owned and operated businesses. While 20 there is no standard definition of small business, 21 the typical NFIB member employs ten people and 22 reports gross sales of about \$500,000 a year.</p> <p>23 NFIB's membership is a reflection of 24 American small business. Currently, small 25 businesses in this country employ nearly half of all</p>

<p style="text-align: right;">Page 166</p> <p>1 private sector employees. Small businesses pay 42 2 percent of total U.S. private payroll. Small 3 businesses generated 63 percent of net new jobs over 4 the past 20 years, and since the end of the 5 recession small businesses have accounted for 60 6 percent of new jobs created.</p> <p>7 In summary, small businesses are 8 America's largest private employer. For this reason 9 it's critically important that the Board understands 10 small firms' unique business structure and the 11 exceptional problems that the Board's proposed 12 amendments to its election rules would place on the 13 smallest but arguably most important employers in 14 this country.</p> <p>15 Small businesses face unique challenges 16 that make compliance with the NLRA exceedingly 17 difficult for even the most determined small 18 business owner. In many small businesses employment 19 concerns, including issues related to labor matters, 20 are made by the owners of the business, who upon 21 receipt of an election petition wouldn't have a clue 22 what to do and would not only need to consult with 23 an outside advisor, but it would first need to find 24 such an advisor with whom to consult.</p> <p>25 For this reason, NFIB is very concerned</p>	<p style="text-align: right;">Page 168</p> <p>1 And I will also add, too, that I know the 2 Board has posed a question relating to whether or 3 how the NLRB could provide assistance to 4 unrepresented small businesses in complying with 5 election procedures. I'm happy to address that 6 issue now or, if you'd like, at a later time.</p> <p>7 MR. PEARCE: Well, I think we'd better 8 stick with the topic at hand. Now, wouldn't you 9 agree, Ms. Milito, that if you're talking about a 10 small business you're usually talking about a small 11 bargaining unit and that the 20 percent rule would 12 apply to a smaller number of people? Wouldn't you 13 say so?</p> <p>14 MS. MILITO: Yes. That's obviously true, 15 yes.</p> <p>16 MR. PEARCE: So in terms of the frequency 17 of the utilization of that 20 percent rule, the size 18 would impact how frequent that would be used, I 19 would imagine. But that being said, when you have 20 the ability to defer an issue until after the 21 election, many an issue becomes mooted out and it 22 may not be necessary to litigate it. Certainly, if 23 your client reported back that they had the election 24 and the union lost the issue of supervisory status 25 and that becomes a moot issue, that would resolve a</p>
<p style="text-align: right;">Page 167</p> <p>1 about limiting the scope of pre-election hearing 2 issues. The NPRM would limit the pre-election 3 hearing to determine only whether a question 4 concerning representation exists. This means that 5 many issues of voter eligibility, including 6 supervisor status, would be deferred to 7 post-election procedures.</p> <p>8 As a result, employees would vote in an 9 election without knowing which employees will 10 ultimately make up the bargaining unit, and some 11 employees who vote might be found ineligible to be 12 part of the bargaining unit. For small business, 13 however, deferral of issues essentially means waiver 14 and defeat. A small business simply cannot afford 15 ongoing litigation and legal fees.</p> <p>16 To ensure due process in representation 17 cases Congress amended Section 9, requiring the 18 Board to investigate each petition, provide an 19 appropriate hearing upon due notice, and decide the 20 unit appropriate. Should the Board proceed with its 21 proposed rule, NFIB believes that employee informed 22 choice and due process notice and hearing required 23 by Section 9 would be compromised, particularly for 24 small employers lacking labor relations expertise 25 and in-house legal departments.</p>	<p style="text-align: right;">Page 169</p> <p>1 lot of the costs on the part of the employer in 2 litigating that point. Wouldn't you agree?</p> <p>3 MS. MILITO: I would agree that the issue 4 would be mooted out for a lot of small businesses, 5 because I think it's just a matter of they're going 6 to throw up their hands. As I said in my testimony, 7 really it's going to concede defeat. I think 8 Mr. Deakins pointed out very ably how in a small 9 business you may have a manager who's clearly 10 outside the bargaining unit, but maybe an assistant 11 manager, is that individual in or out, and that 12 could make a difference for the remaining five or 13 six employees. So it is an important issue for that 14 small business and is one to resolved at the outset 15 because it could impact the decision of the other, 16 as you pointed out, five to six employees and impact 17 the entire business ultimately.</p> <p>18 MR. PEARCE: And that's a decision that 19 really wouldn't have to be made if the unit didn't 20 win the election.</p> <p>21 MS. MILITO: If they didn't win the 22 election, but if they did win the election --</p> <p>23 MR. PEARCE: Then the employer has the 24 opportunity to litigate it.</p> <p>25 MS. MILITO: And my point is that a small</p>

<p style="text-align: right;">Page 170</p> <p>1 business owner is not going to litigate things post 2 election. It's just not going to happen. I've seen 3 that firsthand. They're not going to have the 4 resources, the money, the time to continue 5 litigation. They will already have spent however 6 much money retaining counsel to see them through the 7 election.</p> <p>8 MR. JOHNSON: If your average size is ten 9 members of the employees and employers in your 10 organization and we have a 20 percent rule and we're 11 talking about that one assistant manager, even if 12 we're awaiting the election results is it important 13 or unimportant to your members to know whether they 14 can communicate or utilize that manager as their 15 representative in the ongoing campaign?</p> <p>16 MS. MILITO: It's critically important to 17 know. The only other mouthpiece is likely the 18 business owner, too, and the manager is probably the 19 first line kind of interface, if you will, and so 20 that's why I said -- or the assistant manager if 21 there's a manager and an assistant manager. So I 22 think it's critically important to have those issues 23 resolved, and it can make a huge difference for a 24 small business owner to know that it's not just 25 them, but they have the support of this person who</p>	<p style="text-align: right;">Page 172</p> <p>1 observation without any disrespect to people not 2 here. I think this august group also includes the 3 creme de la creme of the union side bar as well. I 4 just want to express that observation.</p> <p>5 MR. JOHNSON: And I would join in that 6 statement.</p> <p>7 (Laughter.)</p> <p>8 MS. MILITO: And if I could just add, 9 too, you know, just because there are attorneys not 10 in this room, there are absolutely fantastic labor 11 attorneys on both sides throughout the country. You 12 know, it's just a matter of finding them, because 13 it's not -- you know, you have more attorneys that 14 do family law or criminal law, or, you know, "He set 15 up my corporation" or, "I don't do that kind of 16 labor stuff." It is a specialized field.</p> <p>17 MR. PEARCE: Thank you very much. Mr. 18 Fritts.</p> <p>19 MR. FRITTS: Chairman Pearce, members of 20 the Board, thank you. Good afternoon. As I said 21 this morning, I'm here on behalf of the Coalition 22 for a Democratic Workplace. CDW's position is that 23 the proposed 20 percent rule is inappropriate and 24 violates the Act. But I would like to hold aside 25 those legal arguments for purposes of my remarks</p>
<p style="text-align: right;">Page 171</p> <p>1 they saw as a manager.</p> <p>2 MR. JOHNSON: I'm going to engage in some 3 incredible flattery here, so excuse me. We sort of 4 have the creme de la creme of the management side 5 bar that comes to these meetings and present and 6 talk about their best practices and whatnot.</p> <p>7 Typically, your members, the counsel that they hire 8 for litigation of any form, do they generally tend 9 to be members of this august group or not?</p> <p>10 MS. MILITO: No. I say that with much 11 respect. And I will give you a real life example. 12 I had a call from a member last summer who had 13 received -- it was a ULP, it was not an election 14 petition. He had called his attorney. And this is 15 what he said to me on the phone, "I called my 16 attorney, and you know what my attorney told me? I 17 don't do that kind of stuff."</p> <p>18 This was from a little small town in 19 Indiana. And I said, "Well, who should I call." 20 And he said, "My attorney told me 'I haven't a 21 clue,' I don't know anyone who does that stuff." 22 And ultimately he did find somebody, but it did take 23 several days. So it's just that finding a labor 24 attorney can be difficult and can take some time.</p> <p>25 MR. MISCIMARRA: I just have an</p>	<p style="text-align: right;">Page 173</p> <p>1 today and focus instead on some practical questions 2 raised by the 20 percent rule.</p> <p>3 I didn't see anything in the ground rules 4 that prohibits me from asking the Board questions, 5 so I'm going to take the liberty of doing so, not 6 with the expectation that the Board will answer the 7 questions on the spot, but I do believe that they're 8 questions --</p> <p>9 MR. PEARCE: Or at all.</p> <p>10 MR. FRITTS: Or at all.</p> <p>11 MR. JOHNSON: I may hide under this 12 structure.</p> <p>13 (Laughter.)</p> <p>14 MR. FRITTS: But I do think these are 15 important questions for the Board to consider as it 16 deliberates on the proposed rule.</p> <p>17 The first set of questions relates to how 18 the 20 percent rule would apply in the case of an 19 election agreement. Under current procedures a 20 regional director generally will not approve an 21 election agreement if more than 10 percent of the 22 proposed unit will be subject to challenge after the 23 election. And so that raises the question as to 24 whether the 20 percent rule would also change that 25 standard with respect to election agreements or</p>

<p style="text-align: right;">Page 174</p> <p>1 whether the standard for election agreements will be 2 different.</p> <p>3       If the standard is changed for election 4 agreements so that an election agreement would be 5 approved if up to 20 percent of the unit will be 6 subject to challenge post election, that opens the 7 door then to more post-election litigation even in 8 cases when you have an election agreement.</p> <p>9       The second set of questions relates to 10 the practicalities of how a hearing officer would 11 apply the 20 percent rule. The first question I 12 have is: If at the outset of the hearing there are 13 eligibility or inclusion questions that in total 14 affect more than 20 percent of the proposed unit, 15 how will the hearing officer decide which issue to 16 take evidence on and which it will not? Will the 17 hearing officer take evidence on all of those issues 18 because in total they are more than 20 percent, or 19 will the hearing officer take evidence on some of 20 them to get it below 20 percent and then defer the 21 rest? If the answer is yes to the latter, then how 22 does the hearing officer decide which one will get 23 below 20 percent and which one will be deferred? I 24 think those are some practical questions in terms of 25 how that rule would get applied.</p>	<p style="text-align: right;">Page 176</p> <p>1 clearly stated in the proposed rule. 2       The rule also talks about offers of 3 proof, and it's not clear the extent to which, even 4 if the employer has the right to litigate those 5 eight employees as an appropriate unit issue, 6 whether the hearing officer could only take offers 7 of proof on those issues or whether the employer 8 would actually have the right to present evidence on 9 that.</p> <p>10      So if the Board does decide to adopt the 11 20 percent rule I think guidance is needed on these 12 issues, and if I'm wrong and the proposed rule would 13 preclude the employer from litigating that unit 14 scope issue involving less than 20 percent, then the 15 final rule should so state as well. CDW doesn't 16 believe these issues should be deferred, but these 17 are, I think, questions the Board should consider as 18 it deliberates, as I said, on this rule. Thank you.</p> <p>19      MS. SCHIFFER: Thank you. I appreciate 20 those concerns. I do have a question, though. You 21 mentioned in the beginning the application of the 20 22 percent rule to stips. If the parties have agreed 23 to do that, haven't the parties basically decided 24 that they are willing to defer those issues if it's 25 a stip?</p>
<p style="text-align: right;">Page 175</p> <p>1       And then if there is an argument by the 2 employer that the petition for a unit is 3 inappropriate because it excludes certain employees, 4 will the 20 percent be measured based on the larger 5 unit that the employer contends is the only 6 appropriate unit, or will it be 20 percent of the 7 petition for a unit?</p> <p>8       Third, the proposed rule doesn't clearly 9 state how the 20 percent or if the 20 percent rule 10 will apply to unit scope issues under Specialty 11 Healthcare or any other standard. And let's take an 12 example where a union files a petition for a unit of 13 50 employees. The employer contends there are eight 14 employees in a different job classification who are 15 excluded but should be included because they 16 performed the same or similar functions under common 17 supervision at the same location. And so the 18 employer is arguing that the only appropriate unit 19 is a unit of 58.</p> <p>20      As I read the proposed rule, the employer 21 would have the right to litigate those eight 22 employees, whether they should be included, because 23 that is a scope of unit issue, and the proposed rule 24 states that the proposed unit must be found to be 25 appropriate before the election. But this is not</p>	<p style="text-align: right;">Page 177</p> <p>1       MR. FRITTS: I've had the situation where 2 the regional director will not approve the stip 3 because there's more than 10 percent.</p> <p>4       MS. SCHIFFER: But the parties wanted to 5 do that?</p> <p>6       MR. FRITTS: Yes.</p> <p>7       MS. SCHIFFER: And so do you think the 8 parties should be allowed to do that?</p> <p>9       MR. FRITTS: I think in that situation -- 10 I think it depends on the case. I think in some 11 cases, if the parties agree, then I think the 12 regional director should have some discretion to do 13 that. Maybe there is a point at which that becomes 14 excessive in the sense of --</p> <p>15      MS. SCHIFFER: An agency issue.</p> <p>16      MR. FRITTS: Right. Well, and it leads 17 to too uncertainty in the election in terms of who's 18 in and who's out and it leads to too much 19 post-election litigation. So I'm not suggesting 20 that that would be a discretion without limits, but 21 whether you push the 10 percent to 15 percent or 22 something like that, maybe there's some discretion 23 there.</p> <p>24      MR. MISCIMARRA: I have just a technical 25 question. I found a number of your questions to be</p>

<p style="text-align: right;">Page 178</p> <p>1 helpful. I wish I knew the answers to all of them.      2 The point of the Act is not merely to have      3 elections, it's to have elections that give effect      4 to employee sentiments regarding union      5 representation, and that means that if employees      6 select a union to have bargaining relationships.</p> <p>7 To the extent that we adopt a rule that      8 simply moves forward with the election and gets some      9 of these issues wrong, including issues that are      10 under 20 percent, what's the available means by      11 which those issues could end up being resolved? And      12 when do those get resolved if the election has taken      13 place based on a kind of misapplied set of premises      14 about some of these eligibility issues?</p> <p>15 MR. FRITTS: Well, I think it depends on      16 the outcome of the vote. If the vote is such that      17 the margin is more than the 20 percent they may      18 never be resolved, or there may be cases in which it      19 is determinative and so it is resolved in      20 post-election litigation. But at some point,      21 depending on the margins, it may be in effect sort      22 of deferred to the parties to then work that out      23 either in bargaining or in possibly a subsequent UC      24 proceeding, and we've addressed those in our      25 comments.</p>	<p style="text-align: right;">Page 180</p> <p>1 Appeals finds merit to that employer's argument the      2 case would have to be remanded back to the Board to      3 take evidence on whether the individual should have      4 been included or excluded. You're probably talking      5 about a process that could take a year, two years,      6 or even more.</p> <p>7 MS. SCHIFFER: Are you talking about a      8 situation where a determination was made?</p> <p>9 MR. FRITTS: I'm talking become a      10 situation where a determination was not made.</p> <p>11 MS. SCHIFFER: So people were not either      12 included or excluded.</p> <p>13 MR. FRITTS: No. I'm talking about a      14 situation where they were allowed to vote subject to      15 challenge, but the challenges based on the results      16 of the election were not determinative, so there is      17 no need to ever take evidence. So the employer's      18 only recourse, then, is to refuse to bargain in the      19 technical sense.</p> <p>20 MR. PEARCE: Couldn't it be the case      21 that, if a union decides to forego litigating a      22 supervisory issue because it would have a negative      23 impact on then being able to get to an election, the      24 union cannot file a technical 8(a)(5)? Isn't that      25 true?</p>
<p style="text-align: right;">Page 179</p> <p>1 MR. MISCIMARRA: If the certification is      2 based on an election in which a small number of      3 employees were improperly included or improperly      4 excluded, what are the means by which that gets      5 resolved and how long does that take?</p> <p>6 MR. FRITTS: Well, it could take a while      7 potentially. I suppose there are a number of      8 different ways it could play out. If the employer      9 is contending that that is an issue that affected      10 the results of the election, if it's in effect      11 something that taints the election result the      12 employer may choose to refuse to bargain, have a      13 technical 8(a)(5), and that may be ultimately tested      14 in a Court of Appeals. If it was never litigated      15 and of there's no evidence on it, then there's the      16 question of what's the record in that certification      17 tested case.</p> <p>18 MR. MISCIMARRA: And if it turns out that      19 the election in fact was based on premises that were      20 just off and if the certification is tested in that      21 way, how long does that take to resolve?</p> <p>22 MR. FRITTS: Well, potentially, if you're      23 talking about Court of Appeals litigation, you're      24 looking at something that's measured in a year, two      25 years. And then in all likelihood if the Court of</p>	<p style="text-align: right;">Page 181</p> <p>1 MR. FRITTS: That's true.</p> <p>2 MR. PEARCE: And they certainly have no      3 forum to litigate post election that issue.</p> <p>4 MR. FRITTS: That's true. Theoretically      5 what the union could do is file a subsequent      6 petition to represent individuals who are excluded      7 if they believe they should have been included and      8 litigate in a separate R-Case proceeding.</p> <p>9 MR. PEARCE: Right, which creates more of      10 an administrative process.</p> <p>11 MR. FRITTS: True. But I think either      12 way you're talking about more administrative      13 process. If it's the employer's 8(a)(5) challenge      14 or it's a UC proceeding to resolve it after the      15 fact, either way, if you don't resolve the issue      16 there's the potential for subsequent litigation.</p> <p>17 MR. PEARCE: And the notice of proposed      18 rulemaking provides for an administrative procedure      19 for the issue in the event that the issue would be      20 determinative of the results?</p> <p>21 MR. FRITTS: If it's determinative, then      22 there's a post-election process.</p> <p>23 MR. PEARCE: All right. Thank you all.      24 Next we'll hear from Gina Cooper, Arnold Perl, Jody      25 Mauller and Doreen Davis. You may proceed.</p>

<p style="text-align: right;">Page 182</p> <p>1 MS. COOPER: Good afternoon. Thank you 2 for the opportunity to be here and speak with you 3 today. I am Gina Cooper. I am the director of 4 professional and industrial organizing for the 5 International Brotherhood of Electrical Workers 6 AFL-CIO, and I've held that position since July of 7 2010. Prior to that and for the last 27 years I 8 have worked in various capacities for the IBEW, 9 representing and organizing workers in both the 10 construction and the professional industrial 11 industries throughout the United States and have 12 participated in numerous NLRB proceedings.</p> <p>13 In my current capacity I receive reports 14 on organizing campaigns conducted by local unions 15 affiliated with the IBEW throughout the country. I 16 am therefore very familiar with how the NLRB's 17 representation-case rules affect employees who want 18 union representation.</p> <p>19 I know that employers will testify here 20 that nothing is broken and that no changes are 21 needed. They will likely remind you that the unions 22 won 63 percent of all requests for certification 23 resolved in fiscal 2013. I saw that number 24 mentioned in employer fliers, and I found that 25 number startling because it does not fit at all with</p>	<p style="text-align: right;">Page 184</p> <p>1 percent or fewer potential unit employees remain at 2 issue promises to be one effective way to do this. 3 But the IBEW would like the Board to go 4 further. We often encounter situations where the 5 IBEW petitions for a physical production and 6 maintenance unit, also called a P&amp;M unit, which it 7 would be fair to describe as the employees that work 8 in an industrial setting who do the dirty work. The 9 Board has held that P&amp;M units in the utility 10 industry are presumptively appropriate, yet time 11 after time representation has been denied these P&amp;M 12 employees because their employer has insisted that 13 their unit must also include every other statutorily 14 eligible employee on the premises. This is what's 15 known as a wall to wall unit.</p> <p>16 Wall to wall units are not presumptively 17 appropriate in any industry as far as the IBEW 18 knows, and they are definitely not presumed to be an 19 appropriate unit in a utility industry. But the 20 IBEW has been forced to spend exorbitant amounts of 21 time and money because the Board's present rules 22 allow employers to litigate this wall to wall 23 theory. This litigation drags on and on and can 24 delay an election for years.</p> <p>25 The IBEW therefore urges the Board to</p>
<p style="text-align: right;">Page 183</p> <p>1 my experience.</p> <p>2 So I took some time and I looked it up. 3 It turns out that the numbers aren't so good after 4 all. In fiscal 2013 only 80,000 employees were 5 deemed eligible even to vote in a Board election, 6 and only some lesser percentage of those employees 7 actually achieved representation, as the 63 percent 8 number tells us.</p> <p>9 I also checked out the number of 10 unrepresented full-time employees in this country in 11 2013, and that number is 100 million or more. So 12 what we're really talking about is that 80,000 13 employees out of a potential 100 million employees 14 got to vote in 2013, and that percentage is so low I 15 don't even know how to say it, but it is written 16 .0008. As we said in our written comments, this 17 cannot be what Congress had in mind when it passed 18 the Wagner Act.</p> <p>19 So how do we improve a process that 20 clearly needs improving? One way is to stop the 21 delay between the filing of a petition and the 22 holding of an election. As everyone in this room is 23 aware, the more delay the less likely workers are to 24 achieve representation. The Board's proposal to 25 defer litigation until after the election where 20</p>	<p style="text-align: right;">Page 185</p> <p>1 adopt its proposed 20 percent rule. But the union 2 also asks the Board to create an exception and 3 permit the employer's proposed additions to a P&amp;M 4 unit to be litigated after the election even if the 5 additional inclusions are more than 20 percent.</p> <p>6 Therefore, the IBEW asks that you create 7 this exception for situations where the unit sought 8 is presumptively appropriate and the employer says 9 that the unit has to be wall to wall. We feel that 10 that is the best way for these workers to be assured 11 of a fair and balanced election. Thank you.</p> <p>12 MS. SCHIFFER: Thank you. I have a 13 somewhat related issue. There has been some 14 suggestion in the comments that employees make their 15 decision to vote based on whether their team leader 16 is going to be in the unit or out of the unit, and I 17 wondered what your experience is with that.</p> <p>18 MS. COOPER: My experience is that 19 employees are voting for union representation and 20 the unit issue never comes into their decision.</p> <p>21 MR. JOHNSON: I have one quick follow-up. 22 Thanks for being with us. Isn't part of what seems 23 to be driving your concern really delays inherent to 24 the Board itself in terms of getting out decisions 25 on representation cases quickly? I mean, couldn't</p>

