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before the

Committee on Education and the Workforce
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Hearing on H.R. 3094, Workforce Democracy and Fairness Act

Chairman Kline, Ranking Member Miller, and Members of the Committee, thank you for your invitation to participate in this hearing. I am honored to appear before you today.

By way of introduction, I am a senior counsel in the law firm of Morgan, Lewis & Bockius LLP, where I represent employers in many industries under the National Labor Relations Act (NLRA). From 1994 to 1996, I had the privilege of serving as a Member of the National Labor Relations Board (NLRB or Board), and was appointed by President Clinton and confirmed by the U.S. Senate.[1]

The Workforce Democracy and Fairness Act (H.R. 3094) would restore the critical role that Congress should play formulating our national labor and employment policy. The legislation constitutes a measured response to actions by a majority of NLRB Members, especially over the past four months, that would substantially change our federal labor laws without an appropriate mandate from Congress. In my testimony today, I will describe why Congressional action is needed to restore the law and procedures guaranteed by the NLRA.

A. NLRB's Attempt to Pass Labor Law Reform Through New Regulations

On June 22, 2011, the NLRB published an extensive Proposed Rule regarding union elections ("Proposed Rule") that would, among many things, dramatically shorten the period of time between a union filing an election petition with the Board and the actual holding of the election.[2] The Proposed Rule also would effectively gut an employer's ability to mount a lawful, effective information dialogue with its employees on whether or not to select union representation.

The Proposed Rule is a transparent attempt to circumvent Congress on the issue of how, if at all, to reform the nation's labor laws after the failure of the prior 111th Congress to pass the Employee Free Choice Act (EFCA), legislation supported by the labor movement that would have all but ended secret ballot elections at the NLRB in favor of "card check" recognition.

[1] I am not speaking on behalf of Morgan, Lewis & Bockius, the National Labor Relations Board, or any other specific organization, and my testimony should not be attributed to any of these or other organizations. My testimony reflects my own personal views, although I wish to thank David R. Broderdorf for his efforts in helping me to prepare this testimony.

[2] 76 Fed. Reg. 36,812-36,847 (June 22, 2011).

In greater detail, the Board's Proposed Rule would result in an array of changes to decades-old representation procedures under the NLRA. These are not merely technical changes – they would dramatically shorten the time for employees to decide whether or not to vote for union representation, and would severely prejudice employers by imposing unrealistic deadlines and limiting employer speech (even though it is explicitly protected in the statute). Among other things, the Proposed Rule:

- Require that all pre-election hearings take place seven days after the filing of a petition (absent special circumstances), eliminate all pre-election review by the Board, and require that the election date be set at "the earliest date practicable."[3]
- Require employers to provide unions, within seven days of the filing of a petition, with a list of employee names, work locations, shifts, and job classifications, and to provide, within two days of a direction of election, employee addresses, telephone numbers, and email addresses (to the extent available).[4]
- Require employers to file a "Statement of Position" – a new form – that must be filed no later than the seven day hearing date. It must set forth the employer's position on a host of legal issues. Any issues not identified in the Statement would be forever waived.[5]
- Significantly limit the scope of issues and the type of evidence that may be litigated before an election, including most questions regarding the eligibility of particular individuals or groups of potential voters, and dispense with post-hearing briefs unless permission is obtained from the hearing officer.[6]
- Permit the Board to decline to review many of the Regional Directors' decisions, substantially limiting the review options available to employers.[7]
- Permit electronic filing of election petitions, and potentially allow the use of electronic signatures to support the "showing of interest" – in other words, possibly allow employees to sign union authorization cards electronically via the Internet or email.[8]

Board Member Brian Hayes, dissenting from the issuance of the proposed rules, wrote that it is "certain" that the proposed rules would "substantially shorten" the time period from petition filing to election date, suggesting that under the proposed rules elections would be held "in 10 to 21 days from the filing of the petition."[9] Member Hayes also stated in dissent: "Make no mistake, the principal purpose of this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining."[10] By definition, this is a "quickie" election, as that term was used liberally throughout the debate over EFCA and potential alternative legislation in the 111th

[3] 76 Fed. Reg. at 36,825.

[4] *Id.* at 36,820; 36,838; 36,843.

