Time to Update the NLRB's Election Procedure

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Thank you for the invitation to speak today. I am pleased to get to testify on the importance and appropriateness of the National Labor Relation Board's (NLRB's) proposed rule changes for the conduct of union representation elections. As a lawyer and law professor, I have studied and taught labor and employment law, including the Board's processes, for almost thirty years. Over the course of these thirty years I have been fortunate enough to teach labor and employment law not only in the U.S., but also in Germany, France, the U.K. and, most recently, China. As an economist, I have also studied the labor market and the impact of unions and collective bargaining on the distribution of wealth, the health of the middle class and the general health of the U.S. economy. I look forward to sharing what I have learned on these topics that is relevant to discussion of the Board's proposed rule changes.

I. The Need for Reform of the Board's Election Procedures

The Board's election procedure is broken and in need of an overhaul. The procedure is broken because it includes outmoded and superfluous procedures that do not meet the standards of modern administrative and judicial procedure and communication, adding unnecessary cost and delay to be borne by the parties and taxpayers. The procedure is also broken because it allows unscrupulous employers to control the election process through delay and intimidation. Employer control of a process intended to give the employees free choice, frustrates the employees' statutory right to choose and undermines the integrity of the process. The Board's election procedure must be reformed, not only to save time and money for the parties and the taxpayers, but also to return integrity to the process and the employees' statutory rights.

The Current Board Processes are Outmoded Adding Needless Delay and Cost, Frustrating Employees' Statutory Rights and Wasting the Parties' and Taxpayer Money

The purpose of the Board's election procedures is to allow workers who want to have a vote on whether to form a union to be able to have a vote in a timely and economic manner. Yet even in the best of circumstances, when both sides undertake a good faith effort to make the process work, the Board's procedures work against this goal. Current procedures include needless delay and the reliance on outmoded, costly and time-consuming methods for resolving issues, producing evidence, accomplishing service and engaging in effective communication.

The current Board process fails to promote the timely development of the issues between the parties in a way that narrows the issues under consideration to only genuine disputes of material fact. The procedures provide the union with little information about the workers or their jobs, so that the union is forced to make decisions about challenging voters merely on what they can learn from other employees. As a result, unions are forced to challenge employees whose status they question without adequate information resulting in needless disputes and litigation. Moreover, the procedures contain no pleadings like those used in courts to develop the issues between the parties in a way that allows Board Agents to separate the genuine disputes of material fact from the non-issues. Issues and facts are raised and explored in a more hap-hazard fashion over the course of a pre-election hearing, election challenges and a post-election hearing. The board's proposed changes address these problems by incorporating modern principles of administrative and judicial proceedings through a "statement of position form" and an updating of the Excelsior list.

The current Board process also contains superfluous procedures, unnecessary delays and delays of unnecessary and indefinite length. The current procedures allow for two possible appeals in one election, first from the rulings of the pre-election hearing and later from the rulings of the post-election hearing. This duplicity of remedy is costly in both time and money and can result in the appeal of pre-election issues that turn out to be moot once the election is held. The pre-election appeal process also carries with a very costly delay. The board's rules specify that normally the Regional Director can not schedule an election until 25-30 days after the pre-election hearing in order to permit the Board to rule on requests for review. Since reviews are taken in only a minority of cases, in most cases this time is just meaningless delay. Even in cases where review is requested this period is much longer than necessary to give the parties' a meaningful opportunity for review. Under current procedures for petition and objection, almost all of the communication among the Board and the parties is conducted through the Board using the mail—the slowest and most costly method of communication commonly in use. The proposed rules remedy these problems by moving the opportunity for review to after the conduct of the election and shortening the period for requesting such review. The proposed rule changes also change the form of service by requiring the parties to directly serve each other, as well as the Board, through electronic communication—an obvious improvement which brings Board practices in line both with common sense and modern practices of administrative agencies and the courts. The current Board processes need to be amended to streamline procedures and bring them in compliance with modern administrative and judicial practices of procedure and communication, all well-justified to eliminate unnecessary litigation, cost, waste and delay for the parties and the American taxpayer.

The Current Board Processes Allow Employers too Many Opportunities to Control the Election Process through Delay and Intimidation

All too often, NLRB elections are not under-taken under the best of circumstances with a good faith effort by both sides to make the process work. In too many cases unscrupulous employers, and the "union avoidance" firms they employ, use Board process to intentionally delay the election process and give them time to intimidate employees into voting against the union through illegal unfair labor practices (ULP's). In these cases, the many opportunities for delay included in the current Board processes invite lawlessness and undermine the integrity of the election process with the result that cost and litigation squeeze out the employees' free exercise of their statutory right to decide whether to be represented by a union.. Indeed the process has become so burdensome and subject to employer manipulation that many unions have abandoned formal Board processes in favor of employer voluntary recognition. Board procedures need to be reformed to reduce opportunities for abuse, return integrity to the election process and ensure that the election process still meets employees' needs as a way to freely express their desire whether or not to join a union.