<p style="text-align: right;">Page 186</p> <p>1 we solve a lot of this just by fast tracking      2 R-Cases, hiring more folks internally, and treating      3 this the way we would treat, say, Section 10(l)?      4       MS. COOPER: No. I don't believe that      5 would be the remedy.      6       MR. JOHNSON: Is there any part of this      7 that you think the Board could do better internally      8 and satisfy at least some of your concerns?      9       MS. COOPER: I would say that I'll be      10 here tomorrow. If you give me the evening to think      11 about it, I'll be glad to bring that back and take      12 up another good ten minutes.      13      MR. JOHNSON: Sure. Just give me the      14 secret signal to ask the same question again.      15      MS. COOPER: Will do.      16      (Laughter.)      17      MR. PEARCE: Thank you very much.      18 Mr. Perl.      19      MR. PERL: Chairman Pearce and members of      20 the Board, I appreciate the opportunity to be here      21 to address the Board on behalf of the Tennessee      22 Chamber of Commerce and Industry, which represents      23 both large employers and small business owners      24 throughout the state of Tennessee.      25      In the news release on this notice of</p>	<p style="text-align: right;">Page 188</p> <p>1 1979. ITT is a poster child for how protracted      2 litigation results when critical unit issues are not      3 resolved by the Board pre-election. In ITT,      4 following the filing of a union petition for      5 election the company sought at a pre-election      6 hearing the exclusion from the bargaining unit of      7 its 33 group leaders on the basis that they were      8 supervisors. At the hearing the hearing officer      9 received considerable evidence on this issue which      10 under the NPRM he would not, because the group      11 leaders constituted approximately 10 percent of the      12 unit.      13      However, the regional director chose not      14 to make a determination but, instead, ordered that      15 they vote by challenge ballot, and this left the      16 employer in a difficult dilemma. The company's      17 hands were tied because, as explained in the      18 dissenting opinion in Bear National which is      19 prominently mentioned in your NPRM, if the employer      20 is wrong in its belief that the group leaders      21 constituted statutory supervisors and restricted      22 them from engaging in union activity it would      23 trounce on the Section 7 rights of employees, and      24 such conduct would be found to be unlawful and      25 objectionable.</p>
<p style="text-align: right;">Page 187</p> <p>1 proposed rulemaking, the NPRM, Chairman Pearce,      2 you're quoted as stating that such proposals are      3 intended to improve the process for all parties in      4 all cases. Regretfully, in our view, the Board's      5 approach does not meet this high standard.      6       The NPRM proposes a bright line numerical      7 rule requiring that questions concerning the      8 eligibility of potential voters comprising no more      9 than 20 percent of the overall unit be resolved post      10 election, if necessary. We regard this approach as      11 ill-advised and destructive to the interests of      12 employers and will lead to even greater delays.      13 Under the NPRM the disputed supervisory status of      14 certain employees would not be resolved      15 pre-election, and this uncertainty leaves employers      16 more vulnerable to unfair labor practice findings      17 based on the conduct of employees whose supervisory      18 status prior to the election was in dispute. In our      19 view, the supervisory status must continue to be      20 litigated, 20 percent or even 10 percent, and not      21 relegated to the challenge ballot procedure in      22 post-election hearings.      23      A case in point is worth looking at.      24 It's a case I personally handled many years ago.      25 It's ITT Lighting Fixtures, beginning 249 NLRB 441,</p>	<p style="text-align: right;">Page 189</p> <p>1       Following the election won by the union      2 there existed some five years -- five years -- of      3 subsequent litigation all the way to the United      4 States Supreme Court. In the end, the election      5 which the union won five years earlier was vacated      6 and voided.      7       The anatomy of ITT Lighting Fixtures      8 represents a clear and present danger of what can      9 happen if the Board does not provide for the      10 pre-election litigation and the resolution of vital      11 supervisory issues. As correctly observed, in our      12 judgment, by Members Miscimarra and Johnson, by      13 deferring an appropriate hearing about the important      14 issues like supervisory status elections will be      15 accelerated, but in the end it would significantly      16 lengthen the time that it takes to completely      17 resolve election issues, causing added expense to      18 the parties and to the government.      19      The reality is that administrative      20 shortcuts in resolving vital issues pre-election in      21 the name of streamlining the election process causes      22 unfairness and adverse consequences to many      23 bargains. Real world experience -- and those      24 attorneys who here today on both sides have it --      25 demonstrates the fallacy of the Board majority's</p>

<p style="text-align: right;">Page 190</p> <p>1 premise that parties summarily use the pre-election 2 process established under Section 9 of the Act 3 merely to delay the conduct of an election through 4 unnecessary litigation.</p> <p>5       The bright line rule proposed by the 6 Board that eligibility and inclusion questions 7 affecting no more than 20 percent of eligible voters 8 be resolved post election in our view is arbitrary, 9 it's impractical, and it's antithetical to the 10 self-professed high standards which this Board and 11 prior boards has set for itself in the conduct of 12 representational license.</p> <p>13       MS. SCHIFFER: I was also litigating 14 cases in 1979, including one with ITT. But your 15 example I guess to me demonstrates that this in fact 16 has been the Board's practice for 35 years, or at 17 least based on your example, that for at least 35 18 years that there are issues that even when evidence 19 is taken that the regional director does not 20 resolve. And even if the regional director does 21 resolve them there may be an appeal or request for 22 review to the Board so that they're not finally 23 determined typically until I assume in your case 24 post election. Right?</p> <p>25       MR. PERL: Well, I have two responses to</p>	<p style="text-align: right;">Page 192</p> <p>1 percent or 20 percent, but the Board should follow 2 the dissenting opinion in Bear National, Inc. and 3 make determinations of these violations. If the 4 goal is to improve the process for all parties in 5 all cases and to expedite elections, accelerating 6 the election on the front end but delaying it 7 considerably for a matter of years on the back end 8 is not in our view the expeditious resolution of 9 representation questions.</p> <p>10       MS. SCHIFFER: So you would propose that 11 the Board not only not adopt the proposed 20 percent 12 rule but that it in fact rescind the current 13 practice.</p> <p>14       MR. PERL: I would characterize it as 15 modifying the current practice. Because in most 16 cases in my experience, and I've been practicing 17 first with the Board for four years at a regional 18 office and then here in Washington as well as in 19 private practice for over 40 years, and in over 90 20 percent of the cases. Regional directors if they 21 hear a case through the hearing officer and take the 22 evidence they will make a determination.</p> <p>23       In the ITT election case the regional 24 director erred by not making a determination because 25 the record was there, and that could have saved</p>
<p style="text-align: right;">Page 191</p> <p>1 your question, Member Schiffer. The first is there 2 was a record developed pre -- election in ITT 3 Lighting. So when this case went up on a technical 4 8(a)(5) refusal to bargain the court had a record 5 before it went to the Second Circuit twice.</p> <p>6       MS. SCHIFFER: And the supervisory issue 7 was resolved by the Board?</p> <p>8       MR. PERL: The first decision of the 9 Second Circuit remanded it to the Board. The Board, 10 based on the record that had been established by the 11 hearing officer, made a determination on the alleged 12 supervisory status of the group leaders. The case 13 went back to the Second Circuit, and this time it 14 denied enforcement of the Board order and it vacated 15 the election. The petitioner in that case filed a 16 petition to the United States Supreme Court, and it 17 was denied in a split decision.</p> <p>18       The second response to your question is 19 yes. For 35 years, even more, the Board has heard 20 these kinds of challenges. They have taken 21 evidence. But as the Chairman noted earlier, a 22 regional director has the discretion, and I believe 23 you brought this up, not to make a determination.</p> <p>24       So our position is that not only should 25 this issue be litigated, whether it's 5 percent, 10</p>	<p style="text-align: right;">Page 193</p> <p>1 years of litigation had he done so.</p> <p>2       MS. SCHIFFER: But my question is that 3 you're suggesting that the Board undo its current 4 practice.</p> <p>5       MR. PERL: I'm suggesting that the Board 6 follow the dissenting opinion in Bear National and 7 first hear the case, take the issue, make a record 8 and make a determination. It will save considerable 9 litigation on the back end.</p> <p>10       MR. JOHNSON: But here's what I don't 11 understand. Do you acknowledge the concern as being 12 realistic that if there is simply a handful of 13 employees that might be at issue, that could be used 14 as a stumbling block to either getting the 15 stipulated election agreement when there should be 16 one simply because the leverage enforcing an 17 election and a delay may be too tempting?</p> <p>18       MR. PERL: Well, I think that there are a 19 lot of competing interests in leading to agreement 20 on a stipulated election. I was involved in a case 21 several years ago where only one individual was in 22 dispute -- the unit consisted of approximately 40 23 employees -- one individual, because that was a 24 pivotal individual. This individual was a claimed 25 supervisor according to the company and he was</p>

1 asserted to be an employee by the union. The  
 2 individual was responsible for collecting union  
 3 authorization cards and for leading the union drive.  
 4 So here's one individual out of 40, but it was  
 5 pivotal. The issue is whether there is a necessity  
 6 to determine whether that individual is a statutory  
 7 supervisor or rank and file employee, and whether  
 8 it's one or one hundred in some cases depends on the  
 9 facts of the case.

10 MR. JOHNSON: Aside from supervisory  
 11 issues, would your view change if we're talking  
 12 about unit placement of a relatively number of  
 13 individuals?

14 MR. PERL: Yes. My view is different on  
 15 unit placement of other individuals. I think that  
 16 the supervisory status is the one category that must  
 17 be litigated in each and every case where they're in  
 18 dispute regardless of the percentage number, and I  
 19 think issues of inclusion and exclusion in terms of  
 20 the present system going back 35 years ago is less  
 21 severe. However, under Specialty Healthcare now  
 22 there is a different standard. I assume that goes  
 23 to scope of unit and under the NPRM would be heard  
 24 in each and every case, but if it's not, then those  
 25 issues are vital as well.

1 MR. PERL: Well, that is correct. And  
 2 that's why the notion that this issue could be  
 3 resolved through the challenge ballot procedure is  
 4 just not realistic. I mean, there are other impacts  
 5 of disputed supervisors on the conduct of the  
 6 representation election. I truly believe this Board  
 7 wants to get it right, and I bring this case to the  
 8 Board's attention because I think it represents the  
 9 challenge not only to practitioners and parties but  
 10 to the Board.

11 How do you have an expedited procedure  
 12 and what does that really mean? Should it be  
 13 expedited only on the front end, or is it expedited  
 14 through the totality of a representation process?  
 15 Certainly, I don't think any Board member here today  
 16 would agree that five years of litigation over this  
 17 election is an expeditious way to resolve  
 18 representation cases.

19 I think there is a challenge here, I  
 20 applaud the Board for searching to improve the  
 21 process, and I certainly accept the chairman's goal  
 22 here that the process should be improved for all  
 23 parties in all cases. And I think that's the  
 24 standard. To me, the bright line standard is not 20  
 25 percent. The bright line standard is what the

1 MR. MISCIMARRA: Mr. Perl, thanks for  
 2 mentioning this case as an example. You referred to  
 3 it as a poster child. In terms of those particular  
 4 issues that you're bringing to our attention, I'm  
 5 looking here at the second appearance before the  
 6 Second Circuit, which was in 1983 from 1979, so the  
 7 case took four years to litigate. Is that right?

8 MR. PERL: That is correct.

9 MR. MISCIMARRA: One of the issues in the  
 10 case was whether people were wrongfully included or  
 11 excluded from the unit, but another issue in the  
 12 case was whether or not those people may have  
 13 inadvertently affected one way or the other the  
 14 sentiments of other employees who were voting. Is  
 15 that right?

16 MR. PERL: That was the basis, Member  
 17 Miscimarra, of the objections filed to the election  
 18 by the company and was the basis of the technical  
 19 refusal to bargain.

20 MR. MISCIMARRA: So it's really a  
 21 spillover. The percentage of people who are at  
 22 issue is not necessarily indicative of the  
 23 percentage of employees who are voting that could in  
 24 some way inappropriately be influenced by what the  
 25 disputed group is not doing or saying.

1 chairman said, to improve the process for all  
 2 parties in all cases. And the 20 percent rule in  
 3 the approach recommended and taken in the NPRM  
 4 clearly under any standard does not improve the  
 5 process for employers or the employees.

6 MR. PEARCE: Thank you very much. We  
 7 have two more speakers, so we need to move on. Mr.  
 8 Mauller.

9 MR. MAULLER: Good afternoon, Mr.  
 10 Chairman and fellow Board members. I'd like to  
 11 thank you for the opportunity you've given me to  
 12 speak here today. It is really an honor. First,  
 13 let me introduce myself. I'm Jody Mauller, an  
 14 organizer with the International Brotherhood of  
 15 Boilermakers.

16 I come here today in support of many of  
 17 the proposed rule changes, but I would like to speak  
 18 specifically about rules related to matters  
 19 litigated at the pre-election hearing. Although I'm  
 20 not an attorney, I have had the opportunity to  
 21 review how the time spent pre-election hearings by  
 22 the parties impacts workers seeking to do what is  
 23 central to the Act, and that is to vote on their  
 24 desire regarding to be represented by a union.  
 25 Specifically, I'm here to speak in

<p style="text-align: right;">Page 198</p> <p>1 support of the Board implementing the 20 percent      2 rule. This is a rule that makes sense in the      3 context of a campaign and an election, and as I      4 understand it the rule would defer any issues of      5 eligibility that affect fewer than 20 percent of the      6 bargaining unit until after the workers have had the      7 opportunity to vote. This rule would advance      8 allowing workers to vote and to do so in a timely      9 fashion.</p> <p>10 In my experience, it is also difficult to      11 hear the frustration of workers awaiting the      12 election. They are often frustrated with the      13 process and the length of time it takes for an      14 election to go forward. I have seen workers become      15 discouraged, disengaged and repeatedly ask, "When do      16 we get to vote." I am sure many of my colleagues      17 here are familiar with addressing those frustrations      18 and the difficulty of doing that, especially when      19 the holdups are questions that relate to just a      20 small percentage of workers and their eligibility to      21 vote.</p> <p>22 I think the fact that many workers have      23 voiced these concerns is indicative of the need for      24 change. Whether you are for the union or against,      25 there is no reason to unnecessarily delay an</p>	<p style="text-align: right;">Page 200</p> <p>1 that the 20 percent rule as well as other rules will      2 help ensure that this remains the focus.      3 I've reviewed outlines regarding the      4 rules, and I would agree with the assessment that      5 the rules will help prevent this unnecessary and      6 oftentimes wasteful litigation, and I believe      7 pre-election hearings often result in significant      8 and not unneeded delay. The opportunity to cause      9 this delay, whether it is intentional or not, should      10 be prevented, and the rules I believe help in this      11 regard.</p> <p>12 As mentioned by the AFL-CIO in its      13 comments submitted to the Board, the proposals would      14 not permit parties to introduce evidence concerning      15 an issue that is not relevant to the statutory      16 purpose of the hearing such as the eligibility or      17 inclusion of small numbers of employees.</p> <p>18 I recently had an experience where a      19 significant portion of the pre-election hearing was      20 spent taking evidence on the supervisory status of a      21 small percentage of team leads. Certainly, had the      22 20 percent rule been in effect significant time and      23 resources of both parties and the region could have      24 been spared, and I'm convinced that the election in      25 conjunction with other rules would have proceeded in</p>
<p style="text-align: right;">Page 199</p> <p>1 election from going forward. With the 20 percent      2 rule, the focus of the election turns back to what      3 is important, and that's giving workers an      4 opportunity to vote regarding their desire to be      5 represented by a union in a fair and timely manner.</p> <p>6 Everyone here knows that the longer it      7 takes to get to an election there's more potential      8 for problems to arise during the critical period. I      9 would submit that holding the election in a more      10 timely manner, which this 20 percent rule would help      11 achieve, would also help the Board, general counsel,      12 regions and subregions more effectively utilize      13 their resources.</p> <p>14 Instead of spending days and sometimes      15 weeks at pre-election hearings, litigating and      16 putting on evidence regarding issues that affect      17 only a small percentage of workers, elections could      18 go forward and workers could vote subject to      19 challenge. In conjunction with other rules this is      20 a sensible approach. Why engage in days and weeks      21 of litigation regarding eligibility and inclusion      22 matters when the focus should be on the workers and      23 their desire to be represented? I think everyone      24 agrees that the focus of the election should be on      25 the workers, and there is no question in my mind</p>	<p style="text-align: right;">Page 201</p> <p>1 a more timely fashion instead of taking over 70      2 days. The supervisory issue could then have been      3 addressed if necessary after the election went      4 forward.</p> <p>5 Overall, I believe the proposed rules can      6 make a real difference going forward, and it makes      7 sense to implement the new rules. Having elections      8 scheduled at the earliest possible date ensures that      9 workers have an opportunity to vote without      10 significant delay, and the 20 percent deferral rule      11 is one such rule that will help everyone focus on      12 what is important, and that is the workers and      13 giving them a fair and timely opportunity to vote on      14 representation.</p> <p>15 Again, I thank you for your time and      16 consideration.</p> <p>17 MR. JOHNSON: Thank you. Sorry about the      18 air horn.</p> <p>19 MS. SCHIFFER: I just have one question.      20 In your experience you sort of started juxtaposing      21 the litigation of the team leads with the      22 opportunity to vote. Could you put those together      23 for me and describe for me sort of the voters'      24 interest in having the team leads issue resolved?</p> <p>25 MR. MAULLER: I'm sorry. Maybe I</p>

<p style="text-align: right;">Page 202</p> <p>1 misunderstood your question. The team leads in this 2 particular instance, if memory serves me correctly, 3 the unit we petitioned was for 151 workers, the team 4 leads I think were 12, so it amounted to about eight 5 or nine percent. And I think that if we didn't have 6 to spend time at the hearing discussing something 7 that takes eight or nine percent, composing eight or 8 nine percent of the proposed unit, we could have 9 gotten to an election faster, and the employees or 10 the workers there would have stayed engaged and 11 possibly had a different outcome.</p> <p>12 MS. SCHIFFER: Was it your experience 13 with that that the workers' views about how they 14 would vote on the election were dependent on the 15 eligibility of the team leads?</p> <p>16 MR. MAULLER: No, that wasn't. I think 17 mostly the workers were just focused on that they 18 want to be represented by a union. I think more of 19 their frustration was on the fact of the length of 20 time that it took to actually get to exercise their 21 right to make that determination.</p> <p>22 MR. MISCIMARRA: I just have one 23 follow-up. What percentage of the unit employees 24 who voted in that case did the team leads interact 25 with during the campaign period?</p>	<p style="text-align: right;">Page 204</p> <p>1 trillion in annual sales, millions of American jobs, 2 and more than 100,000 stores, manufacturing 3 facilities and distribution centers domestically and 4 abroad. I'm accompanied here today by Kelly Kolb, 5 who is a member of the staff of RILA.</p> <p>6 I'm going to try not to be too 7 repetitious since we have these multiple panels all 8 speaking about the same thing. First, I'm going to 9 address the 20 percent rule, which I believe and 10 which RILA believes is a solution in search of a 11 problem. We've heard a lot of talk about 12 supervisory status issues, which I'm going to speak 13 to in a moment, because it is extremely important to 14 the members of RILA.</p> <p>15 But let us not forget that those are not 16 the only individual eligibility issues that are 17 being deferred potentially under the 20 percent 18 rule. We have managerial status, we have 19 independent contractor status, we have confidential 20 employees, and, of particular interest of late, we 21 have the issue of whether an individual is a student 22 or an employee. These are all the types of issues 23 that under the 20 percent rule there is a 24 possibility would not be determined and would not be 25 litigated.</p>
<p style="text-align: right;">Page 203</p> <p>1 MR. MAULLER: If I understand your 2 question, all of them. They interacted directly 3 with the workers on a daily basis.</p> <p>4 MR. MISCIMARRA: Thank you.</p> <p>5 MR. PEARCE: In your experience, have you 6 elected not to take on a supervisory issue when 7 presented during a pre-election matter?</p> <p>8 MR. MAULLER: No, Mr. Chairman, not in my 9 experience, not that I recall.</p> <p>10 MR. PEARCE: Thank you. Ms. Davis.</p> <p>11 MS. DAVIS: Chairman Pearce, Members 12 Hirozawa, Miscimarra, Schiffer and Johnson, I'd like 13 to thank you for having me here today. My name is 14 Doreen Davis. I'm a partner at the Jones Day law 15 firm, resident in the New York office. I too 16 handled cases in 1979, since I've been practicing 17 traditional labor law exclusively for 35 years.</p> <p>18 Today I'm here representing the Retail 19 Industry Leaders Association and to express their 20 opposition to your notice of proposed rulemaking. 21 The Retail Industry Leaders Association is a trade 22 association of the world's largest and most 23 innovative retail companies. Members include more 24 than 200 retailers, product manufacturers and 25 service suppliers, which account for more than \$1.5</p>	<p style="text-align: right;">Page 205</p> <p>1 In particular, on the supervisory issue 2 for the retail employers, oftentimes the store 3 manager is really the only on-the-ground person in 4 the store who has any managerial authority, and in 5 some cases the issue of whether or not they are 6 truly supervisory employees or not comes up in these 7 cases. And you can imagine what a difficult 8 position that must put employers in if that issue is 9 not determined, especially if they are the sole 10 managerial employee in that store.</p> <p>11 We've talked a little bit about the risks 12 that are inherent in going forward in that situation 13 where the supervisory status isn't determined. And 14 there's a risk not only to the employers of course 15 in having that manager be the communicator or not be 16 the communicator, but there's also risk to the union 17 in that situation in the event that that store 18 manager, for example, is sympathetic to the union 19 and perhaps helping them get cards signed or helping 20 out in the campaign. Well, then the union also runs 21 the risk of the election being overturned if they 22 win it because of supervisory taint of some sort, so 23 it's an issue that's not just something that 24 presents a risk to employers but also presents risk 25 to unions.</p>