[5] *Id.* at 36,821-23.

[6] *Id.* at 36,824-25.

[7] *Id.* at 36,827.

[8] *Id.* at 36,846.

[9] *Id.* at 36,831 (Member Hayes, dissenting).

[10] *Id.*

Congress. And as outlined below, the Proposed Rule suffers from a number of substantive, fatal flaws that require an appropriate Congressional response.

"Speed" Over All Other NLRA Goals. The first flaw is the incorrect premise that the current procedures for conducting secret-ballot elections "take too long" or are "broken," and that this delay causes unions to lose more elections. Unions already win far more elections than they lose. While union members currently comprise only 6.9 percent of private sector employees,[11] unions have prevailed in a *majority* of elections (where there was no incumbent union) *every year from fiscal year 1997 to the present*. And the margin by which unions prevailed in these elections has increased from 50.4 percent (in fiscal 1997) to 64.8 percent (in fiscal year 2010).[12] Even if these numbers were lower, the Board in its neutral role has no business "taking sides" on how often unions prevail in elections.

Nor is the election process too slow. Over the past decade, as noted in the Proposed Rule, elections have occurred within a median time of 38 days after the filing of a petition. And in fiscal year 2010, the average time from petition to an election was 31 days.[13] Those numbers include cases in which a pre-election hearing is held. In Fiscal Year 2010, NLRB Regional Offices conducted 1,790 representation elections. Of those, 1,648 cases or 92.1 percent were held without either party exercising their right to a hearing.[14] And even among the small number of cases in which a hearing was held (142 cases or 7.9 percent), the median number of days from the filing of a petition to a Regional Director decision was 37 days in 2010, significantly *shorter* the Agency's "ambitious" target of 45 days.[15] This time frame has been consistent for the last several years, with the median number of days from petition to Regional Director decision in contested cases at 34 days in 2009, 36 days in 2008, and 36 days in 2007.[16] In spite of these figures – which demonstrate the great majority of elections *already* take place quickly – a selective emphasis of "speeding up" elections is pervasive throughout the Proposed Rule.[17]

The solitary focus on speed constitutes a fundamental distortion of the Act's primary election objective stated in Sections 1 and 7, which is protecting "the exercise by workers of *full freedom* of association" encompassing employee rights to "*self-organization*" by having "representatives *of their own choosing,*" with an equivalent right "*to refrain from any or all of*

[11] *See* U.S. Dep't of Labor Bureau of Labor Statistics, Economic News Release, Union Members Summary (2011) (http://www.bls.gov/news.release/union2.nr0.htm).

[12] *See* NLRB Election Report (Oct. 19, 2010) at 10. Member Hayes indicates unions prevailed in 68.7 and 67.6 percent of all elections held in calendar years 2009 and 2010, respectively. *See* 76 Fed. Reg. at 36,832 (Member Hayes, dissenting).

[13] *See* Gen. Counsel Mem. 11-09, at 18 (March 16, 2011), *cited in* 76 Fed. Reg. at 36,831 n.75 (Member Hayes, dissenting).

[14] *See* Gen. Counsel Mem. 11-03, at 5 (Jan. 10, 2011).

[15] *Id*.

[16] *Id*.; Gen. Counsel Mem. 09-03, at 6 (Oct. 29, 2008).

[17] The Proposed Rule refers to the "expeditious resolution of questions concerning representation" (76 Fed. Reg. at 36,812); allowing the Board "to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret ballot election" (*id*.); "Expeditious resolution of questions concerning representation is central to the statutory design" (*id*. at 36,813); "expeditious processing of representation petitions" (*id*.); "delays in the regional offices' transmission of the eligibility list to the parties" (*id*. at 36,816); "expeditious resolution of questions concerning representation" (*id*. at 36,817); "The proposed amendments would also shorten the time for production of the eligibility list" (*id*. at 36,821); "progression of reforms to reduce the amount of time required to ultimately resolve questions concerning representation" (*id*. at 36,829).

such activities."[18] Employers and unions also have important rights and obligations including those set forth in Sections 8(a) and 8(b), which enumerate employer and union unfair labor practices; plus the employer's right of free speech set forth in Section 8(c). And there is a complex assortment of employee, union and employer rights incorporated into the Act's statutory provisions regarding elections, set forth in Section 9. Most significantly, Section 9(b) states that the "Board *shall* decide *in each case*" what constitutes the appropriate bargaining unit, which is designed "to *assure* to employees *the fullest freedom in exercising the rights guaranteed by this [Act]*."[19] Nowhere does the NLRA contain a mandate from Congress giving speed paramount importance at the expense of the other objectives explicitly referenced in the statute. Speed alone cannot be trumpeted while other statutory goals and obligations are trampled upon.