The current election process gives employers control over the timing of the election process by allowing them numerous opportunities to object, appeal, litigate and create delay. Employers can force a pre-election hearing by refusing to agree on a plan for the conduct of the election, challenging the scope of the bargaining unit, challenging the inclusion or exclusion of employees in that unit, or by raising jurisdictional objections or other bars to the election. Under current processes the Board must hold a pre-election hearing, even if there are no issues regarding voter eligibility or any other legal issue, if the employer declines to agree to an election date, time or location. At the request of the employer, the hearing might not be held on consecutive days, so that a simple 3 day hearing might be scheduled over an 8 week period. Employers can delay the election further by requesting to postpone or adjourn the pre-election hearing. In cases where a pre-election hearing is held, the election occurs an average of 124 days after the petition is filed (Logan, et al 2011). Once the election is held, employers can delay the final vote count and certification by challenging voters and filing objections to the election, triggering more litigation. Of course employers should be given an opportunity to raise valid concerns and objections, but the problem with the current process is that it gives too many opportunities for abusive, unlimited delay and allows the parties to raise an ever larger set of concerns expanding the conflict rather than resolving it. By streamlining procedures and consolidating the parties' opportunity for review in one post-election review process, the proposed rule changes limit unnecessary opportunities for delay while still affording the parties a complete opportunity for meaningful review.

Removing unnecessary opportunities to object, appeal or delay from the NLRB's election procedures is vital because unscrupulous employers can use any period of delay before an election to intimidate employees and discourage union organization through the commission of unfair labor practices. Not surprisingly, the chance of serious ULP charges being filed against an employer in connection with an organizing effort is determined more by the length of the period of time between the petition and election than any other factor including firm size, industry and location (Logan, et al 2011). An examination of election petitions in 2003 shows that ULP charges against employers were filed in 46 percent of all elections and in more than half of the elections with charges filed, the NLRB found merit to at least one charge (Logan, et al 2011).

Unfortunately the ULP data is only the tip of the ice berg on the effects of coercive behavior by recalcitrant employers. Employees do not file charges in all possible meritorious cases because: employees fear employer retaliation for filing charges; and proof problems and inadequate remedies make pursuing all but the most certain cases pointless (Bronfenbrenner 2009). In a random survey of participants in union organizing campaigns between 1999 and 2003, Professor Kate Bronfenbrenner found that employers: threatened to close the plant in 57% of elections; discharged workers in 34% of elections; threatened to cut wages and benefits in 47% of elections; and forced workers to attend anti-union one-on-one sessions with a supervisor at least weekly in two-thirds of elections (Bronfenbrenner 2009). Moreover, the employer's power to delay and engage in coercive behavior has an effect even on consent elections. Unions are much more likely to agree to an election on employers' terms as to bargaining unit, inclusion or exclusion of employees, date and place, just to avoid to potentially coercive effect of delay.

Professional "union-avoidance" firms, retained for the purposes of "keeping the employer union free," promote delay and coercion as a way of controlling the election process. Consultants commonly counsel employers to challenge everything, in order to delay the vote to buy more time to engage in anti-union campaigning (Lafer 2007). In an article titled "Time Is on Your Side," the law firm Jackson Lewis has advised clients that pre-election legal proceedings should be considered "an opportunity for the heat of the union's message to chill prior to the election" (Logan 2004). Certainly not all employers engage in coercive and illegal behavior, but an unfortunate number do, encouraged by "union avoidance" consultants.

The opportunity for delay and coercion in the current Board election procedures has caused many employees to abandon the Board election process in favor of privately negotiated procedures for voluntary employer recognition. Under the law, employers can voluntarily recognize a union as the employees' representative if he or she has a sufficient showing that the union represents a majority of the employer's employees in the relevant unit. Although voluntary recognition has been an authorized method of recognition since the inception of the National Labor Relations Act, beginning in the mid-1990's, unions began to actively abandon formal Board elections in favor of demonstrating majority representation through the use of signed authorization cards.

Today about half of the employees organized in the private sector are organized outside the Board's election processes (Cooper 2008). The Board's proposal helps ensure that its election procedures continue to be relevant and useful to employees in expressing their desire whether to be represented by a union, so that they will not have to resort to other methods, perhaps even strikes, to achieve recognition.