<p style="text-align: right;">Page 206</p> <p>1 I posit to you that this rule may 2 actually of course get to quicker elections. And 3 although the rule does not specifically state that 4 that is one of its purposes, implicitly many of the 5 changes that are being proposed are designed to get 6 to quicker elections. And I go back to a comment I 7 heard Member Miscimarra make in the panel before 8 this. I would think that the Board's goal should 9 not be just to have an election or to have a quicker 10 election.</p> <p>11 The last time I checked, the preamble to 12 the National Labor Relations Act said its purpose 13 was to encourage collective bargaining. And by 14 putting off these issues and submitting them to 15 post-election litigation, I would say to you that I 16 think that that is going to delay collective 17 bargaining and delay first contracts, because this 18 litigation is going to take time.</p> <p>19 If there are determinative challenges, 20 then it's going to be litigated in that context post 21 election and bargaining is not going to start until 22 that's determined. If there are non-determinative 23 challenges, the notice of proposed rulemaking 24 suggests that the issue be resolved in bargaining, 25 which of course is going to delay the bargaining</p>	<p style="text-align: right;">Page 208</p> <p>1 remains in dispute because of supervisory issues, 2 and we've had a case that's been the subject of 3 discussion that was in litigation for four years, is 4 the employer permitted during that period of time, 5 if the union prevailed, is the employer permitted to 6 freely make changes in terms of the operation of the 7 business during the period of time that the election 8 outcome is in dispute?</p> <p>9 MS. DAVIS: Absolutely not. It can't 10 make any unilateral changes without bargaining with 11 the union. If the employer does so, it's at risk of 12 course for an unfair labor practice charge, which 13 makes it very difficult to run a business in today's 14 environment, especially in the retail space. The 15 employers have to be facile and have to respond to 16 new challenges, for example online shopping versus 17 physical bricks and mortar stores. It makes it very 18 difficult for businesses to operate when they are 19 stymied in making changes.</p> <p>20 MR. MISCIMARRA: So there are changes 21 that actually affect the way retail employers do 22 business more often than every four years?</p> <p>23 MS. DAVIS: Yes, daily.</p> <p>24 MR. PEARCE: But under our current rules, 25 if an employer doesn't like the outcome of a unit</p>
<p style="text-align: right;">Page 207</p> <p>1 when your first issue you're bargaining over is the 2 scope of the bargaining unit and who's in and who's 3 out. And the notice of proposed rulemaking also 4 says if it can't be resolved there, then it can be 5 resolved in a unit clarification petition, which 6 also delays, in my judgment, getting to a first 7 contract.</p> <p>8 I would reiterate that the rule does not 9 seem to be clear as to whether the scope of the unit 10 questions under specialty healthcare can be 11 litigated even if they do not constitute the 12 requisite 20 percent, and I would encourage the 13 Board to make that very clear. The limiting of the 14 litigation impedes the employer's ability to develop 15 the record, and it places extraordinary discretion 16 on the regional office employees for whom I have 17 tremendous respect, having started my career there. 18 But to allow a hearing officer to make the decision 19 whether or not to take evidence is making that 20 hearing officer both judge and jury, and for these 21 reasons we oppose the proposals.</p> <p>22 MR. PEARCE: Questions?</p> <p>23 MR. MISCIMARRA: I have one follow-up 24 question. If we do have a quick election, which is 25 advantageous for certain reasons, but the election</p>	<p style="text-align: right;">Page 209</p> <p>1 placement decision by the Board and elects to test 2 cert by not bargaining it, does that add its own 3 risk as well?</p> <p>4 MS. DAVIS: Absolutely. But under the 5 proposed rules the testing of the cert is going to 6 be difficult when there is no underlying record 7 that's been made. I would suggest that what's going 8 to happen in some of the test certification cases 9 where there's no record is there's going to be 10 remand, and you're just going to have more and more 11 time to get these issued resolved.</p> <p>12 MR. JOHNSON: A quick follow-up on that. 13 At what point do you see it becoming a due process 14 problem or a 9(c)(1) problem, if at all, given the 15 volume of what is going to be excluded from the 16 record by a hearing officer?</p> <p>17 MS. DAVIS: I think when the hearing 18 officer makes a decision not to take evidence on a 19 particular issue and says you're not allowed to 20 introduce evidence, that's at the point it happens.</p> <p>21 MS. SCHIFFER: You mentioned impact on 22 the union from not having the supervisory issue 23 resolved, but with respect to card signing the 24 supervisory issue is never resolved at that point. 25 Right?</p>

<p style="text-align: right;">Page 210</p> <p>1 MS. DAVIS: Well, not necessarily when 2 the cards are being signed, that's true, but during 3 the campaign if the --</p> <p>4 MS. SCHIFFER: At some point in the 5 campaign, maybe.</p> <p>6 MS. DAVIS: Maybe.</p> <p>7 MR. PEARCE: Thank you all very much.</p> <p>8 Our next seating involves Mark Spognardi, Michael 9 Lotito, Gabrielle Semel, G. Roger King, Elizabeth 10 Bunn and Maneesh Sharma. Greetings, everybody. Mr. 11 Spognardi.</p> <p>12 MR. SPOGNARDI: Thank you, Board members. 13 My name is Mark Spognardi. I'm a partner at the law 14 firm of Pautsch, Spognardi &amp; Biaocchi in Chicago, 15 Illinois. It's a great pleasure to be here with you 16 today.</p> <p>17 I started my career in labor law almost 18 30 years ago working as a staff counsel to two 19 different Board members, not at the same time. I'm 20 presenting the views of myself as a management side 21 attorney, my firm, my clients and other concerned 22 business people that I deal with on a day-to-day 23 basis.</p> <p>24 I want to focus my attention on the most 25 important subject that I see which people have</p>	<p style="text-align: right;">Page 212</p> <p>1 it's worked well.</p> <p>2 As the Supreme Court also recognized in 3 Bell Aerospace and recognized in Yeshiva University, 4 employers are entitled to the absolute loyalty of 5 their supervisors, of their managers and of their 6 confidential employees. Supervisors and the others, 7 they're expected to act in the interest of the 8 employer. They're agents of the employer. Their 9 actions bind the employer. The statute for 10 supervisors, Section 2(11), says explicitly they are 11 people that hire, they fire, they reward, they 12 discipline, they can make the employee's day, they 13 can break the employee down. At the end of the day, 14 though, the employer is entitled to their loyalty, 15 and they have to be excluded.</p> <p>16 This determination has to be made at the 17 very beginning. In the effort to proceed with 18 quicker elections I believe the unintended 19 consequences will be even further delays after the 20 election. If a person is a supervisor and they are 21 not excluded from the unit they're going to be out 22 soliciting cards or urging support for a union. It 23 is a curse of employee rights, it taints the showing 24 of interest, it subjects itself to administrative 25 investigation and to dismissal of the petition by</p>
<p style="text-align: right;">Page 211</p> <p>1 addressed, and I'll try not to be redundant, but 2 that is the necessity to have a pre-election hearing 3 to determine the eligibility of somebody that may be 4 a supervisor, a manager or a confidential employee. 5 These issues, I believe, are the linchpin and 6 critical to resolve as early as possible in order to 7 preserve laboratory conditions so that employees can 8 cast a free and informed secret ballot.</p> <p>9 As you're well aware, the Act was passed 10 encouraging unionization and collective bargaining, 11 gave employees the right to organize, and gave them 12 protections from employers taking reprisal and 13 retaliation against them for exercising those 14 Section 7 rights. In structuring the Act, Congress 15 through the Taft-Hartley Act, the amendments, made 16 it clear that supervisors are excluded from the 17 protections of the Act. As the Supreme Court said 18 in Bell Aerospace, a division of Textron, Congress 19 also understood and the Board at the time understood 20 that managers, confidential employees, are excluded 21 from the protections of the Act. They cannot be 22 organized. This is simply a basic management versus 23 labor analysis. It is in essence a class conflict 24 analysis, but it is the way that this Board and the 25 National Labor Relations Act has been set up, and</p>	<p style="text-align: right;">Page 213</p> <p>1 the regional director without a hearing 2 administratively.</p> <p>3 Problems continue if you have a valid 4 showing of interest and you're proceeding to an 5 election and you don't resolve these linchpin issues 6 immediately. If the disputed individual is actually 7 a supervisor and aids and abets the organizing 8 efforts it can amount to unfair labor practice of 9 unlawful domination and assistance and destroys 10 laboratory conditions.</p> <p>11 On the other hand, if it's a straw boss 12 or a lead, if they're actually a supervisor their 13 comments and their actions, if they go beyond mere 14 facts and opinions, they could be threats or 15 promises or both, they could be unlawful, they have 16 a binding effect on an employer, it could be grounds 17 for objections, unfair labor practice and result in 18 setting aside the election.</p> <p>19 This all in my view can be avoided by 20 having a hearing to decide eligibility where the 21 parties cannot reach agreement. Great effort is put 22 in the regions to have the parties try to reach 23 agreement. Even where the parties do not reach 24 agreement, in my experience in the regions I've 25 worked in, which is primarily Region 13, having a</p>

1 hearing does not delay the election according to the  
2 Board's current time guidelines.

3 As the Board has acknowledged in its many  
4 opinions, determining these issues is a vexing  
5 problem. Section 9 of the Act requires a hearing,  
6 evidence has to be taken, and often there are no  
7 bright lines, but the consequences of rushing to an  
8 election without determining these lynchpin issues I  
9 believe could result in further delay than is  
10 experienced now.

11 MR. PEARCE: You're out of time. You  
12 used as an example a supervisor potentially tainting  
13 an election by card solicitation and having  
14 supervisory status at the time.

15 MR. SPOGNARDI: Prior to the filing of  
16 the petition.

17 MR. PEARCE: Right. And of course in  
18 that example card solicitation by a 2(11) supervisor  
19 prior to the filing of a petition would have an  
20 effect on the filing of the petition if that  
21 circumstance becomes a ULP or is presented as an  
22 unfair labor practice or --

23 MR. SPOGNARDI: No. It's  
24 administratively handled. My experience is you  
25 contact the region. You say, "We have a petition

1 that's been filed and we have evidence that it's  
2 tainted, we have evidence that the cards and the  
3 signatures were gathered by a supervisor." Then  
4 that evidence is looked at and investigated by the  
5 region, by the field staff, without a hearing,  
6 administratively looked at, and it can result in the  
7 regional director dismissing the petition  
8 administratively, and then the petitioner is free to  
9 later file an untainted petition, but there is no  
10 hearing in that circumstance.

11 MR. PEARCE: And is it your position that  
12 the NPRM would alter that part of the process?

13 MR. SPOGNARDI: No. My position is not  
14 that it would alter that part of the process. I  
15 would like to have a hearing on that issue, but  
16 that's not the way the Board has worked. As far as  
17 I know, as far back as I've practiced it's never  
18 worked that way. It's handled administratively.  
19 And showings of interest under Board rules or Board  
20 policy, I believe both, are not -- the showing of  
21 interest itself is not subject to hearing or  
22 litigation at the pre-election hearing.

23 The showing of interest is a  
24 determination made administratively by the regional  
25 director. The problem is later during the campaign

1 period after the decision of direction is made or  
2 not made.

3 MR. PEARCE: I understand. But in terms  
4 of that particular example, there are processes in  
5 place, and as far as I understand there is no  
6 suggestion that that process would be tampered with.

7 MR. SPOGNARDI: Not by your proposed  
8 rule, no, not at all.

9 MR. MISCIMARRA: Mr. Spognardi, I just  
10 have one question, and I'll ask it one time, but  
11 I'll ask all of the members of this seating to  
12 address it, if they don't mind. If we found a way  
13 to address supervisor status, managerial employee  
14 status and confidential employee status before the  
15 election but we adjusted the Board's internal  
16 procedure so elections took place as quickly or more  
17 quickly than they occur now, would you support such  
18 an approach?

19 MR. JOHNSON: And I have an additional  
20 question for everybody on top of that question which  
21 Phil stole from me.

22 (Laughter.)

23 MR. SPOGNARDI: If you found an approach  
24 that worked for both parties, as the statute is  
25 supposed to do, I would not oppose that. What I

1 think, though, here is that we have a situation  
2 where the rules that existed have worked. You might  
3 complain about delays, but in my experience there  
4 aren't significant delays. I know of no attorney  
5 who is successful in Chicago in choosing an issue to  
6 go to hearing to try to delay an election. They're  
7 all held within 42 days. It just doesn't happen  
8 where I come from. They don't let you get away with  
9 that.

10 And they know how to establish and shut  
11 down an issue on the record: "Oh, he knows how to  
12 fire somebody? We don't need any more evidence.  
13 Move on, counsel." In this instance I believe the  
14 rule has functioned fine, and we're going to deal  
15 with the law of unintended consequences of having  
16 many more delays on the back end.

17 MR. JOHNSON: I revoke my group question,  
18 but here's a piggyback question just for you. If  
19 these three exclusions are so important,  
20 confidential, managerial and supervisory, and we had  
21 a statement of position that was up front earlier  
22 than the hearing, depending on when the hearing is  
23 would you be opposed to the employer having to take  
24 a position on what positions were covered by those  
25 exclusions?

<p style="text-align: right;">Page 218</p> <p>1       MR. SPOGNARDI: Well, if it forces the 2 employer to box himself in, I would.</p> <p>3       MR. JOHNSON: Okay. Assuming there is 4 some opportunity to amend at some later point.</p> <p>5       MR. SPOGNARDI: If there's procedure 6 that's involved, that's something that can be 7 examined. I don't see a delay in the process 8 occurring that really resolves. I don't see any 9 delays being caused by there being a lack of a 10 written position statement up front outlining the 11 issues. And in fact, my experience at the Board is 12 that you are readily contacted by the Board agent 13 and they ask you, "What are the issues, what are the 14 issues."</p> <p>15       MR. JOHNSON: I'm just talking about 16 those three exclusions, because that has come up in 17 prior testimony today.</p> <p>18       MR. PEARCE: Thank you. Mr. Lotito.</p> <p>19       MR. LOTITO: Thank you, Mr. Chairman and 20 members of the Board. I'm Michael Lotito. I'm a 21 shareholder at Littler, and I'm here today on behalf 22 of the International Franchise Association. It has 23 also submitted to the Board written comments on this 24 issue.</p> <p>25       I've given considerable thought to</p>	<p style="text-align: right;">Page 220</p> <p>1 to be provided because the NLRB has brand new 2 election rules.</p> <p>3       The assistant manager also says there 4 will be an election in two weeks. The employee 5 might ask about the voting procedure. The assistant 6 manager might say, "We do not know if you are or are 7 not an eligible employee to vote because you came to 8 us through a temp agency," at which point the 9 employee might ask, "Well, who decides that and 10 when," and the assistant manager might say, "We're 11 really not sure."</p> <p>12       Former acting general counsel Lafe 13 Solomon issued Memorandum GC12-04 which is now 14 withdrawn on April 26th, 2012, suggesting in 15 response to the old new rule that joint employment 16 issues need to be decided upon before the election 17 between two semicolons, citing a couple of cases 18 which I've read which I'm not sure stand for that 19 proposition. I certainly hope the acting general 20 counsel's position was correct. But to me, the 21 proposed rule is not clear on this point.</p> <p>22       Moreover, the Division of Advice is 23 currently considering whether a joint employment 24 relationship exists between a franchisor and a 25 franchisee. The IFA in a letter dated October 29,</p>
<p style="text-align: right;">Page 219</p> <p>1 perhaps what you're thinking about, and that is what 2 more can be said about this particular aspect of the 3 rule that already hasn't been said. And it's 4 occurred to me in reflecting on that that there is a 5 point of view that really cannot be overemphasized 6 here today, and that is how would a new rule 7 actually impact an employee involved in a 8 representation-case matter.</p> <p>9       I remember as a college student asking my 10 employer one day why I could not vote in a labor 11 Board election that was taking place at the store 12 that I was working at. My employer told me that I 13 was ineligible to vote because I only worked during 14 the summer. He also said that I would not hear from 15 the union or otherwise need to participate in the 16 process because I couldn't vote. I knew exactly 17 where I stood.</p> <p>18       But what if that situation happened under 19 the proposed rule? Assume for a moment we have a 20 part-time employee working in a retail store. He 21 approaches the assistant department manager, 22 wondering why a union representative is calling on 23 him at his home and sending him e-mails when that 24 information is supposed to be confidential. The 25 assistant manager explains that the information had</p>	<p style="text-align: right;">Page 221</p> <p>1 2013 to associate general counsel Barry Kearney 2 vigorously reasserted that the traditional finding 3 of separate businesses should continue. In short, 4 the rule should make clear that issues about who is 5 and who is not an employer must be litigated to 6 conclusion, in my view, before an election is 7 scheduled.</p> <p>8       Along the same lines, the Board should 9 make clear whether the status of an individual as an 10 employee must be litigated prior to the election. 11 The Northwestern case has already generated 12 considerable controversy. Frankly, I think that 13 this Board would have been subjected to tremendous 14 criticism if the student athletes voted in an 15 election before their status as employees was even 16 decided upon by a region. Further, under the 17 existing processes, Northwestern can file a request 18 for review, and did so yesterday.</p> <p>19       Under any new procedure will the request 20 for review be permitted on an issue litigated before 21 the litigation, or will that be abolished to 22 expedite the holding the election, even though it 23 may be unclear as to who the employer or even the 24 employee is?</p> <p>25       In sum, in my view any new rule should</p>

<p style="text-align: right;">Page 222</p> <p>1 clearly state that employee and employer status must 2 be litigated to conclusion before the election 3 occurs. The proposed rule may generate additional 4 confusion. What if the employee goes to the 5 assistant manager and asks her to attend a union 6 meeting with him to get answers to some of these 7 questions?</p> <p>8       The assistant manager might say, "I don't 9 know if I can go. They haven't figured out if I'm a 10 statutory supervisor, whatever that means, or not. 11 I'm voting subject to challenge, and I'm not sure 12 what that means, either, because it's not clear if 13 I'm in or out of the unit. If I go to the union 14 meeting with you and they find out that I'm a 15 supervisor, then I'm guilty of spying and the 16 election might be set aside, so it's best for me not 17 go, even though if they find ultimately that I'm an 18 employee I have every right to be there."</p> <p>19       The employee and the assistant manager 20 share a new form of community of interest. I call 21 it legal limbo, their status and their right to vote 22 in the election, and in the assistant manager's case 23 the right to attend either the union or the 24 management meetings may not be decided upon until 25 after the election takes place.</p>	<p style="text-align: right;">Page 224</p> <p>1 prior to that I worked as a field attorney in Region 2 of the NLRB for two years.</p> <p>3       During the last 30 years I can safely say 4 that I have participated in some manner in over a 5 hundred representation cases. Based on that 6 experience, I believe that the Board's R-Case 7 procedures are outdated and easily manipulated.</p> <p>8       Section 9(c) of the Act states that the 9 Board must determine whether a question of 10 representation exists. The language of the statute 11 should guide the types of issues that are litigated 12 in pre-election hearing. In my experience as both a 13 hearing officer and as a union attorney, that is 14 generally not the case. Rather, the pre-election 15 hearing is used as the strategic chip by the 16 employer to either drag out the process or to gain 17 an advantage in terms of the composition of the 18 bargaining unit. The pre-election hearing is rarely 19 about genuine questions of representation.</p> <p>20       A few years ago I led CWA's legal work 21 regarding three representation petitions seeking to 22 represent geographically defined technical units of 23 T-Mobile USA. These cases collectively illustrate 24 some of the ways in which the Board's current 25 pre-election procedures are abused.</p>
<p style="text-align: right;">Page 223</p> <p>1       The ability to make an informed decision 2 is the cornerstone of our election process. How is 3 the part-time employee supposed to find out if he 4 wants to support a union if he doesn't even know if 5 the union will ultimately represent his interest? 6 The same problem exists with the assistant manager.</p> <p>7       You're hearing an awful lot from 8 management representatives and from union 9 representatives, but at the end of the day to me 10 this really is not about unions or management, it's 11 really about employees, and in my view the proposed 12 rule does not necessarily further informed choice by 13 those employees. Thank you very much.</p> <p>14       MR. PEARCE: I'd like to request that the 15 parties refrain from bringing up pending cases in 16 the course of discussions so that it will enable us 17 not to comment on things that we're not supposed to 18 be commenting on.</p> <p>19       MR. LOTITO: I appreciate that, and I'm 20 sorry if it put you in an awkward position, 21 Mr. Chairman. Ms. Semel.</p> <p>22       MS. SEMEL: Good afternoon. My name is 23 Gabrielle Semel, and I am district counsel for 24 District 1 of the Communication Workers of America. 25 I have represented CWA for close to 28 years, and</p>	<p style="text-align: right;">Page 225</p> <p>1       In the first petition CWA-TU, a part of 2 CWA, sought to represent all field and switch 3 technicians in the state of Connecticut, the second 4 sought to represent the same titles on Long Island 5 in New York, and the third the same titles in 6 upstate New York.</p> <p>7       CWA-TU is a joint project with Ver.Di, a 8 German union representing telecommunication workers 9 in Germany. T-Mobile USA sought and got a hearing 10 in each case. The issues were repetitive, did not 11 raise genuine questions of representation, wasted 12 the resources of the agency, the union, the 13 employer, dragged the process out for many months, 14 frustrated the wishes of the employees involved, and 15 were completely unnecessary.</p> <p>16       In Connecticut the employers sought to 17 include radio frequency engineers, all of whom had 18 college degrees in engineering. They challenged the 19 labor organization status of CWA-TU and challenged 20 the authorization cards as not running to the party 21 that filed the petition because they referred to TU 22 affiliated with CWA and not CWA-TU.</p> <p>23       None of these issues required a hearing 24 as the facts were not in dispute. Nonetheless, a 25 four day hearing was held. The regional director</p>