Employer Free Speech Undermined. Another flaw in the Proposed Rule is the unprecedented impact on employer free speech rights. The Proposed Rule's shortening of the election time period inevitably will undermine the ability of employers – after a petition is filed – to engage in speech protected by Section 8(c) of the Act. Section 8(c) states:

> *The expressing of any views, argument, or opinion*, or the dissemination thereof, whether in written, printed, graphic, or visual form, *shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act]*, if such expression contains no threat of reprisal or force or promise of benefit.[20]

Because employers exercise no control over pre-petition union activities – and often have no knowledge of union organizing – employers *exclusively* bear the burdens and limitations resulting from a shorter election period. This renders disingenuous the Proposed Rule's statement that its changes "would apply equally to all parties" and "do not impose any limitations on the election-related speech of any party."[21] Invariably, the Proposed Rule's impact on the timing of elections will diminish the employer's right to express views under Section 8(c). As noted by Member Hayes, shortening the election period "broadly limits all employer speech and thereby impermissibly trenches upon protections that Congress specifically affirmed for the debate of labor issues when it enacted Section 8(c) in 1947."[22]

Lack of Due Process and Employer "Waiver" of Rights. Under the Proposed Rule, it is highly likely that a great number of employers will be forced to waive many substantive legal arguments and positions based on the abbreviated timeframe in which employers are required to

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[18] NLRA §§ 1, 7, 29 U.S.C. §§ 151, 157 (emphasis added).

[19] *Id.* § 159(b) (emphasis added).

[20] NLRA § 8(c), 29 U.S.C. § 158(c) (emphasis added). Obviously, important free speech guarantees also are afforded by the First Amendment to the U.S. Constitution. As the Supreme Court has recognized, Section 8(c) "merely implements the First Amendment" and "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

[21] 76 Fed. Reg. at 36,829.

[22] *Id.* at 36,832 (Member Hayes, dissenting), *citing Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008) (other citations omitted). In *Brown*, the Supreme Court stated that Section 8(c)'s enactment "manifested a 'congressional intent to encourage free debate on issues dividing labor and management'" and reflects a "policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes" because "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB. *Id.*, *quoting Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966) and *Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974).

enumerate them in the "Statement of Position." But, for the litigious employer, there will be an incentive – when confronted by such an onerous timetable – to exhaustively identify every potential alternative bargaining unit, argument and position that could conceivably have compromised employee rights. Like so many other areas governed by the Proposed Rule, the predictable outcome would be a proliferation of additional issues, more litigation, and a longer overall timeframe for representation issues to be resolved. Ironically, these "shortcuts" are being advanced at a time when we are at historic percentage lows in federal court challenges to union certifications.

Employee Rights Negatively Impacted. The Proposed Rule negatively impacts employee rights under the NLRA by making the election period so short that it would deprive most employees of the time needed to reasonably understand the potential benefits or consequences of union representation. As noted previously, NLRB elections currently involve a median election time period of 38 days, and an average time period of 31 days.[23] There is no reasonable justification for reducing this period further, given that the NLRA states employees "in each case" should be "assure[d] . . . the *fullest freedom*" to make their own choice about union representation.[24] Employee decision-making about union representation involves a multiplicity of more significant complex rights and obligations that take time to fully understand. Regardless of whether or not a particular employee group ultimately favors or opposes union representation, such a decision unquestionably produces substantial long-term and day-to-day consequences, including:

- the potential conferral of "exclusive representative" status of a labor organization regarding all matters of wages, benefits, hours and terms and conditions of employment, whether or not the individual employee so chooses,[25]
- the loss of individual rights to deal with the employer in relation to those same subjects,[26]
- uncertainty associated with the consequences of collective bargaining,[27]
- possible resort by the union or employer to economic weapons like strikes, slowdowns, lockouts and possible temporary or permanent replacements,[28]

[23] *Id*. at 36,814; Gen. Counsel Mem. 11-09, at 18-19 (March 16, 2011).

