NLRB Testimony of Russ Brown, Labor Relations Institute
July 19th, 2011

Madame Chairwoman and members of the Board, my name is Russ Brown, I am a Vice President for the Labor Relations Institute. I truly appreciate the opportunity to contribute our views to this proposed rule.

Before getting to the substance of the proposed rule I think it is important to address the need for it. I think any serious student of American labor law would agree that the current process could benefit from efficiency gains. But it is curious that out of all the areas where efficiency might be gained that this Board has chosen the pre-election process.

Historically the Board's election process has been very efficient. The Board has a goal of conducting elections within 42 days from the filing of the initial petition. The median number of days from petition to election in fiscal year 2010 was only 38 days.[1] More than 95% of representation cases are closed within 56 days of the petition being filed, well above the target of 85%.[2] During fiscal year 2010 the Board had only 56 cases that required post-election hearings and again the Board resolved those cases well under the current targets.

Compare this to the Board's experience with resolving unfair labor practice charges. The Board's FY 2010 target was to resolve only 71% of unfair labor practice cases within 120 days of the filing of the charge.[3] This is substantially slower than the target for union representation cases.[4]

Not only is the target slower, but the Board has been much less efficient in resolving unfair labor practice charge cases. The actual experience in fiscal year 2010 was that the median time to issue complaint in unfair labor practice charge cases rose slightly (median of 101 days from the filing of the charge) and the median number of days from the filing of a "merit charge" to the issuance of a complaint got nearly 14% slower than in 2009 (87 days).[5] It is also important to

[1]See GC Memo 11-03, Summary of Operations FY 2010 at p. 5.
[2]Id.
[3]See National Labor Relations Board Performance and Accountability Report Fiscal Year 2010 at p. 19.
[4]Id. The Board target is to resolve 85% of union representation cases within 100 days of the filing of the petition.
[5]See GC Memo 11-03, Summary of Operations FY 2010 at 4.

point out that the Board processes over 7,000 unfair labor practice charges per year, while handling less than 2,000 election cases.[6]

While we agree that seeking efficiency is a worthy goal, it is curious that the Board would start with the election process. Focusing on the efficiency of the unfair labor practice process has nearly 4 times more leverage (due simply to the volume of the caseload) and is the area where the Board's own evaluations show they are moving the wrong direction. Instead the Board is focusing its limited agency resources on the election process, where targets are being met and exceeded, even though those targets are much more ambitious than in the unfair labor practice area.

Member Hayes in his dissent to this rulemaking noted his fear that the process will be viewed as a, "fait accompli" and merely a way to grant unions their goal of "quickie elections."[7] It is hard to disagree with him given this clear choice to ignore the opportunity to focus on an area where efficiency gains would be more certain and much more likely and instead set the stage for what unions want most of all - elections with no opportunity for an employer to exercise its Section 8(c) rights to free speech in the workplace.

Next I would like to address the substance of the proposed rule.

The proposed rule seeks special comment on two issues, electronic voting and blocking charge. Allowing electronic signatures is a terrible idea. There are plenty of examples of situations where employees were tricked into signing a physical authorization card by being told it was something else. The likelihood of confusion and even abuse is much greater with electronic signatures. Checking a box on a website is done as an afterthought today. Ask yourself: when was the last time you actually read the software license before you updated Microsoft Word?

The second problem with electronic signatures is they are impossible to verify without bringing in the actual person who supposedly signed the electronic document. Today physical signatures can be verified against other copies of signatures on file. This is not possible with electronic signatures. And to the extent getting the signature requires providing additional personal or private identification data (like a date of birth, social security number, etc.) then the potential problems multiply even further. The current use of physical signatures is not perfect, but it is far superior to the use of electronic ones.

---

[6]Id. at 5.

[7]See Dissent to NPRM by Member Brian E. Hayes at pp. 5-6.

On the other hand, reforming the process around "blocking" charges is an excellent idea. The current process is abused and frustrates and disenfranchises voters. In 2010 less than 5% of elections required a Board resolution of objections.[8] Casting the ballots, even if they are impounded, is far superior to delaying the election on the off chance that a charge might have enough merit to warrant other actions. Fast-tracking the investigation and resolution of the blocking charge is also a great idea - as discussed above, this should be the focus of any Board rulemaking if the true goal is to improve efficiency of the process.

Next I'd like to address the aggressive time targets in the proposed rulemaking. The Board proposal wants all pre-election unit issues resolved within 5 business days, or else hold a hearing to resolve them. Let me relate a story about my own personal experience to help you understand the tremendous burden you are putting on employers.

Several years ago I was the head of a small transportation company not unlike many of the companies affected by these proposed rules. My business was spread across sixteen western states, and I did not have a true HR department or a labor lawyer. At one point I had an extended trip away from the office planned. After spending an entire day in transit, I found out that the TWU had filed a petition to represent the workers at one remote location.