Finally, the opportunity for delay and coercion in the current Board election process undermines the integrity of the process and the statutory right of employees to make a free and fair choice as to whether they will be represented by a union. How can employees have faith in a process in which one side has so many opportunities to delay the election and certification, and so much power to coerce employees in their decision? What sort of faith can employees have in the protection of their right to organize in a system in which it can take as long as 424 days from the filing of a petition to the resolution of resolve pre-election issues, as happened in a recent case (Kansas City Repertory Theatre, 17-CA-12647), and perhaps years to resolve post-election objections before certification (*Jury's Boston Hotel*, 356 NLRB No. 114 (2011), *Mastec/Direct TV*, 356 NLRB No. 110 (2011), and *Independence Residences, Inc.*, 355 NLRB No. 153 (2010))? The Board's proposed procedures are necessary not only to encourage employees to continue to use Board processes, but also to preserve the employees' statutory right to choose whether to be represented by a union under those processes and the integrity of the process itself.

II. The Board's Proposed Changes: Updating Methods of Procedure and Communication and Lessening Opportunities for Abuse

The Board's proposed rule changes are intended to update the Board's procedures so that they make full use of existing methods of modern communication and are consistent with modern standards of administrative and judicial procedure. These changes will not only improve the Board's election process by encouraging the early development and resolution of disputes, saving costly litigation, but will also shorten the period between the filing of the election petition and the election thereby limiting the possibility of coercion and abuse by unscrupulous employers. At the same time, the proposed changes in Board election procedures preserve a full opportunity for the parties to raise legitimate objections and questions of law and have them ruled on in a timely fashion with an opportunity for appeal. The Board has taken great pains to ensure that its new rules fully satisfy all current requirements of the statute and case law and are a reasonable interpretation of the law. By promoting all of these meritorious objectives, the modest changes which have been proposed significantly improve the efficiency of Board's election procedures, preserving the integrity of the process and encouraging employees to use the process.

Updating Board Procedures to Reflect Modern Communication Technology

Promoting Direct Communication between the Parties
by Means of Modern Methods of Communication

The Board's proposed changes provide for the electronic filing of election petitions, statements of position, employee lists and other documents. Where e-mail addresses are available for the relevant employees, the proposed rules allow the NLRB regional offices to deliver notices and documents to the employees electronically, rather than by mail. Moreover the rule changes require that the parties serve documents on the other side, as well as filing them with the Board, avoiding the time delay of having the Board act as an intermediary postman. These common sense changes promote the use of modern electronic technology in representation proceedings to achieve economies of time and resources for the parties and the Board.

Updating the Excelsior List Requirement

The proposed changes require employers to provide the Board and union with an "Excelsior list" of employees they consider eligible to vote in the election within two days after the scheduling of the election. This list will include not only the employees' names, but also their telephone numbers and email addresses, when available, as well as their work locations, shifts and job classifications. These changes shorten the time for producing the Excelsior list from seven to two days to reflect the greater speed and efficiency of modern methods of electronic recording keeping, retrieval and transmission. The changes also increase the amount of information the employer has to provide in the Excelsior list in order to meet the two purposes of that list announced in the *Excelsior* case, 156 NLRB 1236 (1966). First, as well as the employees' names, the employer will have to give the union the employees' phone numbers and e-mail addresses, where available, to meet the purpose of giving the union meaningful access to the employees in the modern information age. The proposed rule would bar use of this information for any purpose other than the representation proceeding and related proceedings. Second, the employer will be required to give the union information on the employees' work locations, shifts and job classifications to meet the purpose of allowing the union to make an informed decision on an employee's eligibility for inclusion in the bargaining unit.. Absent such basic information, the union is left to just challenge all employees it does not have independent knowledge about, increasing the number of election challenges and disputes and further delaying the process. These changes merely adapt the Excelsior rule to the existence of modern information technology and flesh out the information required to limit conflict and debates in the election process.

Updating Board Procedures to Conform with Modern Administrative and Judicial Procedures

Adopting Simplified Procedures to Establish and Narrow the Issues in Dispute

The Board's proposed changes provide a predictable, fixed schedule for pre- and post election hearings which will allow the parties to promptly resolve issues on the conduct of the election that they cannot resolve by agreement. Under the amended procedures, the Regional Director would schedule a pre-election hearing to begin seven days after the hearing notice is served and, if any potentially determinative issues of material fact raised at the pre-election hearing are postponed until after the election, the Regional Director would schedule a post-election hearing at 14 days after the tally of ballots. The proposed rule provides flexibility to meet the special needs of the parties in that the scheduling of the pre-election hearing is subject to "special circumstances" and scheduling of the post-election hearing is subject to being as soon as "practicable." The proposed seven day notice period before the pre-election hearing is already in use in some Regions, and exceeds the five day notice requirement set forth by the Board in *Croft Metal, Inc*. 337 NLRB 688, 688 (2002). In redrafting the procedures, the Board has consolidated all Representation case procedures into a single part of the regulations. Currently these procedures are described in three different parts of the regulations, leading to redundancy and confusion. These changes simplify the scheduling of pre- and post-election hearings resulting in clarity, efficiency, and an important saving in resources and time.