[24] NLRA § 9(b), 29 U.S.C. § 159(b) (emphasis added).

[25] NLRA § 9(a), 29 U.S.C. § 159(a).

[26] An employer's obligation to bargain under Section 8(a)(5) makes it unlawful for the employer to engage in individual bargaining or direct dealing with employees regarding wages, hours, and other terms and conditions of employment and to implement unilateral changes in mandatory bargaining subjects. *See*, *e.g.*, *Gen. Elec. Co.*, 150 NLRB 192, 194 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970); *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

[27] *See*, *e.g.*, *Midwestern Instruments, Inc.*, 133 NLRB 1132 (1961).

[28] *See*, *e.g.*, *NLRB v. Mackay Radio & Tel. Co*., 304 U.S. 333 (1938); *The Laidlaw Corp*., 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

- financial and other obligations and restrictions – including fees, dues, fines and assessments – that unions may lawfully impose on employees, consistent with union constitutions and by-laws,[29]
- and complex rules regarding how collective bargaining works, and significant restrictions on union decertification if employees later become dissatisfied with union representation and the outcome of bargaining.

The Proposed Rule's adverse impact on informed employee decision-making is made worse by the Rule's additional provisions which, among other things, would curtail pre-election hearings and defer the resolution of many unit issues, including basic eligibility and scope questions, until after the election takes place. Consequently, not only would the Proposed Rule impair employee free choice by requiring an election much more quickly with little time for consideration, the Proposed Rule would deprive employees of important information, including whether they are even eligible voters, substantially increasing the number of employees who may cast votes based on incorrect assumptions. This subverts employee free choice.

Mandated Disclosure of Employee Phone Numbers and Email Addresses. Moreover, the Proposed Rule would impose a new requirement on employers to disclose "available email addresses" and "available telephone numbers" of bargaining unit employees on every voter eligibility list.[30] The Proposed Rule identifies no statutory mandate warranting an expansion beyond existing *Excelsior* list home address requirements, and Congress has never sought to change or expand the *Excelsior* list disclosures. There is no rationale provided in the Proposed Rule except for the Board's observation that an "evolution" towards electronic communications is taking place in "pre-election campaign communication."[31] The existence of various avenues for employer-employee communication has never been interpreted by Congress or the Board to require equal access by union organizers to the identical vehicles for communication. This aspect of the Proposed Rule would constitute a significant intrusion into privacy rights of employees and their families. Email addresses and phone numbers are not essential to "an informed employee choice for or against representation"[32] given that the existing *Excelsior* requirements provide for disclosure of every eligible employee-voter's most reliable and near-universal point of contact, the home address.

Statutory Hearing Obligations Ignored. The Proposed Rule would grant Regional Directors and Hearing Officers the authority to deny employers the right to a pre-hearing election where a dispute over the appropriate scope of the petitioned-for unit concerns less than 20 percent of the bargaining unit (if the disputed individuals were found eligible to vote). This portion of the Proposed Rule violates Section 9(c) of the Act and is misguided as a matter of policy.

[29] *See*, *e.g.*, *Scofield v. NLRB*, 394 U.S. 423 (1969) (union could lawfully maintain and enforce rule providing for fines, suspensions or expulsion of union members who exceed work production ceilings established by the union).

[30] *Id*. The Proposed Rule would impose a similar "available email addresses" and "available telephone numbers" disclosure requirement on the "lists filed with the regional director" (but "not served on any other party") as part of the new Statement of Position that the Board would require from employers. 76 Fed. Reg. at 36,838, Proposed § 102.63(b)(1)(iv).

[31] *Id*.

[32] *Excelsior Underwear, Inc.*, 156 NLRB at 1236, 1241-42 (1966).