<p style="text-align: right;">Page 226</p> <p>1 found -- no surprise -- that the RF engineers were      2 professionals and not appropriate in the unit. He      3 further held that CWA-TU was a labor organization      4 and under the Act administratively determined that      5 the authorization cards supported the petition.</p> <p>6       The employer raised the exact same issues      7 in Buffalo, and a hearing on all three issues was      8 then held in Buffalo again. The regional director      9 in Buffalo ruled in the same manner as the regional      10 director in Connecticut. If there was any      11 justification for a hearing in Connecticut there      12 certainly was none in Buffalo, but in both cases the      13 hearings meant that the workers involved did not get      14 to vote until months after the petition was filed.</p> <p>15       On Long Island the employer claimed that      16 the smallest appropriate unit was all of Long Island      17 and four boroughs of New York City. This is a      18 fairly large, very densely populated geographic      19 area. The employer produced virtually no      20 documentary evidence of regular interchange between      21 New York and Long Island technicians and no evidence      22 that the Long Island technicians were supervised by      23 anyone other than their supervisors on Long Island.</p> <p>24       The hearing, however, took seven days.      25 The regional director found that the unit of</p>	<p style="text-align: right;">Page 228</p> <p>1 process.      2       The issues are not genuine questions      3 concerning representation but questions of strategy.      4 After the election, if the workers elect union      5 representation the parties are generally able to      6 resolve these disputes usually without litigation,      7 not on the basis of strategy but on the basis of      8 what makes sense for collective bargaining purposes.      9 Thank you.</p> <p>10       MS. SCHIFFER: I'd like to ask if you can      11 sort of elaborate on this resolution of the disputes      12 post election and the impact on bargaining.</p> <p>13       MS. SEMEL: The several cases that I have      14 done where those things have been issues, if they      15 could not reach agreement, and I think sometimes      16 they could if actually offers of proof had been      17 made, but if they could not, but after the vote is      18 concluded and if the union wins, then they could      19 actually discuss what these people do and whether or      20 not it makes sense for them to be in the same unit.</p> <p>21       In my experience, I think a lot of those      22 issues have been resolved through the years. I've      23 tried to think back through all the cases I've been      24 involved in to think of specific cases, but usually      25 they've been resolved. If they're not resolved</p>
<p style="text-align: right;">Page 227</p> <p>1 technicians on Long Island was an appropriate unit.      2 However, the decision was not issued until nearly      3 seven months after the petition was filed. This      4 simply should not be. Even regarding the Long      5 Island scope issue, the disputes were not really      6 factual.</p> <p>7       Had the proposed rules been in effect a      8 few years ago all three cases would have been      9 handled very differently. The regional directors      10 would have been able to decide almost all the      11 issues, if not all the issues, based on offers of      12 proof, saving the resources of the agency and the      13 parties while complying with the requirements of the      14 Act, and the employees would have been able to vote      15 in a timely manner.</p> <p>16       I would like to make one last point about      17 disputes regarding unit composition and why I      18 believe these issues should be left to post-election      19 resolution in most cases, as the new rules propose.      20 Often employers seek to include job classification      21 such as RF engineers or low level supervisors to      22 gain a strategic advantage. The employer does not      23 really want them in the unit for collective      24 bargaining purposes but seeks to add potential no      25 votes or, as in the T-Mobile case, to drag out the</p>	<p style="text-align: right;">Page 229</p> <p>1 there are procedures for handling that, but in my      2 experience most of the time, once the parties are no      3 longer in an adversarial position, they can figure      4 out whether or not these people are appropriate in      5 the unit if what they're really talking about is      6 reaching a collective bargaining relationship.</p> <p>7       MR. PEARCE: In your experience, have you      8 made decisions relative to taking on a supervisory      9 issue in an R-Case proceeding, and what impact if      10 any had that been on the pursuit of the election?</p> <p>11       MS. SEMEL: We make these decisions all      12 the time. In CWA in District 1, if we think that      13 there is actually going to be an issue of      14 supervisory status we do not include those people in      15 the petition. The reason we do not include them in      16 the petition is because we don't want to be in the      17 position of having them be involved in an organizing      18 campaign and tainting the process. That's a real      19 issue for unions as well. We don't want to rely on      20 them in any way, and so we do not -- we err on the      21 side of caution.</p> <p>22       But on the reverse, we have included      23 people that we believe are low level supervisors      24 because we don't want to go through the process of a      25 hearing. So without naming cases, because I realize</p>

<p style="text-align: right;">Page 230</p> <p>1 the case I was about to mention is an ongoing case, 2 although not an ongoing representation case, we 3 agreed to a unit that included people that we 4 thought were low level supervisors because the 5 Board's procedures for hearings is so onerous that 6 by the time you can get to an election often means 7 that workers are frustrated and give up.</p> <p>8 I'm going to talk tomorrow about exactly 9 what happened with all of these three units, so I'm 10 not going to talk about it here, but that is what 11 happens. Workers get frustrated, they also get 12 scared, and they give up.</p> <p>13 MR. JOHNSON: A couple of quick 14 questions. First, thanks for being here. The 15 genuine issue of the disputed material facts 16 standard in civil litigation or the FRCP is the 17 subject of many, many decisions, some even going up 18 to the Supreme Court, because it's not the easiest 19 standard to apply.</p> <p>20 From your perspective as a practitioner 21 and leading labor lawyer at one of the leading 22 unions in America, how are we going to impart to 23 people in the regional offices here's what the 24 standard means in the given nature of our cases to 25 avoid having it crop up again and again and again,</p>	<p style="text-align: right;">Page 232</p> <p>1 no problem with getting the regional director's 2 decision on an issue that is not clear. But on some 3 of the issues, for example in the examples that I 4 gave about were there any material facts at issue, 5 the RF engineers, there were no material facts at 6 issue. We would have all agreed they could have 7 presented the job descriptions, and we would have 8 agreed to them. They would have explained what the 9 educational background of all the people was, and we 10 would have agreed with them. That's a legal 11 question. We didn't need a four day hearing on that 12 question.</p> <p>13 MR. JOHNSON: Some issues may be a little 14 closer than that is all I'm suggesting.</p> <p>15 MS. SEMEL: Without a doubt.</p> <p>16 MR. JOHNSON: Then the follow-up to that 17 is basically let's say you have a hearing officer 18 that rules, "Look, there's no genuine issues here," 19 the whole case goes away, gone, no opportunity for 20 review. In effect, some commenters might argue that 21 the hearing officer has now made a recommendation 22 that has controlled the entire case. How do you 23 respond to that?</p> <p>24 MS. SEMEL: Well, I guess what you're 25 asking seems to me very farfetched, to be really</p>
<p style="text-align: right;">Page 231</p> <p>1 because this is something that district court judges 2 blow all the time?</p> <p>3 MS. SEMEL: First, I just want to say one 4 thing about people in the regions. I don't think 5 any of these problems have been caused by the people 6 in the regions. I think the people in the regions 7 work incredibly hard, and I have tremendous respect 8 for the work they do. I don't think that is the 9 problem. The problem really is the process and the 10 fact that the process is easily open to 11 manipulation. It was when I was a Board agent and a 12 hearing officer, and it still is.</p> <p>13 I personally think that there should be 14 training. There should be training for people who 15 will be hearing officers on how to look at these 16 questions. And I believe that when these issues are 17 complicated or are not easy to decide the regional 18 director should make that decision.</p> <p>19 And that's exactly what happens now. If 20 you're at a conference regarding a representation 21 issue or even a hearing and the hearing officer 22 realizes that there is a complicated question, he or 23 she will stop the proceeding and go and speak to the 24 front office and get guidance.</p> <p>25 In my experience at the Board, there is</p>	<p style="text-align: right;">Page 233</p> <p>1 honest. It's not my experience that that many 2 questions are that complicated. In other words, 3 experienced labor practitioners really do understand 4 the standards for inclusion and exclusion of various 5 job classifications. People know that. I don't 6 think it's that big a problem, and I don't think 7 that the rule should be decided on the exception. 8 The rule should be decided based on what the Act is 9 for and the representation of working people. They 10 deserve to get a vote and not be hung up in sort of 11 procedural questions all the time and not knowing 12 what's going on.</p> <p>13 But to your point, I think for the 14 exceptions that there can be guidance to hearing 15 officers that in these kinds of cases you must 16 consult with the regional director so that the 17 hearing officer is not the decision maker.</p> <p>18 MR. PEARCE: We have to move on.</p> <p>19 Mr. King.</p> <p>20 MR. KING: Chairman Pearce and members of 21 the Board. My name is Roger King. I appear here 22 today on behalf of the HR Policy Association, the 23 leading HR spokesperson for large companies in this 24 country from the chief human resource officer 25 perspective. I also have the pleasure of appearing</p>

<p style="text-align: right;">Page 234</p> <p>1 here this afternoon on behalf of the Society for      2 Human Resources Management, and I have with me Nancy      3 Hammer and Kelly Hastings that are in the audience.      4 Mr. Chairman, I would be less than candid      5 if I said it's a pleasure for many of us to be here      6 today. We are going back through what we thought      7 was resolved in 2011 and thereafter, but we are here      8 and we do appreciate the opportunity to share views      9 and comments.</p> <p>10 I think I've been involved in each of the      11 Board's rulemaking initiatives over the years,      12 including the healthcare rulemaking initiative, and      13 I will say I commend the Board for the process you      14 are applying today by going by topic. I think      15 that's certainly an improvement over what we      16 experienced in 2011, but Mr. Chairman, not at the      17 standard that we had with respect to the healthcare      18 amendments. I know you're going to hear later about      19 that tomorrow from my partner, Curt Kirschner.</p> <p>20 I want to stress at the outset a concern      21 that many of us have. The Board clearly has the      22 right to engage in rulemaking. There's no question      23 about that. The statute clearly permits that. But      24 I believe that's a very, very serious burden for      25 this Board to carry, and they need to do so very</p>	<p style="text-align: right;">Page 236</p> <p>1 experienced boards in the history of the agency, and      2 we are still hopeful that you could come to some      3 consensus, all five of you, before proceeding, if      4 you proceed at all.</p> <p>5 In the alternative, if that's not      6 possible, perhaps you can then proceed on negotiated      7 rulemaking. Get the stakeholders involved. Let's      8 have some dialogue beyond what we're having today.      9 We're dealing with important issues that affect      10 labor, affect management, and, as noted, certainly      11 affect employees.</p> <p>12 With that said, I want to spend a few      13 minutes on the hearing officer issue. We really      14 haven't devoted a lot of time to that. We obviously      15 have a Section 9(c) problem from our perspective.      16 There is a statutory requirement for an appropriate      17 hearing in each and every case, a full opportunity      18 for all parties to litigate as they deem      19 appropriate, not delay, not stall, but to litigate      20 and establish a record. And it's also incumbent      21 under 9(b) of the Act that requires the Board in      22 each case, not the hearing officer in each case, not      23 the regional director in each case, but the Board --      24 and I certainly would identify with remarks that      25 people in the field of this agency are excellent,</p>
<p style="text-align: right;">Page 235</p> <p>1 thoughtfully and very carefully. You are dealing      2 with delicate balances that have been established      3 over the years between labor, management and      4 employees. That's particularly the case here.      5 What's being proposed has many different      6 ramifications throughout the Board's rules and      7 regulations. Those have been carefully crafted over      8 decades and have had the involvement of very      9 experienced labor lawyers, management lawyers and      10 employee participation from time to time.      11 And I think we all should be cognizant of      12 a Supreme Court decision that really I think should      13 set the tone for that proceeding. It's NLRB versus      14 Action Automotive. There the Supreme Court clearly      15 articulated that the Board should remain, and I'm      16 quoting, wholly neutral with respect to the      17 representation process. I believe that's      18 exceedingly important for all of us to keep in mind.      19 With that said, we would have hoped, and      20 I say "we," certainly the two parties I'm      21 representing today and perhaps others, would have      22 hoped that this Board would have reached a consensus      23 as to the NPRM if you were going to proceed at all.      24 This Board has an extremely high intellect level,      25 great experience, perhaps one of the most</p>	<p style="text-align: right;">Page 237</p> <p>1 that they are trained professional, no question --      2 but ultimately the accountability for the issues      3 that we're dealing with today rests with the five of      4 you, not with career civil servants. And that's      5 where it should be. You're subject to Senate review      6 and Senate confirmation, and many of us have great      7 concern about pushing this down to the regional      8 officer level.      9 Finally, with respect to hearing officer      10 determinations, I would gladly accept the Federal      11 Rules of Civil Procedure, the genuine issue of      12 material fact. That question's been asked a couple      13 of different times. That's an exceedingly difficult      14 standard. Article 3 judges have a difficult time      15 getting that right. Supervisory status, that issue      16 in healthcare has gone twice to the United States      17 Supreme Court, and still there is not great clarity.      18 So to suggest these are just simple      19 issues that could be easily dealt with by a hearing      20 officer who may not even be a lawyer I think is not      21 practical beyond the legal obstacles that I've      22 mentioned.      23 That's something that has to be thought      24 about. A hearing officer is going to be placed in      25 an exceedingly difficult position making rulings.</p>

<p style="text-align: right;">Page 238</p> <p>1 Yes, they can go to the front office, they can seek 2 guidance, but not on each and every issue. And if 3 they don't permit briefs, and we haven't talked 4 about that and I know that will be discussed later, 5 that's an exceedingly difficult standard. Due 6 process violations? Absolutely.</p> <p>7 There is going to be a lot more 8 litigation here, and we don't need to do it. What 9 the Board is doing today day in and day out in 10 holding elections in this country really is an 11 example for the rest of the free world in many 12 respects. What you do here you do well, and we 13 don't need to change what we're doing today.</p> <p>14 MR. PEARCE: Questions?</p> <p>15 MR. KING: Did I get the answer to the 16 question posed by Member Miscimarra?</p> <p>17 MR. MISCIMARRA: I asked the question.</p> <p>18 MR. KING: As noted by my colleague 19 Doreen Davis, it's just not supervisory, managerial 20 and confidential status. What about independent 21 contractors? You talk about a difficult standard. 22 We have various statutes that define who is and who 23 is not an independent contractor from the IRS and 24 beyond. It's not easy. How are we going to deal 25 with that? What about students versus employees?</p>	<p style="text-align: right;">Page 240</p> <p>1 the election, as has been articulated by Mr. Perl 2 and others, is simply going to result in more 3 litigation.</p> <p>4 MR. JOHNSON: One follow-up to that, 5 though. In your experience for independent 6 contractor and sort of student as employee issues, 7 isn't that something that applies to almost the 8 entire bargaining unit? It's not a situation where 9 you'll have like two or three people typically.</p> <p>10 MR. KING: Member Johnson, I agree. I 11 want to talk in a second on the next panel about the 12 problems with the Board's challenge procedure 13 process. That could affect a very significant 14 number of potential voters. I don't think we've 15 really paid enough attention to that issue. If you 16 have 30, 20, 25 percent of a unit being uncertain on 17 the independent contractor issue, that's a very 18 significant issue that deserves attention pre 19 election and not post election.</p> <p>20 MS. SCHIFFER: What would your minimum 21 time be?</p> <p>22 MR. KING: I knew you were going to ask 23 that question.</p> <p>24 MS. SCHIFFER: I didn't want to 25 disappoint.</p>
<p style="text-align: right;">Page 239</p> <p>1 It's a difficult question. On managerial status you 2 have a case, and we're not going to discuss it here, 3 but that issue, managerial status, is important to 4 consider.</p> <p>5 So this is an area where thoughtful 6 people should be able to articulate thoughtful 7 ideas, thoughtful positions and reach an agreement. 8 I would submit to you one of the real problems here 9 is not having a minimum number of days between 10 filing a petition and election. That would solve a 11 lot of this.</p> <p>12 Yes, there is maneuvering on both sides. 13 We all know that. Good lawyers use procedures to 14 their clients' advantage. You could call it delay. 15 I don't agree with that. My union colleagues take 16 every advantage of the blocking charge procedure. 17 That's their right at this point.</p> <p>18 So let's talk about what really the issue 19 is at here. Is it jockeying back and forth on 20 procedural rules? Should we have a minimum number 21 of days between filing the petition and the 22 election? Perhaps so. That might solve a lot of 23 this.</p> <p>24 But back to your question, I think those 25 are significant issues. And to put them off after</p>	<p style="text-align: right;">Page 241</p> <p>1 MR. JOHNSON: And your maximum. 2 MR. KING: I don't have a minimum per se. 3 I think what the Board is doing today is 4 appropriate. We have the 38 to 42 target that's 5 being met consistently. And I think, to further 6 answer your question, it depends on the size of the 7 unit and the number of issues that are involved in 8 the unit hearing. If I were pressed, I think the 9 legislation currently pending in Congress is a guide 10 you might want to look at.</p> <p>11 MR. PEARCE: Thank you. Ms. Bunn. 12 MS. BUNN: Thank you, and good afternoon. 13 I just want to make a couple of points, because I 14 think most of the speakers have addressed a variety 15 of the sub-issues that are part of this overall 16 panel.</p> <p>17 All of them combined do two things, I 18 think. They foster uniformity in the process and 19 they eliminate unnecessary delay, not all delay, but 20 unnecessary delay. And this to us has the salutary 21 effect of reducing gamesmanship and, again, the 22 unnecessary delay that's inherent in the current 23 system.</p> <p>24 So on both of those points why is that 25 important? I think there are a couple of reasons.</p>

<p style="text-align: right;">Page 242</p> <p>1 One, employers take advantage of delay; not all      2 employers, but too many employers. There's      3 research, academic research that demonstrates this.      4 I know Dr. Bronfenbrenner will be speaking tomorrow.      5 There is also the book "Confessions of a Union      6 Buster" in which Martin Levitt states that the      7 beauty of such legal tactics, referring to      8 bargaining unit challenges, quote, is that they are      9 effective in damaging the union effort, and no      10 matter which side prevails delay steals momentum      11 from a union organizing drive, close quote. The      12 longer the delay, the longer the union campaign      13 persists. Unnecessary delay has real life      14 consequences to employees.</p> <p>15       But there is a second reason, and that      16 has to do with eliminating frivolous and unnecessary      17 litigation in order to wrest control back into the      18 hands of the government, the Board, and taking some      19 of the control of the timing of the election away      20 from the employer. A Board election is intended to      21 be an orderly democratic process by which the      22 government ensures that employees have a right to      23 choose to be represented or not. When the control      24 over the timing of the election is tilted too much      25 in favor of the employer, workers loose faith in the</p>	<p style="text-align: right;">Page 244</p> <p>1 exclusion for 20 percent or less of the unit.      2       The current rule is simply that those      3 issues have to be litigated prior to the election      4 but not decided, and often in cases the regional      5 director defers the decision until after the      6 election. Also, petitions for review are filed, so      7 that question in those instances remains open even      8 while the ballot takes place.</p> <p>9       And as far as the tainting of the showing      10 of interest goes, unions always deal with that issue      11 because that issue exists throughout the campaign,      12 throughout the collection of the cards, up until      13 that question is finally determined. During the      14 entire campaign period the union has to deal with      15 that issue and they know how to deal with those      16 issues.</p> <p>17       As far as the offer of proof question, I      18 just wanted to point to one of the findings within      19 the survey I talked about earlier. 35 percent of      20 the attorneys that responded to our survey said that      21 they were involved in pre-election hearings where      22 the hearing officer allowed the company to introduce      23 evidence that, had the hearing officer taken offers      24 proof, they likely would not have been able to      25 introduce any of that evidence.</p>
<p style="text-align: right;">Page 243</p> <p>1 process and democracy suffers.</p> <p>2       I've been involved in a lot of organizing      3 campaigns. In every single one in which I have been      4 involved one of the very first questions, if not of      5 the first question that a worker asks, is when will      6 the election be held, and every time the organizer      7 must painfully explain that the question cannot be      8 answered, that it could be 30 days, it could be 90      9 days, and it could be years.</p> <p>10       When the worker understandably asks,      11 "Okay, what factors govern how long it's going to      12 take," again, the organizer has to answer that it      13 depends on the extent to which the employer wants to      14 delay and what region the petition has been filed      15 in.</p> <p>16       The proposed rules would result in a more      17 uniform answer to that question. It returns to the      18 Board a greater control of the process while      19 affording due process rights to the employer.</p> <p>20       MR. SHARMA: I'm just going to speak very      21 quickly. We've just got a couple of minutes, and I      22 know the panel is already over time. I just had a      23 couple of issues that I wanted to address. One is      24 the selection of supervisory status question and      25 questions declaring eligibility and inclusion and</p>	<p style="text-align: right;">Page 245</p> <p>1       One of the examples that was provided to      2 us was very similar to one that was provided earlier      3 in which an employer raised the same issues in a      4 pre-election hearing that it had lost in a number of      5 different regions throughout the country. An offer      6 of proof in that situation would have alerted the      7 hearing officer and the regional director that the      8 only issues that the company was looking to raise      9 were issues that already had been cited by other      10 regions.</p> <p>11       And two other quick points I wanted to      12 raise about our survey. One goes to the idea of      13 unions stipulating to avoid litigation at hearing.      14 89 percent of attorneys who responded to our survey      15 reported that their clients at some point had agreed      16 to concessions that reach a stipulation in order to      17 avoid unnecessary litigation. And one other thing      18 was that 76 percent of attorneys who had been in the      19 situation said they had been able to resolve      20 eligibility issues post election through bargaining.</p> <p>21       MR. PEARCE: Thank you.</p> <p>22       MR. JOHNSON: Just two things, 30      23 seconds. You mentioned that the unions typically      24 know how to deal with the issues of indeterminacy in      25 terms of these exclusions, you know, confidential,</p>