My travel plans were well known and I don't think it is a coincidence that the petition was filed on the day I left. I had no idea what this petition meant and I had no choice but to cut my trip short. It took me four business days to just get home and hire a lawyer.

It would have been impossible for me to present evidence at a hearing about the appropriate unit the next day. Our unit issues were complex. There were questions about supervisory status of employees, what locations were included (or properly excluded) and much more. These proposed time targets are so aggressive that they will lead to mistakes, poor judgments, and are likely to complicate rather than simplify unit issues.

I was scared that I would say or do something that would get me in trouble. so I

[8]See General Counsel Memo GC 11-03 at p. 5.

hired the firm I now work for, the Labor Relations Institute, to educate my workers during the election campaign. Communicating to my employees was always challenging. They were on the road almost the whole time and I only had limited periods where I could talk to them about anything. LRI had around a month to educate my employees at several locations. Their campaign was very educational and they encouraged my employees to investigate the facts and get both sides of the story.

After that month I knew that win, lose, or draw, my employees had the information they needed to make an informed decision. Information the union certainly did not offer. In other words they got both sides of the story. My company won our election without any objection or unfair labor practices. But I can assure you that if an election had happened in 10 days or two weeks there is no way my employees would have been able to make an informed decision.

The requirement to furnish a list of voters, including phone numbers and email addresses, in two days after the direction of election is simply not enough time. Just consider my personal experience. We did not have a centralized human resource system and were spread out among many states. We had questions about who was in and out of the unit.

Whether talking about a small organization or even a big company, it can often take more than a day just to get a list to review. Getting this list right is too important to rush. If it's wrong it can overturn the election. The current seven days is a good balance between getting the list quick and getting it right.

The Board also asks for comment on penalties for improper disclosure of confidential information. The Board should provide some type of opt-out process for employees who wish to protect their private contact information from unions and other allied groups. In addition there should be severe penalties for breaches of these confidentiality provisions. In every campaign I have been involved in I have had workers express to me that they don't like having their personal information given to unions without their permission. The CAN-SPAM Act and national do not call lists require organizations to provide the opportunity for citizens to opt-out of solicitations. The NLRB rules should provide a similar opportunity for employees.

The core change in the proposed rulemaking is shifting many of the appropriate unit decisions until after the election. The biggest change is punting any unit issues affecting less than 20% of the unit until after the election. The basic justification

for this change is that disputes of unit issues delay elections. As we've already seen, this is a cure in search of a disease. The vast majority of elections today occur around a month after the petition is filed, even while deciding all unit issues in advance.

Pushing the hearing until after the election the proposed rule change creates uncertainty with voters, disenfranchising both union and company supporters. For example, it is common that a petition might include both production and maintenance employees. But sometimes employees from one department may not want to be included with the other.

The purpose of the current framework is to make sure that employees who share a community of interest are included in a unit together - and that they are excluded from employees who don't share a community of interest. The proposed rule punts this important issue into the post-election period so long as it impacts less than 20% of the voting unit. That is like saying we don't know whether the votes from Texas and California will count in the next Presidential election.

The proposed rule ironically discourages participation in elections. Some employees may decide not to vote because they don't want to be included with others who may or may not be in the final unit. Workers have the right to know who will be in their bargaining unit on the day they vote. This is why they don't allow exit polls from the East coast to play before polls close in the West coast. If you are interested in enfranchising workers then make sure they know exactly who will be in their bargaining unit when they vote.

Furthermore, the challenge process creates a situation to where some votes may not be anonymous. Under the current rule the number of challenged ballots is usually limited. Under the proposed rule you will have many more potential challenged ballots. Each of those voters may be concerned that their vote might be disclosed. For this reason it is important for as many potential challenges to be resolved prior to the actual vote.

Unions win nearly 70% of all union elections under the current rules. Unions sometimes counter this by arguing that they withdraw many of the petitions they file. While unions do withdraw around a third of the petitions filed each year, this withdrawal rate has remained consistent over the last decade, even while the union win rate has improved substantially. It is also important to note that many of the withdrawals are "light filing" situations where the union files with the minimum

support needed, planning to to withdraw the petition so they can get the Excelsior list and then re-file after getting more support.

Increasing efficiency is a worthy goal. But these changes seem explicitly designed for the sole purpose of reducing the time to election. Pushing most unit decisions until after the election disenfranchises voters and is counter to the purposes of the Act. Any rule change needs to be about what is best for workers, not what is best for unions. The proposed rule is counter to the purposes of the Act and impairs the credibility of the Board at a time when it is seen increasingly as a politicized agency determined to help labor unions. The bottom line is that the Board should not implement the dramatic changes proposed.