The Board and the courts have long held that Section 9(c) "makes mandatory a pre-election hearing."[33] During my tenure on the NLRB, the Board responded to a call for more "rapid" elections and changes to the existing procedures. However, after considering this request, the Board concluded that the statutory requirement of a pre-election hearing prevented the Board from having an unfettered right to accelerate the election process. In *Angelica Healthcare Services*, the Regional Director directed an election without addressing the request for a hearing. Citing the plain language of Section 9(c), the Democrat-controlled Board held that the Regional Director *must* provide the "appropriate hearing" referenced in Section 9(c) of the Act "prior to finding that a question concerning representation existed and directing an election."[34] Based on Taft-Hartley's enactment, parties have the right under Section 9(c) to present evidence in a pre-election hearing. The Proposed Rule's limitation on pre-election hearings violates Section 9(c) of the Act, and this limitation should not be adopted by the Board. It constitutes misguided policy for the Proposed Rule to eliminate or dramatically reduce the role played by the pre-election hearing.

B. <u>Smaller Bargaining Units That Unions Can Organize More Easily: *Specialty Healthcare*</u>

The Board's June 22, 2011 Proposed Rule is by no means the only example of the Board's recent activity to stack the deck in favor of unions during the election process. As Representatives who stand for election, you instinctively know that if you control who comprises the electorate – including reducing the size of the electorate to artificially low numbers – you will have a key to winning an election. That is what the NLRB has done for unions. On August 26, 2011, in *Specialty Healthcare & Rehabilitation Center of Mobile*, the Board announced a new standard for determining whether a petitioned-for unit of employees is appropriate for collective bargaining.[35] The case nominally involved the issue of appropriate bargaining units in non-acute care healthcare facilities, which in this case was a unit of Certified Nursing Assistants.[36] However, the Board's decision went far beyond this rather narrow issue and articulated a new standard for determining whether unions in other industries may petition for an election among a small group of employees over an employer's objection that the union has inappropriately excluded other related groups of employees from the prospective unit.[37]

For decades, when determining if such an exclusion is appropriate, the Board has examined whether the excluded group of employees is "sufficiently distinct" to warrant their exclusion.[38] The Board's new standard in *Specialty Healthcare*, however, reverses that inquiry, so that employers will have the burden of proving that the excluded employees share an "overwhelming community of interest" with the employees included in the union's petition.[39] The Board's new standard predictably will facilitate union organizing by rendering "appropriate" extremely small bargaining units even though the employees perform work functions and are managed in a manner that logically connects them to a larger group. As noted by dissenting Board Member Brian Hayes, the "overwhelming community of interest" test has "vast practical

[33] *NLRB v. S.W. Evans & Son*, 181 F.2d 427, 429 (3d Cir. 1950).

[34] 315 NLRB 1320, 1321 (1995). *See also Barre National, Inc.*, 316 NLRB 877 (1995).

[35] *Specialty Healthcare*, 357 N.L.R.B No. 83, at *1.

[36] *Id.*

[37] *Id.* at 8.

[38] *See, e.g.*, *NLRB v. Action Automotive, Inc.*, 469 U.S. 490 (1985).

[39] *Specialty Healthcare*, 357 N.L.R.B No. 83, at *16.

ramifications . . . [because it] obviously encourages unions to engage in incremental organizing in the smallest units possible."[40] The recent decision therefore allows unions the right to petition for inappropriately small units, for example, a unit of employees with the same job title or description, and then places a stringent burden on an employer to prove an "overwhelming" community of interest with other employees during an abbreviated and summary pre-election process under the Proposed Rule.[41]

Changing the unit determination standard in this manner not only will predictably lead to increased union organizing in the short term, it is likely to cause greater problems in new bargaining relationships. Bargaining with a small unit of employees, which excludes many other employees who share a substantial community of interest (and who may be unrepresented or organized by a different union), will impose significant costs on employers, and undermine employment stability by causing increased workforce fragmentation (at a time when it is all the more important for employers to manage employees in ways that are more efficient, with employees identifying to a more significant degree with the business as a whole). Ultimately, the Board has a statutory responsibility to approve bargaining units that are not only appropriate for union organizing, but which also are calculated to foster stable bargaining relationships and be consistent with effective business operations. These considerations are undermined, not furthered, by the new *Specialty Healthcare* standards.