<p style="text-align: right;">Page 246</p> <p>1 managerial, supervisory, things like that. How 2 would you respond to the argument by some 3 commenters, "Well, that's because you're the repeat 4 players in here, you know how to do this from long 5 practice," whereas you might have an employer who 6 has no idea because they're not represented or they 7 haven't been through enough representation 8 campaigns?</p> <p>9       MR. SHARMA: I think it's not necessarily 10 that the unions are repeat players. They're just 11 cautious. They understand what the implications 12 might be. And again, and I think this goes back to 13 the question or the issue that was discussed on the 14 earlier panel, which is that employers do have 15 access to resources and counsel to answer these 16 questions quickly and much quicker than I think is 17 being discussed here. And so I think employers can 18 get those questions answered, to the best degree 19 that they are going to be answered, I understand, 20 but they can get counsel and advice on those issues 21 quickly.</p> <p>22       MR. JOHNSON: And one last thing. And 23 I'm sorry. I've not done a line by line of your 24 survey. I promise that I will. Did you do anything 25 to control for confirmation bias?</p>	<p style="text-align: right;">Page 248</p> <p>1 post-hearing briefs and other matters related to the 2 post-hearing process would be of limited utility. 3 As a result, we believe that it's important to 4 underscore the AHA's strongly held view that the 5 NPRM's proposed blanket 20 percent rule regardless 6 of the size of the unit or the issues in dispute 7 would violate Section 9(c) and would assign due 8 process to non-petitioning parties. Leaving scores 9 of unresolved issues, especially supervisory status 10 as the parties are directed to an election imposes 11 an unfair and unrealistic burden on hearing 12 officers, will create confusion among voters and 13 increases both unfair labor practices and disputes 14 in the workplace during an election campaign. These 15 effects are especially problematic for employers in 16 the healthcare field who must promote a tranquil 17 healing patient care environment at all times.</p> <p>18       Turning to the Board's specific proposal 19 regarding the post hearing process, the proposed 20 elimination of post hearing briefs will in our view 21 erode the fair hearing process by limiting the 22 parties' ability to articulate their position and 23 explain applicable authority. Under the proposed 24 amendments, at the close of the hearing parties will 25 be permitted to file briefs only with the permission</p>
<p style="text-align: right;">Page 247</p> <p>1       MR. SHARMA: No. We admit that it was a 2 survey that was put together quickly, and it was 3 mostly to give you an idea of what practitioners are 4 reporting that they are experiencing.</p> <p>5       MR. JOHNSON: Thank you very much.</p> <p>6       MR. PEARCE: We're way beyond time, so 7 we'll recess for four minutes.</p> <p>8       (Recess.)</p> <p>9       MR. PEARCE: Thank you all, and I 10 apologize for the abbreviated break. The next topic 11 is Concluding statements, arguments and post-hearing 12 briefs; Direction of Election with decision to 13 follow. We have Mr. Kirschner, Ms. Sencer, 14 Mr. Deakins and Mr. King. Once again, thank you 15 all. Mr. Kirschner, can you proceed?</p> <p>16       MR. KIRSCHNER: Good afternoon, Chairman 17 Pearce and members of the Board. Again, my name is 18 Curt Kirschner with Jones Day appearing on behalf of 19 AHA, the American Hospital Association. The topics 20 for this panel which you just described, concluding 21 statements and post-hearing briefs and direction of 22 election overlap in some fundamental respects with 23 the topics from the prior panels.</p> <p>24       If under the Board's proposed rules a 25 hearing would be precluded, then obviously</p>	<p style="text-align: right;">Page 249</p> <p>1 of the hearing officer and within the time permitted 2 by and subject to the limitations imposed by the 3 hearing officer. Especially in conjunction with the 4 proposed changes to expedite the hearing process, 5 the parties will not know the facts at issue until 6 the hearings occur.</p> <p>7       Particularly in the healthcare field, 8 with larger units and complex issues regarding 9 supervisory status and other unit determination 10 issues, parties should have the opportunity to brief 11 in writing the legal authority regarding issues 12 raised and facts introduced at the hearing.</p> <p>13       For example, the role of charge nurses 14 may vary between units at a hospital. The role of 15 charge nurses as with respect to whether their 16 supervisor may change varies based on what shift 17 they work and with the number of other supervisors 18 around. These issues will depend on the facts 19 introduced at the hearing and should require and 20 should allow briefing. The current timeline for 21 submitting briefs is already extremely expedited 22 relative to other litigation standards, generally 23 only a week or two, and in our experience does not 24 unduly delay the representation process.</p> <p>25       The elimination of the matter of right to</p>

<p style="text-align: right;">Page 250</p> <p>1 file a post-hearing brief is also inconsistent with      2 the limited role of hearing officers allowed under      3 9(c)(1) of the Act. The NPRM imposes substantial      4 authority to the hearing officers to make myriad      5 determinations, including whether and regarding what      6 issues post-hearing briefing is allowed. In      7 combination, those restrictions grant substantial      8 and we believe excessive authority to hearing      9 officers, and thus would be inconsistent with      10 Section 9(c)(1).</p> <p>11 Under the current rules, as has been      12 stated before, hearings occur in only a small      13 percentage of the cases. Over 90 percent of cases      14 result in a stipulation, meaning that no      15 representation hearing and thus no briefing is ever      16 required. In light of how infrequently hearings      17 currently occur under the existing procedures, the      18 AHA does not believe that any of the proposed      19 changes that are at issue in this panel's topics      20 need to occur.</p> <p>21 If a party does not believe that a      22 post-hearing brief is necessary, then that party is      23 free to offer an oral argument in conclusion of the      24 hearing, but that should not preclude the other      25 parties, however, from briefing the issues that were</p>	<p style="text-align: right;">Page 252</p> <p>1 made.      2 I see that I'm out of time, so I'll      3 conclude there.      4 MR. PEARCE: You say that the filing of a      5 post-hearing brief is a matter of right. What's      6 your basis for saying that?      7 MR. KIRSCHNER: My understanding is that      8 under the current rules the hearing officer      9 routinely grants the party the right to file a      10 post-hearing brief.      11 MR. PEARCE: I practiced before the Board      12 and I was a hearing officer and I was 15 years in a      13 regional office, and it's my understanding that that      14 is a discretion imparted by the regional director,      15 and although commonly granted, it is not clear to me      16 that that is a right. If I'm incorrect I'd like      17 some correction in that regard.      18 But that being said, if it is the      19 regional director's call with respect to the legal      20 determinations that are made based on the facts as      21 laid out in the hearing, isn't it the current job of      22 the hearing officer not to make a legal      23 determination but to facilitate the development of      24 the record?      25 MR. KIRSCHNER: That's correct, and</p>
<p style="text-align: right;">Page 251</p> <p>1 raised during the hearing if that party feels that      2 doing so would be helpful to clarifying the record      3 and presenting their arguments.      4 In response to one of the issues posed by      5 the Board, we do not believe that a direction of      6 election should precede a decision. The direction      7 of election obviously couldn't be issued until the      8 basis of the decision had already been determined.      9 Issuing a direction of election while the Board sits      10 on the decision would keep the parties in the dark      11 regarding the Board's rationale for its      12 determination. This could lead to questions and      13 even suspicions regarding the basis of the      14 conclusions that are embodied in the direction of      15 election.      16 Not issuing decisions until sometime      17 before the election itself leaves the parties      18 uninformed about the basis of the potential appeal      19 to the Board, which of course implicates another set      20 of proposed rule changes. Based on our experience,      21 issuing the direction of election prior to decision      22 would not likely save more than a brief period of      23 time in the vast majority of cases, especially given      24 that direction of elections could not be prepared      25 until the basis of the decision has already been</p>	<p style="text-align: right;">Page 253</p> <p>1 that's what's required by the Act. Our concern is      2 that by having the hearing officer be able to make      3 determinations about what the scope of the hearing      4 should be, applying the summary judgment rule with      5 respect to whether there is sufficient evidence to      6 support an issue, enabling the hearing officer to      7 determine whether and under what conditions and      8 about what a briefing could be done, in combination      9 all of those items together give such substantial      10 authority to the hearing officer that we believe in      11 effect that the hearing officer is essentially      12 making a recommendation which is precluded by      13 9(c)(1).      14 MS. SCHIFFER: As you indicated, commonly      15 the parties are allowed seven days to file briefs,      16 and so that seven day period sort of ends up going      17 by whether the parties file briefs or not.      18 MR. KIRSCHNER: Goes by, meaning prior to      19 a direction of election?      20 MS. SCHIFFER: Right.      21 MR. KIRSCHNER: Well, I would think that      22 it depends on the circumstances. I would think that      23 the Board typically would want to receive the brief      24 before issuing the direction of election.      25 MS. SCHIFFER: Right. That's what I'm</p>

1 saying. There is no obligation on the parties to  
 2 file briefs, and often the DDE waits the seven days  
 3 or at least the seven days even if no briefs are  
 4 received.

5 MR. KIRSCHNER: That is my understanding  
 6 as well. I think that the issue here is whether the  
 7 parties should have the ability following the  
 8 hearing to take the time to brief certain legal  
 9 issues that remain in contention. As indicated,  
 10 most representation hearings get stipulated to, and  
 11 so it may be that by the conclusion of the hearing  
 12 that there aren't any live issues and they reach a  
 13 stipulation at that point. But I agree, Member  
 14 Schiffer, that there is typically that seven day  
 15 period regardless of whether the parties are filing  
 16 briefs or not.

17 MR. JOHNSON: Would you have a problem,  
 18 then, with basically having a declaration of whether  
 19 to file briefs that would then affect the timetable?

20 MR. KIRSCHNER: I think it would be  
 21 helpful for the Board to know whether the parties  
 22 intend to file briefs, because parties that are  
 23 taking the time to file a brief would hope that  
 24 someone would be reading it and considering it  
 25 before making the decision, and so therefore having

1 briefing would provide much more utility than  
 2 pre-hearing briefing, given the lack of discovery  
 3 and the timeline between the petition and the  
 4 hearing.

5 MR. JOHNSON: What issues might be argued  
 6 in other than oral argument form?

7 MR. KIRSCHNER: I think some of the  
 8 supervisory status issues are particularly  
 9 complicated as a fact based test, and you may have  
 10 individuals who might have the same title but who  
 11 perform different functions. You could have charge  
 12 nurses who are on the floor on a unit during the day  
 13 shift and they have their manager and director  
 14 around at the same time. Conversely, the same  
 15 charge nurse in terms of title could be on the night  
 16 shift and no other managers are around, thereby  
 17 effectively giving that nurse far more leeway with  
 18 respect to the management and supervision of the  
 19 nurses who are on the floor at that point.

20 So sometimes those very specific  
 21 situations require briefing citations for the record  
 22 and application of the complex and fact based tests  
 23 that the Board has articulated for supervisory  
 24 status.

25 MR. JOHNSON: What's the prevalence of

1 a declaration about whether briefs would be filed or  
 2 not would I think be rewarding to the parties to  
 3 know that someone is actually going to read it and  
 4 helpful to the Board to know whether they should be  
 5 waiting for it or not.

6 MR. JOHNSON: What if somebody said, you  
 7 know, "Mr. Kirschner, why wouldn't pre-hearing  
 8 briefs serve the same purpose as post-hearing  
 9 briefs?"

10 MR. KIRSCHNER: Particularly given the  
 11 timetable for representation hearings, a pre-hearing  
 12 brief would be problematic because the parties don't  
 13 yet know what the true issues are going to be. It's  
 14 not until you go through the hearing and you know  
 15 whether there are certain issues, for example  
 16 whether someone's in one bargaining unit or another,  
 17 whether someone's a supervisor or not, you don't  
 18 know until you've completed the hearing what the  
 19 true final issues are going to be.

20 And it may be that through the course of  
 21 the hearing you resolve a lot of issues that you  
 22 thought were going to be open issues at the  
 23 commencement of the hearing, so you only need to  
 24 brief a couple of narrow issues that might still be  
 25 very important. But I would think post-hearing

1 documentary evidence in the healthcare industry in  
 2 these kinds of cases?

3 MR. KIRSCHNER: Well, all hospitals do  
 4 need to comply with joint commission and other  
 5 obligations and have written position descriptions.  
 6 Hospitals generally have position descriptions. But  
 7 in my experience, those position descriptions may  
 8 not be fully descriptive of the duties that the  
 9 employees fulfill relative to the test applied by  
 10 the Board. So you write the position description  
 11 not to determine whether they're a supervisor or in  
 12 a technical or service bargaining unit, you write  
 13 the position description for the purpose of running  
 14 your hospital, and therefore the key elements of  
 15 supervisory status for example may not be equally  
 16 reflected in that job description.

17 MS. SCHIFFER: I may not be remembering  
 18 correctly, but did you tell us that most hearings  
 19 you've been involved with lasted a day?

20 MR. KIRSCHNER: That was not me.

21 MS. SCHIFFER: I believe there have been  
 22 comments that for most hearings the time is about a  
 23 day. My question to you is if there was an  
 24 opportunity to have a brief break to sort of collect  
 25 thoughts, would that make a difference in having an

<p style="text-align: right;">Page 258</p> <p>1 oral argument at the conclusion of the hearing?</p> <p>2       MR. KIRSCHNER: In my experience, and 3 perhaps it is me, if I were orally arguing a case 4 and I haven't had the time to reflect fully on all 5 of the facts and evidence that comes in, I am going 6 to try to make sure that I argue and touch on each 7 and every issue that potentially might be raised. 8 If you have some time to review the transcript and 9 focus on your arguments you actually may in writing 10 brief fewer issues, but I think also more 11 effectively.</p> <p>12       MS. SCHIFFER: That actually was not my 13 experience at the regional level, but I see the 14 logic.</p> <p>15       MR. PEARCE: Thank you. Ms. Sencer.</p> <p>16       MS. SENCER: The current system basically 17 built in two weeks of unnecessary delay in most 18 cases. When asked if briefing is allowed the 19 regional director usually says yes, and that would 20 generally be seven days. And I'll say opposing 21 counsel because it's rarely union counsel that's 22 asking for it in these cases, but opposing counsel 23 says, "Can I get an extra week," and, depending on 24 the length of the transcript, that extra week is 25 granted. That's before the regional director even</p>	<p style="text-align: right;">Page 260</p> <p>1 needing to provide those actual citations because 2 presumably the entirety of the record is going to be 3 read by whoever is writing this decision. From that 4 point of view, the oral argument is not a 5 particularly high standard to be reached in this.</p> <p>6       Coupled with a statement of position 7 which basically would form the outline for 8 management side's closing argument or their closing 9 brief later on and the narrowing of issues through 10 the hearing, there's really not that much left to be 11 argued and not that much left to be briefed. And 12 when you only have a few issues and they're the same 13 kind of issues that come up regularly, there's 14 really no reason to add this extra time in simply to 15 allow for a closing argument that, frankly, winds up 16 rehashing the opening argument and in many cases the 17 closing summary provided by management.</p> <p>18       I frequently will argue my cases orally, 19 and I do it for a lot of reasons. One of them is 20 because if you have workers in the room, they like 21 to know that it's being resolved and that you 22 understood their issues. The unions like it for 23 that reason as well. I presume management would 24 like it for those reasons as well, that their 25 counsel understood the issues that they had with the</p>
<p style="text-align: right;">Page 259</p> <p>1 then gets started working on the DDE. Once the DDE 2 is issued, it has 25 days built into it before we 3 have the election scheduled.</p> <p>4       So simply by going to a hearing that's 5 going to need a decision to be issued we've added 39 6 days into the process, which in some ways accounts 7 for these numbers from the Board's website that 8 indicate that if there is a contested case it's 9 generally around 65 or 66 days until we get to 10 election from the date the petition is filed. But 11 really, only all but the most complicated cases 12 really don't need this kind of briefing.</p> <p>13       I hear what Mr. Kirschner is saying, and 14 I understand that people would like to be able to 15 brief all of these out each and every time. But 16 when it comes down to it, the supervisory status 17 that he's talking about he himself has litigated 18 many, many times, I have litigated many, many times, 19 and the standards are written out very clearly in 20 the Board's procedures in the outline on 21 representation handling. So there is a list. You 22 have to know which issues you have to hit because 23 that guidance has already been provided. And since 24 hopefully the reader of the record is reading the 25 record, they will see that testimony without us</p>	<p style="text-align: right;">Page 261</p> <p>1 unit.</p> <p>2       But we do it orally. The representatives 3 of the employer give an oral closing also at the 4 same time because -- I don't know why. Maybe they 5 don't want to be outdone or maybe they feel the same 6 way for their client. But whatever the reason may 7 be, they give an oral closing.</p> <p>8       And then they give a written brief 9 afterwards, sometimes up to like 30 pages after a 10 one day hearing, that rehashes all of the background 11 of what the employer does and every tiny little bit 12 of testimony and cites to the record extensively. I 13 don't think it's necessary, and it leads to 14 unwarranted delay. It adds to the work of the 15 regional director when they finally get around to 16 writing the decision because there's more 17 information for them to go through that may not 18 actually help to make the decision, which, in these 19 closed cases, is based on the testimony of the 20 individuals and not the arguments of counsel anyway.</p> <p>21       Regarding this issue on the direction of 22 election and decision, we know in some cases what 23 the decision is going to be. I had a case where the 24 petition was filed in late January. The employer 25 asked for the extension and got an extension for a</p>

1 week for the pre-election hearing. The employer  
 2 then said, "I'm not going to be available for that  
 3 so I'm not going to show up, but I'm not going to  
 4 stip, either." The union had to put on a hearing  
 5 with no one on the other side because under the  
 6 current rules the region was not allowed to simply  
 7 take it as an offer of proof. We were then provided  
 8 the opportunity if we wanted it to write a closing  
 9 argument. We declined. We did an oral closing  
 10 based on the witnesses that we had presented. And  
 11 we pretty much knew what this unit was going to be.  
 12 It was a single classification. It was a  
 13 presumptively appropriate unit.

14 It took about three and a half weeks  
 15 after the week that was given for us to do the  
 16 closing and to provide a closing argument for the  
 17 regional director to issue a decision. As a result,  
 18 in a case where the employer did not show up, it  
 19 still took 67 days to get to election. That to me  
 20 is not reasonable. It's somewhere between a  
 21 contested and an uncontested case, but there is no  
 22 reason why the decision couldn't wait and the  
 23 direction of election issued earlier. We knew who  
 24 was going to be able to vote.

25 The region, when we asked them about it,

1 Without the post-hearing brief, exactly  
 2 how do you think -- I'm asking you to interpret our  
 3 own proposed rule -- how would our proposed rule  
 4 work? And is it really worth it to dispense with a  
 5 post-hearing brief? I think that just leaves the  
 6 alternative of every regional director in every case  
 7 having to just read a cold record without the  
 8 recommendation of someone else and decide based on  
 9 that.

10 So it strikes me, if we want to be prompt  
 11 and get to the right result and do what the statute  
 12 says, isn't a post-hearing brief, if it takes seven  
 13 days in which both sides can file, isn't that just  
 14 better than just throwing all of these cold records  
 15 at the poor regional director who has to just then  
 16 decide the cases?

17 MS. SENCER: Well, I think nothing  
 18 prohibits oral argument on this in that it does  
 19 change the nature of the information that's provided  
 20 to the regional director. Second, the way that I  
 21 read the proposed rule, there's nothing that limits  
 22 the employer's ability, other than maybe their time  
 23 constraints, from filing a pre-hearing or providing  
 24 at the date of hearing a post-hearing brief that  
 25 they would provide as an offer of proof that would

1 simply said it was taking time to tweak the  
 2 decision, that the people who they needed to consult  
 3 and who were going back and forth to the regional  
 4 director who was writing the decision weren't  
 5 available at all of those times in between, and as a  
 6 result the employees are the ones who suffered and  
 7 had to wait.

8 MR. PEARCE: Thank you. Questions.

9 MR. MISCIMARRA: Ms. Sencer, our task as  
 10 an agency is to try to, I think, do three things.  
 11 One is we want to be prompt, we want to have the  
 12 correct outcome, and we also want to do what the  
 13 statute says we have to do, all three salutary  
 14 objectives. The question I have -- and for a moment  
 15 I'll just exclude the extension issue because we  
 16 could address that separately and I'll exclude the  
 17 25 day deferral.

18 If we're talking about the seven day  
 19 post-hearing briefing and our statute says the  
 20 hearing officer is not allowed to decide issues --  
 21 and curiously, it even says hearing officers at  
 22 least in pre-election cases are not even permitted  
 23 to make recommendations, so we're stuck with a  
 24 record of some kind and the regional director has to  
 25 make the decision.

1 go into the record that would highlight some of  
 2 these technical difficulties or specific legal  
 3 issues that are being looked at.

4 If I can, I want to address this issue of  
 5 the hearing officer. In the regions that I practice  
 6 in, whenever we have a dispute about whether or not  
 7 something should go into the record we get paused,  
 8 the hearing officer leaves the room to consult with  
 9 someone in the back, and they come back and they  
 10 say, "The regional director says this is what's  
 11 going to happen." So those decisions are not being  
 12 entrusted to the hearing officer. They're being  
 13 made to the regional director after the presentation  
 14 by the advocates to the hearing officer.

15 MR. MISCIMARRA: But would you agree the  
 16 statute requires the regional director to make a  
 17 decision based on the record?

18 MS. SENCER: Yes, and that's where that  
 19 whole issue about offers of proof comes in.

20 MR. PEARCE: Have you had experience  
 21 where post-hearing briefs are not filed?

22 MS. SENCER: I don't recall any cases  
 23 where the employer has chosen not to file a  
 24 post-hearing brief. I know that I have only in very  
 25 few cases filed post-hearing briefs, and those are

1 not your run-of-the-mill supervisory status or  
 2 community of interest cases but more like the ones  
 3 that I was talking about this morning, the  
 4 contracting and expanding unit kind of cases where  
 5 you have to do some analysis as to how many people  
 6 there actually are based now on how many people  
 7 there are going to be and what those percentages  
 8 look like, those kinds of cases. But the way that I  
 9 read the proposed rule, there wouldn't be any  
 10 limitation on the regional director in those cases  
 11 choosing that closing briefs are important and  
 12 necessary and issuing that for those cases those  
 13 kinds of arguments can be provided after the fact.