The proposed changes also set up a system that requires the parties to identify issues and describe evidence soon after an election petition is filed in order to facilitate resolution and eliminate unnecessary litigation. Along with a copy of the petition, the parties will receive both a description of the NLRB representation case procedures, including their rights and obligations, and a "statement of position form", which will help the parties identify the issues they may want to raise at the pre-election hearing. The "statement of position form" will expressly ask about the parties' position on all major issues in the election proceeding including: jurisdiction; appropriateness of the petitioned for bargaining unit; proposed exclusions from the unit; the existence of any bar to the election; and the time and location of the election. If the employer objects to the petitioned for unit, the form will ask the employer to specify the closest unit the employer concedes is appropriate. The parties will be required to state their positions no later than the start of the hearing, before any evidence is accepted. The Regional Director may permit the parties to complete the form at the pre-election hearing and it may be completed with the assistance of the hearing officer. After the issues are properly joined, the hearing officer would require the parties to make an offer of proof concerning any relevant issue in dispute and would not proceed to take evidence unless the parties' offers create a genuine issue of material fact. Litigation of eligibility issues raised by the parties involving less than 20 per cent of the bargaining unit would be deferred until after the election. The parties could choose not to raise voter eligibility issues at the pre-election hearing but rather do this through the challenge procedure during the election. These changes are expressly designed to adapt Board practices in election proceedings to modern principles of administrative and judicial procedure which require that issues must be plead or are lost, and that the finder of fact need only address issues of material fact. See e.g. Fed. R. Civ. P. 56. These changes are aimed at the same goals which support other administrative and judicial bodies – to allow for better management of the hearing process by discouraging the litigation of frivolous and irrelevant issues. The proposed rule also defers, until after workers have had a chance to vote, the litigation of the eligibility or inclusion of individual employees affecting less than 20% of the bargaining unit. This saves time and resources because, depending on the outcome of the election, disputes over the eligibility of individual employees affecting less than 20% of the bargaining unit may never need to be decided.

Adopting a Unified Process of Discretionary Appeal

The proposed rule changes also consolidate all election-related appeals to the Board into a single post-election appeals process. This common sense change not only simplifies the process, but also greatly shortens the time to election by eliminating the pre-election request for review and the accompanying 25-30 day waiting period. The unification of the appeals process would also achieve economy in litigation because some pre-election appeal issues will be rendered moot by the election itself. All pre- and pos-election rulings remain subject to review. The proposed rule changes also give the Board discretion to deny review of post-election rulings -- the same discretion now exercised concerning pre-election rulings -- permitting career Regional Directors to make prompt and final decision in most cases. Discretionary review will preserve Board resources in providing an opportunity for appeal and is consistent with modern administrative practices.

The Impact of the Proposed Changes on Employees, Employers and the American Taxpayer

The modest changes in the Board's proposed rule will modernize the representation election process and bring it in line with modern practices of administrative and judicial procedure and communication. The proposed changes will streamline and simplify the existing process, avoiding unnecessary cost and delay for employees, employers and the American taxpayer. They will also require that the parties timely raise objections and offers of proof, and follow just one appeals process, promoting resolution of important issues and avoiding unnecessary litigation once again saving all those concerned time and money. The significant streamlining of the process avoids delay which invites the commission of ULP's and the coercion of the employees in the exercise of their right to decide whether to be represented by a union. By avoiding abuse of the process through delay and coercion, the proposed changes uphold the employees' right to freely decide whether to be represented by a union and the integrity of the Board's processes.

Some might argue that the Board's proposals go too far in streamlining their processes, and that employers will no longer have adequate time before an election to express their views on unions. However, these concerns seem unfounded. The proposed rules do not set a fixed schedule for the election, but specify only that the election be set at the earliest time "practicable." The proposed changes do nothing to limit the employer's right to communicate with his or her employees, which exists from the first day the person is employed. An employer is likely to know when his employees are considering whether to form a union, even before the petition is filed and has many opportunities to express his or her opinion on this matter at that time. Besides, employers do not have to wait until after their employees are actively considering representation or an election petition is filed to begin communicating with his or her employees on matters of importance to them. Bronfenbrenner and Warren have shown that employer Unfair Labor Practices regarding organization commonly begin well before the filing of the election petition and can continue throughout the election campaign (Bronfenbrenner and Warren 2011). Surely if employers are engaging in ULP's during this time, they are also actively engaging in communication with their employees, or at least have the opportunity.

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