C. Proposed Legislation Is Reasonable and Balanced Approach for Effective NLRB Secret-Ballot Elections and Collective Bargaining

The measured legislation proposed, H.R. 3094, is needed to restore the proper functioning of the NLRB's election procedures, and to reaffirm that Congress is responsible, in the first instance, for establishing and making any fundamental changes in our national employment and labor law policy. Based on my review, the Workforce Democracy and Fairness Act seeks a return to the status quo of the long-standing and effective election procedures that have been in place at the NLRB, and the legislation would codify those rules and procedures into law and restrict this NLRB – or any future NLRB – from attempting to violate the mandates of the NLRA and circumvent Congress with regard to election procedures.

The major provisions of this legislation that would restore the status quo to the NLRB's election process include a specific mandate that "in each case" the Board would, "*prior to an election*," hold a meaningful hearing to determine the unit appropriate for the purposes of collective bargaining. These hearings would expressly incorporate the Board's standard "community of interest" factors to ensure that the unit is of appropriate scope and composition to balance employee choice with effective collective bargaining. The list of eight enumerated factors that comprise the community of interest test are drawn from the Board's existing case law precedent. Review of action of Regional Directors by the Board would be assured.

In response to the Board's *Specialty Healthcare* decision, the legislation dispenses with the Board's recent embrace of so-called "micro-units" by returning the law to its pre-*Specialty Healthcare* state, whereby a union's petition that seeks to exclude certain employees would only

[40] *Id.* at *27 (Hayes, B., dissenting).

[41] A related problem with the *Specialty Healthcare* decision is the lack of clarity regarding how the decision interacts with preexisting "industry-specific" rules and standards which the Board majority stated it did not intend to change. *Id.* at *20.

be processed if the petitioned-for group had interests "sufficiently distinct" from other employees.[42] *Specialty Healthcare's* use of the "overwhelming community of interest" test to promote the expansion of small bargaining units, would, under the proposed legislation, be a test appropriately limited to the Board's "accretion" cases whereby an employee group is added to an existing unionized employee group without a secret-ballot election.[43]

The legislation introduced also would codify a reasonable time framework for conducting NLRB elections – reasonable for employers, employees, and unions. Under this language, the required pre-election hearings may not be held until at least 14 days after the filing of a petition, which ensures that all parties have at least some time to analyze the legal issues involved and prepare for the potential hearing, including the preparation of necessary witness and evidentiary support. The actual secret-ballot election may not be held until at least 35 days after the filing of the petition, which ensures an opportunity for communication by the employer, the employees, and the union on the relevant issues associated with employees selecting or rejecting union representation.

Finally, employee privacy rights are adequately protected in the legislation by granting employees the choice of how union representatives may personally contact them – through either a telephone number, email, or home address – rather than have the Board mandate through regulation that all of the above, or more, of these methods to contact employees must be provided to union representatives. The proposed language reflects the spirit of *Excelsior* and more than adequately provides unions the ability to unilaterally contact all eligible voters to provide election-related communications.

This concludes my prepared testimony. Thank you again for the invitation to appear today. I would be happy to answer any questions that Members of the Committee may have.

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[42] Prior to *Specialty Healthcare*, the Board looked with disfavor upon fractured units, i.e., a group that is "too narrow in scope." *Colorado Nat'l Bank of Denver*, 204 NLRB 243, 243 (1973). Where "the petitioned-for employees do not share a sufficiently distinct community of interest from other employees to warrant a separate unit," the unit petitioned-for is inappropriate for collective bargaining purposes." *Seaboard Marine, Ltd.*, 327 NLRB 556, 556 (1999). The legislation essentially codifies this standard into the statute.

[43] The Board in accretion cases can add unrepresented employees to an existing bargaining unit, without *any* election, based on the overwhelming extent of employee interchange, working conditions, common management, functional integration, bargaining history, and other factors. *See*, *e.g.*, *Safeway Stores, Inc*., 256 NLRB 918 (1981); *United Parcel Service*, 325 NLRB 37 (1997); *NLRB v. Sweet Lumber Co.*, 515 F.2d 785, 794 (10th Cir. 1975), *cert. denied*, 423 U.S. 986 (1975). That standard has no relevance to secret ballot elections.