14       MR. PEARCE: So let me understand you.  
 15 Did you say that in the majority of your cases you  
 16 don't file a post-hearing brief?

17       MS. SENCER: That is correct.

18       MR. PEARCE: Has it been your experience  
 19 that the regional director has not been able to  
 20 discern what the petitioner's legal position is  
 21 relative to --

22       MS. SENCER: I think that the regional  
 23 director is able to determine what our legal  
 24 position is because we're asked at the end of the  
 25 hearing to state what our position is for the

1 decisions with more complete written decisions to  
 2 follow, and that actually provides more certainty to  
 3 the parties because they know faster what's going to  
 4 happen and everyone knows what to prepare for next.  
 5 Even if they might not know the rationale, they know  
 6 where that decision is.

7       MR. JOHNSON: A couple things on the  
 8 briefing piece of it. Let's just assume -- and put  
 9 yourself in the shoes of the management attorney for  
 10 a moment. They have the sort of twelve factor  
 11 supervisory 2(11) test, they have the burden of  
 12 proof, they have to show specific examples of the  
 13 authority existing, they have to show responsibly to  
 14 direct that there will be some consequences, they  
 15 have to show discretion, and it can't be a  
 16 conclusory showing. And let's say you have four or  
 17 five of those employees at issue and you're going  
 18 through it one at a time because there are different  
 19 supervisors and you throw a few other issues in.

20       I realize -- and I have great admiration  
 21 for union attorneys because typically you walk in  
 22 with very little preparation, very little access to  
 23 the documents, only talking to witnesses one or two  
 24 times before an arbitration and you can pull it all  
 25 together, but when you have a document heavy case

1 appropriate unit and given an opportunity to do an  
 2 oral closing on the record where I refer to the  
 3 leading cases on whatever the issue is that we're  
 4 discussing.

5       MS. SCHIFFER: That was my question as  
 6 well. Do you feel your position was misunderstood  
 7 or compromised because you didn't file a written  
 8 brief?

9       MS. SENCER: I don't think so, because I  
 10 think that the readers of the record are fairly  
 11 careful in making sure to go back to determine what  
 12 it is that they're looking at and getting beyond the  
 13 -- I don't want to say "exaggeration" or  
 14 "hyperbole," but it kind of is. I'm counsel.

15 Right? We're hired to be the advocates. Their job  
 16 is to read it and determine what actually is going  
 17 on regardless of how I characterize the evidence or  
 18 how someone else characterizes the evidence.

19       MS. SCHIFFER: I'd like to get back just  
 20 briefly to the decision and direction of election.

21 Do you feel that the fairness of the election would  
 22 be compromised if the decision came out later?

23       MS. SENCER: I don't think so. And I'm  
 24 going to go back also in this case to the issues  
 25 about arbitration. Arbitrators issue bench

1 where you have the burden of proof and you have all  
 2 these different prongs of tests, is it really fair  
 3 to expect an attorney to walk in and be able to  
 4 build a record and make a convincing case to  
 5 anybody?

6       MS. SENCER: I'm going to say yes.

7       MR. JOHNSON: I thought you'd say yes.  
 8       (Laughter.)

9       MS. SENCER: There is no point in time  
 10 when the evidence is fresher than what you've just  
 11 heard it. That is the moment when you've heard all  
 12 of this. And most attorneys who do oral closings,  
 13 during the course of a hearing they say, "Oh, this  
 14 is what he said, I'm going to put that down in this  
 15 spot right here because that's going into my closing  
 16 as a point that I want to highlight because it  
 17 really shows how it addresses points two, three and  
 18 four of the supervisory status test."

19       MR. JOHNSON: But what if you have to  
 20 have 20 or 30 documents you have to talk about  
 21 regarding interchange between locations, community  
 22 of interest factors, things like that? Can you  
 23 really have all that spiralling out in your head so  
 24 that then it just emerges like Athena, "Boom, here I  
 25 am, perfect brief, perfect argument?"

1 MS. SENCER: There is a tradeoff between  
 2 perfection and speed in some of these cases, but I'm  
 3 not sure that perfection is what's necessary.  
 4 Perfection is what delays us. And perfection in  
 5 writing the brief is not the same thing as getting  
 6 it right on the decision. Getting it right on the  
 7 decision, the regional director has the time that  
 8 they need from the record to pull all of that  
 9 together. The job of the advocate is to highlight  
 10 those issues so that the regional director knows  
 11 what they're looking for in the record.  
 12 MR. JOHNSON: But isn't there a  
 13 correlation between quality and due process?  
 14 MS. SENCER: Not necessarily.  
 15 MS. SCHIFFER: And whose documents are  
 16 they?  
 17 MS. SENCER: They're always the  
 18 employer's documents in those cases. The union  
 19 doesn't have those documents.  
 20 MR. PEARCE: And whose burden is it if  
 21 it's a supervisory issue to establish what is being  
 22 asserted?  
 23 MS. SENCER: Most frequently the  
 24 employer. Every once in a while the employer will  
 25 state it the other way and say our unit is

1 address all election issues, including issues of  
 2 voter eligibility, and they rejected proposed  
 3 amendments that would have implemented shortened  
 4 pre-election periods without hearings on unit scope  
 5 and voter eligibility issues. I also think that the  
 6 rule, to the extent that it gives the hearing  
 7 officer discretion to make decisions, is clearly in  
 8 violation of the statute.  
 9 The hearing officer's role, as I've  
 10 always understood it, is to simply create a record,  
 11 and that's it. He has no authority to do anything  
 12 else. So I really feel like the Board is getting  
 13 too close to the edge of the law in some of the  
 14 things it's doing. I think it's almost inviting  
 15 litigation.  
 16 I wanted to make only one final comment  
 17 on post-hearing briefs. The real advantage is that  
 18 if you are able to file briefs you have a written  
 19 transcript of the record, and that's not something  
 20 you can have on an oral argument. I think that's a  
 21 very important thing.  
 22 And one final note. The comment that  
 23 this is like an arbitrator issuing a decision and  
 24 saying, "I'll send my opinion to you later," that's  
 25 not anything like what we're talking about here.

1 incorrect, and then we have to defend our unit. But  
 2 most frequently it's the other way around and the  
 3 employer says the argument is overly broad.  
 4 MR. PEARCE: Thank you. Mr. Deakins.  
 5 MR. DEAKINS: Thank you. I just have a  
 6 few comments to make. I do think that the proposed  
 7 rule has aptly been described by the minority view  
 8 as "election now, hearing later," which means a lot  
 9 of essential issues do not even receive potential  
 10 pre-election consideration by the Board. And I  
 11 think there is a very serious legal question as to  
 12 whether this rule will be considered ultimately. It  
 13 almost invites employers to file litigation to set  
 14 aside these rules.  
 15 I think the approach clearly violates  
 16 Section 9(c), and the legislative history shows that  
 17 if you go back to Senator Taft's statements in 1948,  
 18 he said, in describing the pre-election hearing,  
 19 quote: It is the function of hearings in  
 20 representation cases to determine whether an  
 21 election may properly be held at the time, and, if  
 22 so, to decide questions of unit and eligibility to  
 23 vote.  
 24 And in the 1978 discussions in Congress,  
 25 Congress again said that pre-election hearings must

1 What we're taking about here is directing an  
 2 election and making a decision later. It's not a  
 3 matter of, "This is my decision and I'll write you  
 4 an opinion later about it." There is no decision.  
 5 It's simply a direction of election with something  
 6 to come later. Thank you.  
 7 MR. JOHNSON: Just one quick thing. What  
 8 if it's just one or two issues that are really  
 9 separating the parties? Do you have a problem with  
 10 having oral argument at that point?  
 11 MR. DEAKINS: A record is still helpful.  
 12 And it seems to me that it's important, at least  
 13 certainly from an appellate standpoint, to be able  
 14 to argue in a written brief what's in the written  
 15 record, so yes, I would say in all cases, which as I  
 16 understand is the existing practice of the Board  
 17 today.  
 18 MR. MISCIMARRA: Mr. Deakins, regarding  
 19 something I had mentioned earlier, we have this  
 20 current practice which is seven days, and for the  
 21 time being I'll exclude the possibility of an  
 22 extension, but there is also a potential issue of a  
 23 request for review to the Board. If we were to  
 24 preserve the current practice with respect to  
 25 post-hearing briefing which provides a roadmap to

<p style="text-align: right;">Page 274</p> <p>1 some degree for the only permissible decision maker,      2 that is, the regional director to actually base his      3 or her decision on the record, and if we took the      4 equivalent amount of time and found a way to squeeze      5 it out of our internal procedures for evaluating      6 requests for review, is that an approach that you      7 would find to be objectionable as to this particular      8 issue?</p> <p>9       MR. DEAKINS: It would not be      10 objectionable to me, no. You're not taking away any      11 privileges that the employer has.</p> <p>12       MR. HIROZAWA: I would ask you to think      13 back to the representation cases that you've handled      14 through a decision. In how many of them do you      15 think that you would have been unable to adequately      16 point out the relevant evidence and the legal      17 arguments in a closing statement?</p> <p>18       MR. DEAKINS: Well, I would say in most      19 of them. In a case where you have competing      20 witnesses at least, I think it would always be the      21 case because you've got to look at all of those      22 testimonies together and try to figure out where to      23 come between all those witnesses.</p> <p>24       MR. HIROZAWA: Thank you.</p> <p>25       MR. PEARCE: Thank you very much. Mr.</p>	<p style="text-align: right;">Page 276</p> <p>1 to add, or perhaps subtract, and that's an open      2 issue, employees with respect to the unit. That is      3 the accretion test. It's an exceedingly high      4 standard and very fact intensive. So briefing has a      5 positive impact on the determination process.</p> <p>6       With respect to the hearing officer      7 recommendation, and we touched upon this but I don't      8 know that we really drilled into it, the statute's      9 quite clear that the hearing cannot make      10 recommendations. But if the hearing officer is      11 deciding whether 20 percent, putting aside the math      12 issues that Jonathan Fritts articulated, the hearing      13 officer in making those kinds of determinations, I      14 would submit to you, is making a recommendation.</p> <p>15       You clearly have a statutory problem.      16 Under the proposed rules you have pushed the hearing      17 officer into a recommendation process whether you      18 acknowledge it or not, and I think if this matter      19 goes to a judicial proceeding the Board is going to      20 have a great deal of difficulty defending its      21 position on the recommendation issue.</p> <p>22       I want to close by talking about the      23 Board's challenge ballot procedure process, a      24 process that's troubled me for some time. In our      25 statement at pages 10, 11 and 12 we get into this a</p>
<p style="text-align: right;">Page 275</p> <p>1 King.</p> <p>2       MR. KING: Thank you, Chairman Pearce.      3 Again, I'm appearing here on behalf of the HR Policy      4 Association and SHRM.</p> <p>5       With respect to briefing, it's been my      6 experience that briefs are helpful to the region,      7 the regional director making the ultimate decision,      8 also helpful to the Board, and further helpful to      9 have a more complete record. Beyond that,      10 supervisory issues, as Mr. Johnson just mentioned,      11 can be very fact intensive. I mentioned the fact      12 that twice the Supreme Court in this country has had      13 to deal with Section 2(11) issues that are not      14 necessarily easy to address in closing argument or,      15 indeed, even with appropriate briefing.</p> <p>16       Further, I would cite multi-site voting      17 unit cases where, as the Board is well aware, the      18 party articulating the position that the only      19 appropriate unit is a multi-site unit must overcome      20 the single site presumption. That is not easily      21 accomplished in a closing argument.</p> <p>22       Finally, with respect to briefing, the      23 Board's decision in Specialty Healthcare, if it      24 stands, imposes a considerable burden on a party      25 that is contesting the sought after unit that wishes</p>	<p style="text-align: right;">Page 277</p> <p>1 bit.</p> <p>2       We went back and asked the Board under a      3 FOIA request how often the challenge ballot      4 procedure has been utilized, frankly not that      5 frequently, and in most cases a very small number of      6 potential voters. I think that's good, because if      7 you think about the challenge ballot procedure it's      8 flawed in many respects.</p> <p>9       We cite in our paper studies in the      10 voting rights movement, studies in analyses where      11 procedures similar to what happens in a challenge      12 ballot proceeding is looked on with a great deal of      13 disgust and angst in the general election process.</p> <p>14       Stop and think about it. You have an      15 individual that may not be interested in voting in      16 the first instance. You try to explain perhaps to      17 that individual that his or her vote's going to be      18 challenged, and they may proceed to the vote and      19 maybe they won't. They go into a room that's      20 foreign to them, and then if they proceed to the      21 table to vote either the Board agent and/or the      22 employer representative or union representative      23 challenges this person, and at that point they're      24 wondering, "Why am I here, what's going on?" Think      25 about the civil rights movement and some of the</p>

<p style="text-align: right;">Page 278</p> <p>1 challenges in this country. Very repugnant.      2 At any rate, let's assume that our voter      3 continues to proceed to cast a vote, goes to the      4 curtain, pulls the curtain, passes the ballot and      5 comes back. His or her ballot then is placed in a      6 special envelope with his or her name on it. And      7 the individual at this point is wondering, "What is      8 going on here," even though you've tried to explain      9 the process in the first instance. "Is someone      10 going to know how I voted, why are they taking my      11 name, why is this going in a special envelope?"      12 This whole process is rotten with      13 potential abuse, and we could cite common studies o      14 the general voting process itself. I think the      15 Board was well advised the last time they went      16 through this process to drop the so-called 20      17 percent rule. I would strongly urge you to do it      18 this time. If you continue to use this as a      19 linchpin either to defer voting unit issues post      20 election, I would strongly then urge you to look at      21 the whole challenge ballot voting procedure.      22 I cite in our presentation one recent      23 Board election where well over 12 percent of the      24 voting unit was subject to challenge, and I know      25 from the election some employees never voted. But</p>	<p style="text-align: right;">Page 280</p> <p>1 has always had the challenge ballot, I don't know if      2 forever and ever, but for decades has had a      3 challenge ballot procedure. Right?      4 MR. KING: Yes.      5 MS. SCHIFFER: And do you think it would      6 be useful in connection with the proposed rules if      7 the notice of election actually set forth who would      8 be eligible, who may be unresolved, and challenge      9 sort of what the challenge ballot process is so that      10 people would know when they went in that this was      11 part of the voting process and that this is the way      12 it works?      13 MR. KING: Member Schiffer, I think that      14 would be helpful. I would go further if we go down      15 this route that only the Board agent could be the      16 challenging party, if you will. I would not permit      17 the employer or union to challenge based on some      18 anecdotal evidence, as I have experienced.      19 What I didn't mention is that sometimes a      20 challenged voter will go back to his or her      21 department or unit and say, "They're challenging      22 people, you don't want to go in," and you chill the      23 environment that way. So there could be reforms, I      24 agree, but the data from the Board from 2011, 2012      25 and 2013 shows a very infrequent use of the</p>
<p style="text-align: right;">Page 279</p> <p>1 even if this process goes exceptionally well,      2 explaining to voters that the challenge ballot      3 process is like this, this and this, you have people      4 waiting in this long line, this takes time, and if      5 it's up to 20 percent it will take a lot of time,      6 and they may not ever vote. I submit to you this      7 will decrease voter turnout, and it's repugnant to      8 our whole voting process in this country. If you do      9 continue to use the challenge ballot procedure for      10 this rule, I would submit that challenges ought to      11 be resolved prior, not in front of a voter, that      12 voter ought not to be subject to this type of      13 potential abuse, that there ought to be a cap on the      14 number of challenges that can be presented, and,      15 frankly, the challenge ballot procedure should have      16 a number on the ballot, not the employee's name, but      17 a number that could go into this election in much      18 greater detail.      19 I just submit to the Board that using the      20 challenge ballot procedure to remedy post-election      21 issues is not good for anyone, particularly the      22 employee. Thank you.      23 MS. SCHIFFER: I have a question. I read      24 your comments about the challenge ballots, and I      25 basically have this question about it. The Board</p>	<p style="text-align: right;">Page 281</p> <p>1 challenge ballot procedure, and expanding it to 20      2 percent I think is just flat wrong.      3 MS. SCHIFFER: The data you're relying      4 on, those are determinative challenges?      5 MR. KING: They are challenges, Member      6 Schiffer, that were made. I don't know if they were      7 determinative or not. The average number of      8 challenge ballots is only 4.5 per election, and most      9 of them were five or fewer employees, but I don't      10 know the answer to that question.      11 MS. SCHIFFER: I wondered about that,      12 too, when I read that as well.      13 MR. JOHNSON: You're talking about pages      14 10 and 11 of your 2014 comments. Right?      15 MR. KING: Yes, Member Johnson.      16 MR. JOHNSON: I didn't quite catch, and I      17 know you were trying to get through a lot of      18 material there in the comments, but what really is      19 going to be the incremental delay that you predict      20 if suddenly we have a much higher frequency of      21 challenge ballots beyond an average 4.5 an election      22 or whatever your statistics say?      23 MR. KING: The points we were making at      24 pages 10, 11 and 12 do not speak to the so-called      25 delay issue. They spoke to the chilling of</p>

<p style="text-align: right;">Page 282</p> <p>1 participation and the potential lowering of voter 2 turnout and the concerns associated therewith. 3 There may very well be increased litigation as a 4 result of the voter challenge process. That has 5 been spoken to by a number of my colleagues, but it 6 was more a procedural concern about how, Member 7 Johnson, this process works and how it's detrimental 8 to employee free choice.</p> <p>9       MR. JOHNSON: You'd just mentioned longer 10 post-election proceedings, and I was trying to 11 figure out what you meant.</p> <p>12       MR. KING: Well, my point there, and I 13 know where you are in the paper, my point is there 14 that there may very well be increased litigation on 15 the issue of who was challenged and who was not. 16 And you've heard this before. If the number of 17 challenge ballots is not dispositive or 18 determinative of the outcome of the election and the 19 unit is successful, the status of the individuals 20 challenged will not be resolved by the Board in the 21 first instance, and you'll have to resolve that 22 issue either at the collective bargaining table or 23 through a unit clarification proceeding. That's 24 what we meant by incremental litigation.</p> <p>25       MR. HIROZAWA: I'd like to go back to the</p>	<p style="text-align: right;">Page 284</p> <p>1 that's a challenge I think for any practitioner. So 2 I do think briefing does have a legitimate place. 3       The final answer to your question is that 4 there has been some discussion here today about the 5 Federal Rules of Civil Procedure. I know you 6 practiced for many years in the courts and you have 7 private practice experience. I think you would have 8 to concede that there briefing is permitted, and I 9 think we can draw some valuable experience from the 10 Federal Rules of Civil Procedure here.</p> <p>11       MR. PEARCE: Thank you all.</p> <p>12       (Recess.)</p> <p>13       MR. PEARCE: Okay. The seating now will 14 be with regard to D and G, Board review, to address 15 whether and how to amend the process for Board 16 review of the decision and direction of election. 17 Seated would be Brian Petruska and Curt Kirschner. 18 Mr. Petruska, you may proceed.</p> <p>19       MR. PETRUSKA: Thank you, Chairman 20 Pearce, Members Hirozawa, Johnson, Miscimarra and 21 Schiffer. My name is Brian Petruska. I am counsel 22 to the LIUNA Mid-Atlantic regional organizing 23 coalition. We are a coalition of laborers' district 24 councils located in six states stretching from 25 Pennsylvania to North Carolina. The coalition is</p>
<p style="text-align: right;">Page 283</p> <p>1 main topic, specifically the closing statements in 2 post hearing briefs. I understand that there are 3 very significant policy considerations that will 4 have to be grappled with to figure out what's going 5 to produce the best decision making process.</p> <p>6       But as a matter of law, if it's the 7 regional director that makes all these 8 determinations, is there any legal problem with the 9 proposed changes concerning closing statements and 10 post hearing briefs?</p> <p>11       MR. KING: Member Hirozawa, I think there 12 is to this extent: if the hearing officer has made 13 recommendations/determinations, that is an issue 14 whether it's addressed in briefing or not. But the 15 issue ultimately on briefing, is it helpful or not, 16 I think's that's a policy decision. I would concur 17 with you. Ultimately I think, though, that the 18 Board and the parties are well advanced in their 19 decision making to have the benefit of that 20 briefing.</p> <p>21       I read Board cases almost daily and I 22 think I stay on top of the law, but for me at the 23 end of a representation proceeding to be able to 24 articulate in closing argument all the relevant 25 cases, particularly in a community of interest test,</p>	<p style="text-align: right;">Page 285</p> <p>1 the organizing arm for the Laborers International 2 Union in those states. My office is in Reston, 3 Virginia, and I've primarily practiced before Region 4 5.</p> <p>5       I'd first like to address why the 6 proposed amendments are necessary. I was surprised 7 to see quite a number of comments from business 8 organizations questioning the needs for these 9 amendments, and I was surprised because, in my 10 opinion, the Board's representation election program 11 faces nothing short of a crisis.</p> <p>12       In 2009 the Board conducted approximately 13 1,700 representation elections, and that number 14 represented the fewest since 1940, but that 15 comparison isn't fair because the elections in 1940 16 involved nearly 600,000 workers, whereas only 96,000 17 workers were involved in 2009. I hardly need to 18 point out that the U.S. workforce is now three times 19 larger than it was in 1940.</p> <p>20       Moreover, the Board floats adrift of its 21 core mission. Approximately 90 percent of the 22 Board's caseload consists of ULP filings, with only 23 10 percent directed to elections. This is a 24 profound inversion of the Board's purpose. The 25 National Labor Relations Act is wholly different</p>

<p style="text-align: right;">Page 286</p> <p>1 from Title VII and the other civil rights influenced 2 statutes. It does not create a private right of 3 action for the purpose of providing individual 4 recovery. Rather, its purpose is, in the words of 5 the Act, to encourage the practice and procedure of 6 collective bargaining.</p> <p>7       The way the Board encourages collective 8 bargaining is centrally by holding these 9 representation elections, and the Board is currently 10 failing in that mission. It is only reasonable for 11 this agency to question why, with so many workers 12 now compared to then, so few take part in 13 representation elections. It is only reasonable for 14 this agency to ask what can it do to make the 15 process more accessible. The proposed rulemaking is 16 a modest step in the direction of making the 17 election process swifter, less litigious and more 18 fair. In light of the historic decrease in the 19 utilization of its representation apparatus, not 20 taking these steps would be an abdication of the 21 agency's responsibilities.</p> <p>22       Which brings me to the proposed 23 rulemaking. What is at the heart of this 24 rulemaking? There are many parts, but central to it 25 is the elimination of an interlocutory review. In</p>	<p style="text-align: right;">Page 288</p> <p>1 out that the utilization of the request for due 2 process historically correlates strongly with the 3 incidence of illegal discharge and illegal 4 intimidation and unfair labor practices. From 1990 5 to 2009 the correlation is very high, nearly a 6 one-to-one ratio. I do not suggest this correlation 7 provides a basis for eliminating this review, but it 8 is a factor that should support the decision to 9 eliminate what is otherwise a redundant and 10 potentially wasteful procedure.</p> <p>11       At bottom, those who oppose the 12 elimination of the interlocutory request for review 13 do so on the grounds of inertia, that an object at 14 rest should stay at rest. You're left with this 15 argument because the process has little to recommend 16 itself on its own merits. If it had never existed, 17 no one would see fit to establish it. If it were 18 eliminated, no subsequent Board is likely to see fit 19 to restore it. The proposed rulemaking has it right 20 on the merits with respect to this step, and the 21 current interlocutory request for review should be 22 eliminated as proposed. Thank you.</p> <p>23       MR. MISCIMARRA: Mr. Petruska, thanks for 24 being with us today. You know, one way to eliminate 25 the need for Board review would be to go back to the</p>
<p style="text-align: right;">Page 287</p> <p>1 the annals of jurisprudence, few things are more 2 settled than the conclusion that an interlocutory 3 review is wasteful, that it causes delay and 4 produces piecemeal litigation. Interlocutory 5 reviews are generally considered anachronistic, and 6 their elimination usually is considered reform.</p> <p>7       The specific facts here support the 8 Board's current proposal to eliminate in review of 9 direction of election the interlocutory review. 10 From 1973 to 2009 requests for review were filed in 11 only 1.2 percent of cases on average -- this is RC 12 cases -- resulting in the modification or reversal 13 of case outcomes in only 7/10 of a percent of RC 14 cases, and yet this level of review has a median 15 period of delay averaged over 29 years of 257 days, 16 so over eight months.</p> <p>17       As an aside, I currently have an election 18 in which ballots have been impounded since last July 19 due to a request for review. It does not make sense 20 to prolong cases by a factor of 600 percent in order 21 to adjust the outcome of 7/10 of a percent of cases. 22 Particularly in light of the Board's serious backlog, 23 the agency can and should take reasonable steps to 24 reduce redundant litigation.</p> <p>25       A final point. My written comments point</p>	<p style="text-align: right;">Page 289</p> <p>1 early '60s delegation of representation cases to 2 regional directors, because if we'd decided all of 3 those then there wouldn't be any need for review. 4 But as opposed to inertia, as I said before, we want 5 to get to the right outcome promptly and do it in a 6 way that's consistent with the statute.</p> <p>7       The statute says that the parties have 8 the right to seek Board review of, quote, any action 9 of regional directors, including requests that we 10 review pre-election party motions for a stay in the 11 election. So what do we do with that to the extent, 12 as the proposed rule indicates, that it purports to 13 accomplish the elimination of that review prior to 14 the election?</p> <p>15       MR. PETRUSKA: The proposed rulemaking 16 does state that it will permit a review upon 17 request, discretionary in circumstances, and I 18 believe I would look for a standard where the review 19 might otherwise escape review. That's the federal 20 standard for interlocutory reviews in general. I 21 believe there's a separate exception in federal 22 cases. But generally the standard is that to get to 23 an appeals court in the middle of a case you have to 24 be able to show that the case might otherwise evade 25 final review. I don't see anything in this proposed</p>

<p style="text-align: right;">Page 290</p> <p>1 rulemaking that differs from that.</p> <p>2 I do think that the parties can have 3 their rights preserved to raise an issue they need 4 to raise, and it doesn't have to be done before the 5 end of the case. It doesn't have to be done in the 6 middle of the case. I do think it would be 7 important to make sure that the process does not 8 eliminate the ability to raise an issue.</p> <p>9 But consolidating it to the end of the 10 process, which is how I understand the proposed 11 rulemaking, I think, given all the factors, this is 12 the proper course in terms of prudent husbanding of 13 resources and dealing with -- I mean, this Board has 14 had a lot of issues with the two person Board, lots 15 of things that have made its docket, I imagine, 16 quite long, and consolidating litigation is a good 17 step to help redress that problem.</p> <p>18 MR. MISCIMARRA: Thank you.</p> <p>19 MR. JOHNSON: Why should there be a 20 presumption that an election was regularly conducted 21 if we basically moved virtually all review of it to 22 the back end after it's taken place?</p> <p>23 MR. PETRUSKA: Whether an election would 24 always occur? Is that --</p> <p>25 MR. JOHNSON: No. Why should we have a</p>	<p style="text-align: right;">Page 292</p> <p>1 timetables in this regulation to get out decisions 2 on elections, election requests for review?</p> <p>3 MR. PETRUSKA: You're saying under the 4 current procedure or under the proposed rule?</p> <p>5 MR. JOHNSON: The proposed rule, the 6 modification.</p> <p>7 MR. PETRUSKA: Could you repeat the 8 question?</p> <p>9 MR. JOHNSON: Sure. It seems to me that 10 one of the main problems you have is delay. It also 11 seems to me that part of the problem for the delay 12 is essentially that the Board is sitting on this. 13 And my question is: Should, as part of this NPRM, 14 we attempt some self-regulation in terms of turning 15 around decisions on these issues regardless of where 16 they end up in the process?</p> <p>17 MR. PETRUSKA: Like a mandatory dismissal 18 after it sits for a period of time?</p> <p>19 MR. JOHNSON: Right, or perhaps going the 20 other way, like a mandatory grant of review if it 21 sat for a certain period of time.</p> <p>22 MR. PETRUSKA: That process wouldn't make 23 sense to me. I don't see much to recommend that.</p> <p>24 MR. JOHNSON: Because?</p> <p>25 MR. PETRUSKA: An automatic either grant</p>
<p style="text-align: right;">Page 291</p> <p>1 presumption that an election was regularly conducted 2 and the result should stand as is if we're basically 3 moving all of our review of it to the back end?</p> <p>4 MR. PETRUSKA: I'm not sure that is the 5 presumption, and I'm not sure that having an 6 interlocutory review rejects that presumption. 7 There is still the discretionary review at the end 8 of the proposed rulemaking. If in fact the election 9 has been improvidently held the Board can address it 10 at that time. It will receive the papers and be 11 able to make a full determination based upon the 12 filings, and I don't think that reflects a 13 presumption.</p> <p>14 MR. JOHNSON: What proposals, if any, 15 would you have, though, to make sure that there was 16 no delay on the back end of the process?</p> <p>17 MR. PETRUSKA: Can you specify where?</p> <p>18 MR. JOHNSON: Well, basically the way 19 that I take it is that you're not thrilled about 20 having to wait a very long time while a request for 21 review is pending. So we'd basically pull that 22 piece and put it to the end of the process, wherever 23 it may end up, and who knows what the final rule may 24 ultimately end up looking like. Should there be 25 anything where we self-regulate in terms of</p>	<p style="text-align: right;">Page 293</p> <p>1 or denial of it? If it automatically grants to 2 review, then you're just going to have a larger 3 backlog, so it makes the problem worse.</p> <p>4 MR. JOHNSON: Well, that probably isn't 5 the only reform that would be necessary to speed 6 things up. Do you have a concern that we would be 7 slow on the back end of all of this process if 8 essentially our review is at the back after the 9 election has already happened, or is that not 10 concerning to you?</p> <p>11 MR. PETRUSKA: Well, I suppose it's 12 possible. I think in general that one of the merits 13 of the proposed rulemaking is that by having the 14 election process play out you do let the election 15 itself play a role in narrowing and potentially 16 eliminating litigation. One thing I point out in my 17 comments is that currently around 95 percent of 18 cases don't involve determinative challenges. I'm 19 presuming that you have a ratio like that.</p> <p>20 Letting the election determine 21 eligibility issues is a smart thing to do because 22 you're going to eliminate most of them. Similarly, 23 here, once you have the election outcome the parties 24 will know what the initial determination of the 25 election was, and it may be that people who had a</p>

<p style="text-align: right;">Page 294</p> <p>1 gripe somewhere in the process liked the election 2 result, and so that's going to eliminate that 3 litigation because they won the election even though 4 they didn't like the process. I think that by 5 consolidating and narrowing you probably do reduce 6 the overall amount of litigation rather than enlarge 7 it.</p> <p>8       MR. JOHNSON: I think that's a plausible 9 thesis, but would that be the only source of your 10 way that we institutionally solve the delay problem, 11 just by issues dropping out because we go through 12 and hold an election?</p> <p>13      MR. PETRUSKA: I know that the Board can 14 delegate to three person panels to divvy up the 15 caseload. You have a five member Board now for the 16 first time in a long time, so that's obviously a 17 smart way to do it. I don't see much of an 18 alternative to going through and dealing with the 19 cases you have, but I do think that the proposed 20 rulemaking is a smart step in terms of letting the 21 election process do a lot of the heavy lifting of 22 reducing litigation and also keeping that litigation 23 from being dealt with repeatedly in the process.</p> <p>24      MS. SCHIFFER: In the example you gave 25 did the Board grant the review?</p>	<p style="text-align: right;">Page 296</p> <p>1 and so that does a great deal to expedite the 2 election process by eliminating the formality of the 3 25 day waiting period.</p> <p>4       MR. PEARCE: Thank you very much. Mr. 5 Kirschner.</p> <p>6       MR. KIRSCHNER: Thank you again for this 7 opportunity to address you at this time with respect 8 to the NPRM changes with respect to Board review.</p> <p>9       There are two significant sets of changes 10 that the Board is proposing with respect to Board 11 review. The first deals with further limiting Board 12 review prior to the election, also referred to as an 13 interlocutory review, in place of the current 14 discretionary standard. The second is with respect 15 to changing the Board's post-election review to a 16 discretionary standard. In our view, neither change 17 is warranted or appropriate under the law; and 18 moreover, neither change we think would have any 19 substantive impact on expediting elections, but, 20 rather, would only truly end up impairing the 21 fairness of the election process.</p> <p>22       With respect to the pre-election Board 23 review, the NPRM's proposal to eliminate the current 24 discretionary review in place of an extremely 25 limited special permission standard apparently -- it</p>
<p style="text-align: right;">Page 295</p> <p>1       MR. PETRUSKA: No. It's still pending.</p> <p>2       MS. SCHIFFER: So the request for review 3 is still pending. And could you comment on the 4 delay in cases where employers, if there are any, on 5 the impact of the proposed rule change in cases 6 where employers do not request review?</p> <p>7       MR. PETRUSKA: Comment on the effect of 8 it?</p> <p>9       MS. SCHIFFER: The proposed rule would 10 eliminate the 25 day waiting period, so could you 11 specifically comment on that?</p> <p>12      MR. PETRUSKA: Well, when looking at all 13 the different steps, the proposed rulemaking, as I 14 look at it, clears up obstacles to conducting 15 elections expeditiously, and the biggest time period 16 it sweeps away is the minimum 25 days in scheduling 17 the election. I mean, it's foreseeable that if you 18 have a stipulated election you could do that one or 19 two weeks later. Now, of course with a stipulated 20 election it's going to be agreed to, the date gets 21 agreed to, but there would be no presumption -- 22 there's no other reason not to hold it in a week. 23 The employer has no other reason not to hold it in a 24 week, so you could hold it a week after stipulation 25 or you could hold it two weeks after stipulation,</p>	<p style="text-align: right;">Page 297</p> <p>1 is not entirely clear from the NPRM -- but 2 apparently would effectively preclude pre-election 3 review by members of the Board rendered by hearing 4 officers and regional directors.</p> <p>5       This is especially concerning, given the 6 enhanced discretion that is provided to the regional 7 directors and hearing officers elsewhere in the 8 NPRM. This delegation of authority we believe is 9 inconsistent with the 1959 amendments to the Act, in 10 particular Section 3(b), which enables the Board to 11 delegate matters to a regional director subject to 12 the right of the parties to seek Board review of any 13 action by the regional director, including requests 14 to stay elections.</p> <p>15       In this way a Board proceeding, because 16 of Section 3(b) and other components of the Act, is 17 different than the way in which federal court 18 litigation proceeds. There is nothing like Section 19 3(b) with respect to the role of circuit courts and 20 district courts, and for that reason I think that 21 the analogy to federal court litigation is flawed 22 with respect to this particular issue.</p> <p>23       Pre-election decisions currently subject 24 to the Board's discretionary review include many 25 critical issues such as unit scope, supervisory</p>

<p style="text-align: right;">Page 298</p> <p>1 status and voter eligibility. Particularly in the 2 healthcare field with large units and complex 3 determinations of supervisory status, discretionary 4 Board review of such pre-election issues serves the 5 purposes of the Act by enabling the Board to take 6 action when necessary to avoid obvious errors being 7 made by the regional directors. Although the great 8 majority of regional directors and their staff are 9 performing their jobs admirably, errors do sometimes 10 occur.</p> <p>11       Maintaining the Board's ability to step 12 in prior to the election, when it concludes that it 13 should do so, helps avoid unnecessary litigation and 14 subsequently re-run elections after disputes are 15 resolved. Limiting the Board's discretionary review 16 to the special permission standard is not likely to 17 have any substantive benefits to the process. The 18 Board rarely grants such review, as already noted, 19 issuing them only in relatively rare cases to avoid 20 situations in which the Board would likely need to 21 re-run the election if it were to occur.</p> <p>22       Moreover, the pendency of the request for 23 review does not substantively interfere with the 24 issuance of a direction of election. The Board's 25 internal procedures for reviewing the request for</p>	<p style="text-align: right;">Page 300</p> <p>1 issues that we believe would make it more likely 2 that the Board should actually conduct a review in 3 the case.</p> <p>4       Finally, this proposed change is only 5 likely to delay the commencement of true bargaining 6 relationships. If the Board decides not to review a 7 post-election dispute the appealing party is likely 8 to feel that it has not had a real chance at a real 9 review of this dispute. This will, in our view and 10 in our concern, promote the use of technical 8(a)(5) 11 violations so that the Board and perhaps a court 12 later will be required to review the dispute.</p> <p>13       In these types of cases, the employer is 14 essentially required to engage in activity that they 15 know will be considered by the Board to constitute 16 an unfair labor practice charge in order to obtain 17 review of an issue that presumably could have been 18 resolved during a representation process. But the 19 entire technical 8(a)(5) process is problematic, 20 it's extremely slow, it exacerbates disputes within 21 the workplace, and it delays bargaining between the 22 parties.</p> <p>23       For hospital employers especially, the 24 technical 8(a)(5) process can be problematic. 25 Hospitals need to preserve, as I've stated before, a</p>
<p style="text-align: right;">Page 299</p> <p>1 review are the Board's internal procedures, and you 2 can modify those. Therefore, eliminating this 3 discretionary review would not in our view by itself 4 expedite election, but would in certain 5 circumstances allow elections to be conducted that 6 inevitably would only need to be re-run.</p> <p>7       With respect to the post-election review 8 process, the Board seeks to make a major substantive 9 change by leaving this review entirely to the 10 Board's discretion. In the view of many employers, 11 the Board by doing so would be merely attempting to 12 avoid statutory obligation to review and correct 13 disputes under its jurisdiction.</p> <p>14       As a preliminary matter, it should be 15 noted that this proposed change only affects 16 post-election procedures so it doesn't affect when 17 elections are conducted. It's obvious, based on the 18 process currently in place, that parties in Board 19 proceedings would much prefer to have an opportunity 20 for Board review, as demonstrated by the number of 21 stipulated election agreements rather than consent 22 election agreements. The proposed rule change is 23 also especially problematic given the extremely 24 broad discretion elsewhere in the NPRM that enables 25 hearing officers and regional directors to hear many</p>	<p style="text-align: right;">Page 301</p> <p>1 tranquil healing environment throughout its care of 2 patients. The longer disputes exist within the 3 litigation process, the more disruptive that 4 environment is going to be. As leaders in their 5 communities, hospitals are generally reticent to be 6 seen as violating the law even for technical 7 reasons.</p> <p>8       Moreover, many hospitals are sometimes 9 evaluated based on lack of legal violations. For 10 example, a hospital's Magnet status, a recognition 11 program operated by the American Nurses 12 Credentialing Center, or a hospital's accreditation 13 by the Joint Commission could be questioned by 14 having unresolved violations of the NLRA even if 15 they are considered, in our parlance, technical 16 violations. For all these reasons, the Board should 17 not limit further its review of disputes either 18 prior to or after an election. Thank you.</p> <p>19       MR. MISCIMARRA: Mr. Kirschner, 3(b) 20 indicates that any action of the regional director 21 is subject to a party's potential request for 22 review. In the proposed rule it kind of interprets 23 that, under the special permission standard, a new 24 narrower special permission standard, as meaning the 25 Board would consider pre-election requests for</p>

<p style="text-align: right;">Page 302</p> <p>1 review if they would otherwise evade the review.      2 And this is in the category of me asking      3 what our own proposed rules mean. Have you given      4 any thought to any examples of what that language      5 means in the representation election context? What      6 kinds of issues do we have that might otherwise      7 evade review and therefore still be subject to      8 pre-election review under that new standard? And      9 I'm not suggesting that you should be able to come      10 up with examples, because I haven't quite figured      11 that out, but I was wondering if you have.</p> <p>12 MR. KIRSCHNER: Well, I've thought about      13 it, and I have two areas of concern. First of all,      14 the evading review standard needs to be looked at      15 with respect to the other component of your proposed      16 change, which is the discretionary review of the      17 post-election process, so would it be evading review      18 if in fact the mandatory review right now post      19 election becomes discretionary. That's one      20 particular issue.</p> <p>21 I also do not understand, having read the      22 Board's rules, exactly how a special permission      23 standard varies from the existing discretionary      24 review standard. Looking at the percentage of cases      25 in which review is granted and how small it is, I'm</p>	<p style="text-align: right;">Page 304</p> <p>1 Board's blocking policies. I think what exists      2 works very well.      3 I'd like to start off and say that I      4 would oppose any criticism of the union viewpoint in      5 regards to the delay that, as we've heard, is a      6 result of blocking charges. The delay in those      7 cases is completely separate and apart from the      8 delay that we're talking about in the other elements      9 of the proposed rulemaking.</p> <p>10 Blocking charges are called blocking      11 charges for a reason. It's because bad conduct has      12 occurred which does in fact require a delay in the      13 process in order that employees may be able to      14 freely and fairly exercise their rights. Trying to      15 compare the two, like I said, the litigation issues      16 pre-election and what occurs in blocking delays, is      17 not an apples to apples comparison whatsoever, and      18 so I would reject any criticism of our position as      19 regards to we accept the delay that does occur in      20 blocking charges.</p> <p>21 In the summary you requested comments on      22 various aspects of the blocking charge; first,      23 should the regional director require an offer of      24 proof when these charges are filed. I would not      25 object to the submission of such an offer. However,</p>
<p style="text-align: right;">Page 303</p> <p>1 not sure how it could get much smaller and still be      2 some sort of review.      3 It almost appeared to me that the Board      4 acknowledged that 3(b) required some type of review,      5 and so therefore it established on its face the      6 special permission standard. But it also was doing      7 so by trying to even limit further the standards      8 that currently exist, which seems to me to be just      9 an apparent attempt to cover the statute by saying,      10 "Yes, we have some review, but it's so extremely      11 limited that in essence we're never going to grant      12 it."</p> <p>13 If there is true review still possible, I      14 don't understand why the Board needs to change the      15 current standard if you could still have      16 discretionary review and make its discretion of      17 course whether to grant the review or not and      18 thereby obviously still complying with Section 3(b).</p> <p>19 MR. PEARCE: Thank you. Our last seating      20 is with regard to blocking charges, and that would      21 be Melinda Hensel and Arnold Perl, both of whom have      22 testified before.</p> <p>23 MS. HENSEL: Thank you for having me,      24 Mr. Chairman. I can make this real short and easy.      25 I don't support any changes really at all to the</p>	<p style="text-align: right;">Page 305</p> <p>1 I would object to the regional director making a      2 decision on the conduct of the election or even      3 proceeding with the hearing based solely on that      4 offer of proof because we are dealing in those cases      5 with ULP charges, and there are credibility issues      6 to be determined before one can decide if the charge      7 has merit. I don't think you can make those      8 determinations solely off of an offer of proof, but      9 certainly it would assist to define the parameter of      10 the charge and how particularly egregious the      11 conduct was.</p> <p>12 In that regard, blocking charges in my      13 experience are very typically investigated rather      14 quickly. The case handling manual gives the      15 regional director very broad discretion to decide      16 how he or she is going to deal with the charges. I      17 recall one instance where we filed the charge. It      18 was maybe three or four days before the election.      19 We got the call the next day saying that, "You will      20 be here with all of your witnesses, you will not      21 leave until every witness has given a statement, and      22 we will issue a decision on the merits in advance of      23 the election and make a decision as to whether or      24 not it's going to proceed." We did that. We      25 presented witnesses from 8 a.m. until 1 a.m., and</p>

<p style="text-align: right;">Page 306</p> <p>1 the regional director did in fact issue his decision 2 the next day. So the discretion that's provided for 3 in the case handling manual is exercised by the 4 regions, and I just don't see any need to change the 5 way it's exercised.</p> <p>6 There were questions about whether or not 7 an R-Case hearing should proceed in the event of the 8 filing of blocking charges. Again, I believe that 9 the case handling manual already sufficiently 10 handles those questions that you've posed. In a 11 type one case the regional director can decide to 12 proceed. Commonly, in a type two case, because it 13 might result in the dismissal of the petition, it 14 will be held in abeyance pending. I think that 15 that's a fair resolution of those two different 16 types of cases.</p> <p>17 I suppose my objection to proceeding to 18 hearing in a type one case is we may find ourselves 19 in a position where, if the conduct has been 20 sufficiently egregious, we're going to have trouble 21 gathering the witnesses that we need even to present 22 our unit issues or exclusion issues. I have been in 23 that circumstance where the witnesses really don't 24 want to come forward because they've been 25 sufficiently brainwashed by the employer, and it's</p>	<p style="text-align: right;">Page 308</p> <p>1 against the other related to bad conduct in an 2 attempt to delay to have a longer period of time to 3 get their voice out there. I can't say that it's 4 never done.</p> <p>5 But at the same time, I think for the 6 most part our regional directors are quite good at 7 seeing through the smoke, that they make typically 8 good decisions on those charges, and that they do 9 give a lot of thought to what the effect of the 10 employees has been when making their decision as to 11 whether or not to proceed.</p> <p>12 MR. MISCIMARRA: Ms. Hensel, I want to 13 just preface this by saying that I really appreciate 14 your contribution. And this applies to the speakers 15 throughout the day today. I think people have been 16 very thoughtful and very reflective and also very 17 civil in terms of talking about these issues that 18 have generated such strong feelings on all sides.</p> <p>19 With respect to blocking charges, this is 20 an area that's interesting because all five members 21 are very interested in comments on the blocking 22 charge doctrine. I have a mechanics question and 23 then more of a philosophical query.</p> <p>24 The mechanics question is: If you have a 25 blocking charge that remains unresolved for some</p>
<p style="text-align: right;">Page 307</p> <p>1 been very difficult to present that case.</p> <p>2 However, I would say to the extent that 3 we are able to dispose of administrative issues it's 4 worthwhile to do so. That way, once the charge is 5 resolved you can get yourself to election much 6 faster. And again -- I see my time is up -- the 7 difficulty there, though, is if the resolution of 8 the charge ends up taking an especially lengthy 9 time, and that can happen, you may get to the point 10 where it is finally resolved and find that your unit 11 is completely changed and you really need to go back 12 through those procedures again. So it's a tossup as 13 to whether or not it's a waste of Board resources to 14 continue the process while you have a blocking 15 charge pending.</p> <p>16 MR. PEARCE: Some might argue or some 17 have argued that a blocking charge is a mischievous 18 tool, particularly when the petition is used for 19 decertification. How do you respond to that?</p> <p>20 MS. HENSEL: I agree that all charges can 21 be mischievous tools, not just blocking charges. 22 Employers have been known to file charges relating 23 to the solicitation of cards in an attempt to block 24 and delay. Sometimes when you've got an election 25 with two rival unions involved one files charges</p>	<p style="text-align: right;">Page 309</p> <p>1 period of time, and then if the blocking charge 2 clears, if the underlying ULP is subject to a 3 resolution or there's ultimately an election, if an 4 election takes place in months or in some cases 5 years later, does it make sense to have a different 6 election eligibility date and then a different 7 Excelsior list as compared to what may have been an 8 original Excelsior list that then becomes stale? 9 What are your thoughts about that?</p> <p>10 MS. HENSEL: I think in some cases, 11 depending on the length of time that's passed and 12 whether or not the unit has changed substantially, 13 it might be required. I actually don't like 14 agreeing with that, but I agree that it might be 15 required.</p> <p>16 If the unit hasn't changed all that much, 17 and I don't know if there is a percentage of 18 employee turnover you would ascribe to that, then I 19 think it would be fair to go back to that original 20 eligibility date because I don't think that a party 21 should benefit by virtue of its own bad conduct, and 22 the change in the unit description or the 23 composition may actually end up benefiting that 24 party.</p> <p>25 MR. MISCIMARRA: It could go the other</p>

<p style="text-align: right;">Page 310</p> <p>1 way, too.</p> <p>2 MS. HENSEL: It could. This is one of 3 those -- it's very -- I don't think you can predict.</p> <p>4 MR. MISCIMARRA: My other more general 5 question is: Would you agree that there is at least 6 some tension? From the employer's side, employers 7 are suggesting in many of the contributions where 8 we've received comments, that we have this process 9 for representation elections and that there are 10 these issues that are real issues that at least 11 warrant resolution.</p> <p>12 The proposed rule kind of resolves that 13 by saying, "We want to resolve these issues, but we 14 really need an election quickly, and then we can 15 resolve the issues." And then the blocking charge 16 doctrine, there are these issues that really are 17 serious issues that require resolution, but with 18 respect to blocking charges we actually say, "Well, 19 no, the election can wait."</p> <p>20 And I'm not asking you to embrace the 21 idea that we should just abandon the blocking charge 22 doctrine. But would you agree at least that the 23 issues themselves raise kind of an interesting 24 tension because in both cases you have some legal 25 issues that require resolution, that in one case</p>	<p style="text-align: right;">Page 312</p> <p>1 legal issues are unresolved at the time, which kind 2 of begs the question of when should the resolution 3 take place.</p> <p>4 MS. HENSEL: Especially in type one cases 5 the union or whoever files does have the option of 6 filing a request to proceed, and in my experience 7 when we do that they're typically honored. That 8 requires the party filing the request to think long 9 and hard and really know its bargaining unit as to 10 what has occurred. In that regard, there were 11 requests for comments about whether or not the 12 election should have been and then the ballots 13 should just be impounded. Again, this is a tough 14 topic. There are instances where that might be a 15 fine solution, but I don't think it's a good 16 solution for all instances or even most.</p> <p>17 MR. MISCIMARRA: Thank you.</p> <p>18 MR. JOHNSON: If I can just jump in. 19 First off, thank you both personally in our last 20 sitting of the day, and thank all of the speakers. 21 We went a little bit long, but everybody made 22 invaluable contributions, and I appreciate everybody 23 having come out and contributing.</p> <p>24 I would also like to say that I fully 25 accept the good faith behind the unions' and labor</p>
<p style="text-align: right;">Page 311</p> <p>1 we're saying that going to the election quickly 2 doesn't matter, and then with respect to the 3 blocking charges, if we stick with current doctrine, 4 that at least with respect to many of them we're 5 saying that actually the resolution of the charges 6 is more important than proceeding to an election 7 quickly?</p> <p>8 MS. HENSEL: I would go back to the fact 9 blocking charges are filed when the person or the 10 entity filing doesn't feel like that there is a fair 11 opportunity for an election anymore, and that's why 12 it makes sense to stop the process and try to remedy 13 the harm that's been caused. If employees have been 14 told, "No, we're closing down and you guys will 15 never work again if you do this," do you believe 16 that it's possible to have a fair election? I 17 don't. I don't think that it's possible. And the 18 employees need assurances from the government that 19 that contact was unlawful, that they're not allowed 20 to do that, that they're not allowed to say that, 21 and that you need to see this notice posting for 60 22 days before we can let you go vote to make sure that 23 you understand that that's the case.</p> <p>24 MR. MISCIMARRA: I appreciate the 25 response. Of course, in both cases the alleged</p>	<p style="text-align: right;">Page 313</p> <p>1 movement's position that blocking charges are an 2 important and in some cases necessary part of the 3 process in that just because there is an election 4 that may be pending, that doesn't mean, "Hey, 5 anything goes," and I think we're all sort of 6 unified on that.</p> <p>7 I guess my question is: To the extent 8 that we wanted to put sort of a quasi 10(j) standard 9 of if it's irremediable conduct without a 10 postponement, that in our regulations on blocking 11 charges and get out of this sort of type one/type 12 two arena, would that be the phraseology that would 13 make sense to you, "irremediable without 14 postponement on an election?"</p> <p>15 MS. HENSEL: I suppose I could wrap my 16 arms around that. Again, it's another one of those 17 sort of vague Board phrases that's always subject to 18 interpretation. How would you define that phrase?</p> <p>19 MR. JOHNSON: Right. Well, that 20 basically we're not going to have laboratory 21 conditions without -- a postponement without putting 22 the election and basically the petition in abeyance 23 because of maybe a decertification petition, for 24 example, in my example.</p> <p>25 MS. HENSEL: I haven't really considered</p>

<p style="text-align: right;">Page 314</p> <p>1 such a thing. Can I think about that a little bit?</p> <p>2       MR. JOHNSON: Of course. The comments 3 period is over with, but I'll let you think about 4 it.</p> <p>5       MS. HENSEL: Thank you.</p> <p>6       MR. PEARCE: Thank you. Mr. Perl.</p> <p>7       MR. PERL: Thank you very much. The 8 NPRM's attempt to focus on identifying and 9 minimizing unnecessary barriers to the fair and 10 expeditious resolution of questions concerning 11 representation properly puts the spotlight on the 12 Board's blocking charge policy. In fact, the 13 Board's blocking charge doctrine has been in the 14 spotlight for the last 20 years.</p> <p>15       Let me explain. The Board, when it dealt 16 with this in the last rulemaking procedure, 17 explained in 2011, when it issued its final rules 18 under the NPRM without making any changes to the 19 discredited blocking charge policy, that the policy 20 was not intended to be misused by a party as a 21 tactic to delay the resolution of a question 22 concerning representation raised by a petitioner.</p> <p>23       20 years ago in 1994, then Board Chairman 24 William Gould created the National Labor Relations 25 Board Advisory Panel, comprised of both union and</p>	<p style="text-align: right;">Page 316</p> <p>1 labor practice charges are filed by a party, instead 2 of blocking the holding of the election or 3 implementing any of the other possible changes 4 mentioned in the NPRM, the Board should simply 5 consolidate the charges with any post-election 6 objections which may be filed by said party.</p> <p>7       Deferring such matters to post-election 8 challenges, as stated by Member Miscimarra, would 9 follow the approach taken by the Board majority's 10 proposal in the NPRM to defer until after the 11 election resolution of issues affecting voter 12 eligibility. And if the charges are sufficiently 13 serious -- Member Johnson alluded to the 10(j) 14 procedure. That seems to be a procedure that's used 15 more often today than previously, and would seem 16 very appropriate to deal with outrageous unfair 17 labor practices without the need and necessity or 18 advisability of cancelling or postponing an 19 election.</p> <p>20       In sum -- and this is on a more macro 21 basis -- I think the blocking charge policy is one 22 of those areas, like the 25 day rule you were just 23 discussing eliminating in the request for review 24 procedure, that the Board could and should as a 25 matter of policy deal with, because you're targeting</p>
<p style="text-align: right;">Page 315</p> <p>1 employer panels, consisting of 50 practitioners, 25 2 from the union side and 25 of us from the management 3 side. The stated purpose of the advisory panel was 4 to provide input to the Board, to achieve efficient 5 and equitable reforms, and to implement the 6 objectives of the Act and its procedures.</p> <p>7       Interestingly, one of the issues on the 8 advisory panel's agenda was in fact this Board's 9 blocking charge policy. Many of us serving on the 10 advisory panel then advocated that the Board 11 eliminate the blocking charge policy due to the fact 12 that it was subject to outright manipulation as was 13 asked by the chairman. Although I believe the 14 advisory panel made a number of significant 15 contributions to the Board, one of the items that 16 remain without change is the blocking charge 17 doctrine.</p> <p>18       Now, the Board's blocking charge policy 19 should be eliminated once and for all. This is 20 perhaps the easiest of all the issues appearing in 21 the NPRM that the five member Board could agree on. 22 This is in keeping with the Board's declaration that 23 no party should use the unfair labor practice 24 procedure to unnecessarily delay the conduct of the 25 election. In those cases where pre-election unfair</p>	<p style="text-align: right;">Page 317</p> <p>1 specific problem areas rather than an overall 2 reformulation of representation policies that's 3 contained in the notice of proposed rulemaking.</p> <p>4       I think under a narrow approach the Board 5 could properly deal with these kinds of issues and 6 make appropriate incremental improvements to its 7 excellent overall record in the conduct of 8 representation elections without sacrificing the 9 employer's right of free speech or the employee's 10 right of free choice.</p> <p>11       I personally dealt with the blocking 12 charge policy, and the memories remain today, where 13 two unions in the hotel industry had five petitions 14 at the same time. Our election was to go first. 15 This was down at the Walt Disney World property, and 16 the union did not want to have on its record that it 17 lost the first of these five elections, fearing that 18 it appeared that they would not prevail. So instead 19 of having the election held, two weeks before the 20 election the two unions, the joint petitioners, 21 filed blocking charge policies, and the regional 22 director blocked the election. And I remember 23 coming up to Washington and filing a special appeal, 24 urging the Board to overrule the regional director 25 and conduct the election, which the Board in that</p>

<p>1 case did.</p> <p>2 But not every party is represented by</p> <p>3 counsel that would take advantage of some of the</p> <p>4 other Board procedures to do that. And I think the</p> <p>5 blocking charge policy is the only area I can think</p> <p>6 of that -- and I respectfully heard the prior</p> <p>7 speaker here representing the viewpoint of labor --</p> <p>8 that in our view this is the only area where one</p> <p>9 party can totally manipulate the Board's processes,</p> <p>10 and I think it's totally inconsistent with the</p> <p>11 purposes of the Act and the administration of the</p> <p>12 Act by a very distinguished Board.</p> <p>13 MR. PEARCE: Thank you. Questions.</p> <p>14 MS. SCHIFFER: I have a question. If I</p> <p>15 understand you correctly, you're suggesting that ULP</p> <p>16 charges never block an election because they're used</p> <p>17 by unions for the purpose of delay.</p> <p>18 MR. PERL: That they can be used too</p> <p>19 often for purpose of delay. Nothing is a hundred</p> <p>20 percent absolute.</p> <p>21 MS. SCHIFFER: And do you think that that</p> <p>22 should be the same standard when we evaluate whether</p> <p>23 employers file post-hearing briefs or whether a</p> <p>24 party be able to even participate in the election</p> <p>25 process, for example? I mean, at each step of the</p>	<p>Page 318</p> <p>1 MR. PERL: I think the basis for the</p> <p>2 Board's determination in this procedure should be</p> <p>3 going back to what the chairman said is the goal,</p> <p>4 what the NPRM is intended to do, that it is intended</p> <p>5 to be fair to all parties in all cases. Now,</p> <p>6 perhaps that's just aspirational, but I believe it's</p> <p>7 something more than that, because the present</p> <p>8 system, it works.</p> <p>9 Maybe it doesn't work as well as some</p> <p>10 would hope. But when you look at weighing the</p> <p>11 considerations here, if something works fairly well</p> <p>12 currently, having elections go from petition to</p> <p>13 election in the shortest period almost in the</p> <p>14 history of the Board, there are certain areas that</p> <p>15 interfere with the efficient and effective</p> <p>16 representation process, and one is the blocking</p> <p>17 charge.</p> <p>18 It was identified in 1994 in the advisory</p> <p>19 panel as one of the potential problems in the</p> <p>20 efficient administration of the representation</p> <p>21 process. It was dealt with again in 2011 under the</p> <p>22 first Board looking at it under the proposed</p> <p>23 rulemaking, and now it's on the agenda once again by</p> <p>24 this Board.</p> <p>25 At some point the Board really should</p>
<p>Page 319</p> <p>1 way should we be guided by whether employers can use</p> <p>2 that process for the purpose of delay?</p> <p>3 MR. PERL: Well, I think you're looking</p> <p>4 at specific factual information. I was not on the</p> <p>5 panel for the post-hearing briefs. I was sitting</p> <p>6 here and I was listening to the discussion. But I</p> <p>7 think this is an apples and oranges situation,</p> <p>8 Member Schiffer. We're all attorneys here, we all</p> <p>9 want to do an excellent job representing our client,</p> <p>10 whoever they may be, and I think the employer view</p> <p>11 on post-hearing briefs is that it serves a very</p> <p>12 useful service, especially in complex cases, to</p> <p>13 effectively formulate the arguments based on the</p> <p>14 facts of the case and present that to the regional</p> <p>15 director for his determination.</p> <p>16 Blocking charge policy is totally</p> <p>17 different. This is a tactic. It's not a strategy.</p> <p>18 It's a tactic that can be used and has been used too</p> <p>19 often. I still remember that experience down at</p> <p>20 Walt Disney World.</p> <p>21 MS. SCHIFFER: Sure, you do. And there</p> <p>22 have been comments filed with us about employers</p> <p>23 purposefully using other Board processes for delay.</p> <p>24 So my question is: Should that be the basis for our</p> <p>25 deciding?</p>	<p>Page 321</p> <p>1 come to grips with the fact that this stands out</p> <p>2 there like a sore thumb and deal with it</p> <p>3 effectively. I think it's quite different from what</p> <p>4 you might be alluding to. Is it really a tactic of</p> <p>5 employers in a pre-election to want in a</p> <p>6 pre-election hearing the opportunity to litigate the</p> <p>7 supervisory status of individuals in dispute where</p> <p>8 that has an effect on potential unfair labor</p> <p>9 practices by employers when it doesn't get resolved,</p> <p>10 when disputed supervisors affect the conduct of</p> <p>11 other employees in the unit, and where the employer</p> <p>12 is caught in the horns of a dilemma? That's not the</p> <p>13 blocking charge policy at all.</p> <p>14 MS. SCHIFFER: Well, my question was:</p> <p>15 Should that be a factor in our decision on the</p> <p>16 proposed rule, whether parties use it as a tactic or</p> <p>17 delay? You're suggesting that should be a factor in</p> <p>18 our decision on the blocking charge. Should that be</p> <p>19 a factor in our decision on other issues that we are</p> <p>20 presented with?</p> <p>21 MR. PERL: I think the blocking charge</p> <p>22 policy is different. The blocking charge policy</p> <p>23 almost --</p> <p>24 MS. SCHIFFER: So you think with the</p> <p>25 blocking charge it should be, but not with the other</p>

<p style="text-align: right;">Page 322</p> <p>1 issues we're looking at.</p> <p>2 MR. PERL: Because on the other issues I</p> <p>3 don't think that one could say that --</p> <p>4 MS. SCHIFFER: People have said that. We</p> <p>5 have comments that do say that.</p> <p>6 MR. PERL: Well, anyone who has asserted</p> <p>7 that going to a pre-election hearing creates</p> <p>8 unnecessary litigation for the sole purpose of</p> <p>9 delaying an election hasn't gone through some of the</p> <p>10 experiences of attorneys that have appeared before</p> <p>11 you for the last 30, 40 or even 50 years.</p> <p>12 MS. SCHIFFER: So they're just wrong. My</p> <p>13 second question, and you brought this up at the</p> <p>14 beginning when you mentioned a fair process: Is it</p> <p>15 a good use of Board resources in your view to go</p> <p>16 ahead with an election where there is evidence that</p> <p>17 no fair election can be held?</p> <p>18 MR. PERL: I think it is, because when</p> <p>19 you look at the rationale of what the panel majority</p> <p>20 has said in the notice of proposed rulemaking, some</p> <p>21 of these issues are going to wash out. It may not</p> <p>22 be necessary to resolve them post election. The</p> <p>23 unions now are winning over 60 percent of all</p> <p>24 elections. They file unfair labor practice charges,</p> <p>25 you've eliminated the blocking charge doctrine, the</p>	<p style="text-align: right;">Page 324</p> <p>1 in this seating for having to hang out and wait</p> <p>2 while the hours passed. I hope it wasn't too much</p> <p>3 of an inconvenience. We will start tomorrow at 9:30</p> <p>4 a.m., and I hope everybody has a pleasant evening.</p> <p>5 We stand in recess.</p> <p>6 (Meeting adjourned at 6:07 p.m.)</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 323</p> <p>1 petition results in going to an election and the</p> <p>2 union wins. The asserted or claimed unfair labor</p> <p>3 practice charges that have been filed are more</p> <p>4 readily resolved at that point than it is on the</p> <p>5 front end pre-election, because if unfair labor</p> <p>6 practice charges are filed pre-election most likely</p> <p>7 they're going to be litigated. If they're deferred,</p> <p>8 as you have been done on all these other issues post</p> <p>9 election, there's perhaps a much greater likelihood</p> <p>10 they will never get litigated.</p> <p>11 MS. SCHIFFER: Thank you.</p> <p>12 MR. PEARCE: I'd like to clarify. Mr.</p> <p>13 Perl, you've made a statement about Ms. Hensel</p> <p>14 representing the view of labor. We have no view of</p> <p>15 labor. My understanding is that this is the</p> <p>16 testimony of individuals except where they're making</p> <p>17 clear that they're testifying on behalf of an entity</p> <p>18 that they're representing. Is that correct, Ms.</p> <p>19 Hensel?</p> <p>20 MS. HENSEL: That is correct.</p> <p>21 MR. PEARCE: Thank you. With that, we</p> <p>22 have completed our speakers of the day. I want to</p> <p>23 thank everybody for coming, to thank all the</p> <p>24 speakers for their thoughtful comments, and I'd</p> <p>25 particularly like to thank these esteemed attorneys</p>	<p style="text-align: right;">Page 325</p> <p>1 District of Columbia</p> <p>2 To wit:</p> <p>3 I, Keith A. Wilkerson, a Notary Public of</p> <p>4 the District of Columbia, do hereby certify that the</p> <p>5 that these proceedings were recorded</p> <p>6 stenographically by me and that this transcript is a</p> <p>7 true record of the proceedings.</p> <p>8 I further certify that I am not of</p> <p>9 Counsel to any of the parties, nor an employee of</p> <p>10 Counsel, nor related to any of the parties, nor in</p> <p>11 any way interested in the outcome of this action.</p> <p>12 As witness my hand and Notarial Seal this</p> <p>13 23rd of April 2014.</p> <p>14</p> <p>15 Keith A. Wilkerson,</p> <p>16 Notary Public</p> <p>17 My commission expires:</p> <p>18 November 12, 2014</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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