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RUSHING UNION ELECTIONS: PROTECTING THE INTERESTS OF BIG LABOR AT THE EXPENSE OF WORKERS' FREE CHOICE

HEARING

BEFORE THE

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, JULY 7, 2011

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RUSHING UNION ELECTIONS: PROTECTING THE INTERESTS OF BIG LABOR AT THE EXPENSE OF WORKERS' FREE CHOICE

Thursday, July 7, 2011
U.S. House of Representatives
Committee on Education and the Workforce
Washington, DC

The committee met, pursuant to call, at 10:05 a.m., in room 2175, Rayburn House Office Building, Hon. John Kline [chairman of the committee] presiding.

Present: Representatives Kline, Petri, McKeon, Biggert, Platts, Wilson, Foxx, Goodlatte, Hunter, Roe, Walberg, DesJarlais, Hanna, Rokita, Bucshon, Gowdy, Barletta, Roby, Ross, Kelly, Miller, Kildee, Payne, Andrews, Woolsey, Hinojosa, McCarthy, Tierney, Kucinich, Wu, Holt, Davis, Bishop, and Hirono.

Staff present: Andrew Banducci, Professional Staff Member; Katherine Bathgate, Press Assistant/New Media Coordinator; Casey Buboltz, Coalitions and Member Services Coordinator; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Marvin Kaplan, Professional Staff Member; Barrett Karr, Staff Director; Ryan Kearney, Legislative Assistant; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Kate Ahlgren, Minority Investigative Counsel; Aaron Albright, Minority Communications Director for Labor; Tylease Alli, Minority Clerk; Jody Calemine, Minority Staff Director; John D'Elia, Minority Staff Assistant; Brian Levin, Minority New Media Press Assistant; Celine McNicholas, Minority Labor Counsel; Megan O'Reilly, Minority General Counsel; Julie Peller, Minority Deputy Staff Director; Meredith Regine, Minority Labor Policy Associate; and Michele Varnhagen, Minority Chief Policy Advisor/Labor Policy Director.

Chairman KLINE. A quorum being present, the committee will come to order. Good morning, everyone. I would like to welcome our guests and thank our witnesses for being with us today.

This week, the Wall Street Journal noted that, quote—"The stumbling recovery has also proven to be the worst since the economic disaster of the 1930s." With the backdrop of this difficult economy, we meet today to discuss the National Labor Relations Board's recent proposal to rush union elections.

This proposal is the latest example of an activist NLRB crafting a solution to a problem that does not exist. The proposal will enact sweeping change to the nation's workplaces at a time when many employers are struggling to keep their businesses open, and nearly 14 million individuals are searching for work.

It is a step in the wrong direction, and we must reverse course. The board's flawed proposal will upend an election system that has served employers and workers well for decades. On average, elections are held within 31 days of the date a petition is filed. Last year, 95 percent of all initial elections were conducted in less than 60 days.

In 2009, the median time between notice of a preelection hearing and the end of the same hearing was just 13 days. Acting general counsel, Leif Solomon, described this record as outstanding—"an excellent case-handling performance." His quotes. I realize there are times when cases simply take too long to resolve, creating frustration for employers and workers.

Any party that causes needless delay should be held accountable. However, I believe Mr. Solomon's strong endorsement of the board's record suggests these instances are exceptions to the rule. Despite this record of success, the Obama board seems to believe the current process is not doing enough to advance the cause of big labor.

Unions currently win nearly 70 percent of all elections, yet the rules of the game are being rewritten to further tilt the playing field in favor of union interests. Under the board's proposal, a union election could occur in as little as 10 days. Where big labor cannot convince workers to unionize through an open and fair process, the NLRB will step in to stifle an employer's free speech and undermine an employee's free choice.

I know there are some who consider this a modest proposal that will help promote, quote—"fair elections." But I wonder if a small business owner, already struggling to keep the doors open, would consider it modest to have just 7 days to find legal representation and prepare their case to present to the NLRB.

Is it fair to tell workers the views of their employers are less important than the views of the union? Is it modest to delay important questions, such as vote eligibility until after the election? Is it fair to provide to the union an employee's phone number, work location, email address, further subjecting workers to union pressure and jeopardizing their privacy?

Is it fair to tell workers they may have as little as 10 days to consider all of the ramifications of joining a union before they cast a ballot in the election? These are the questions that lie at the heart of the board's proposal, and I believe they lead to a resounding and categorical "no."

I have in my hand a document released by the NLRB's general counsel titled "An Outline—An Outline of Law and Procedure in Representation Cases." This is the outline. It is broken down into 24 different sections, and spans nearly 450 pages. Keep in mind, this represents merely an outline of the legal morass an employer confronts during a union election.

It is a challenge for any large business with a team of skilled attorneys on staff, let alone the small employer who lacks the legal knowledge and resources necessary to navigate the complexities of

federal labor law. Forcing employers and workers to grapple with the full consequences of all this in as little as 10 days will undermine and employer's ability to communicate with their employees and cripple the worker's ability to make a fully informed decision.

I am confident we will hear our friends on the other side of the aisle criticize today's hearing. It is certainly their right to do so. However, we all have a responsibility to oversee the board's activities and ensure it is working for the best interests of all workers.

The board's recent proposal is part of an ongoing effort to promote a culture of union favoritism that is creating greater uncertainty among America's job creators. We cannot sit by and become willing accomplices in the NLRB's job-destroying agenda. I look forward to hearing from our witnesses today.

And with that, I will now recognize Mr. Miller, senior Democrat of the committee, for his opening remarks.

[The statement of Mr. Kline follows:]

Prepared Statement of Hon. John Kline, Chairman, Committee on Education and the Workforce

Good morning. I would like to welcome our guests and thank our witnesses for being with us today.

This week, the Wall Street Journal noted that "the stumbling recovery has also proven to be the worst since the economic disaster of the 1930s." With the backdrop of this difficult economy, we meet today to discuss the National Labor Relations Board's recent proposal to rush union elections. This proposal is the latest example of an activist NLRB crafting a solution to a problem that doesn't exist. The proposal will enact sweeping change to the nation's workplaces at a time when many employers are struggling to keep their businesses open and nearly 14 million individuals are searching for work. It is a step in the wrong direction, and we must reverse course.

The board's flawed proposal will upend an election system that has served employers and workers well for decades. On average, elections are held within 31 days of the date a petition is filed. Last year, 95 percent of all initial elections were conducted in less than 60 days. In 2009, the median time between notice of a pre-election hearing and the end of the same hearing was just 13 days. Acting General Counsel Lafe Solomon, someone who is no shill for big business, described this record as "outstanding" and "excellent casehandling performance."

I realize there are times when cases simply take too long to resolve, creating frustration for employers and workers. Any party that causes needless delay should be held accountable. However, I believe Mr. Solomon's strong endorsement of the board's record suggests these instances are exceptions to the rule.

Despite this record of success, the Obama board seems to believe the current process isn't doing enough to advance the cause of Big Labor. Unions currently win nearly 70 percent of all elections, yet the rules of the game are being rewritten to further tilt the playing field in favor of union interests. Under the board's proposal, a union election could occur in as little as 10 days. Where Big Labor can't convince workers to unionize through an open and fair process, the NLRB will step in to stifle an employer's free speech and undermine an employee's free choice.

I know there are some who consider this a "modest" proposal that will help promote "fair" elections. But I wonder if a small business owner—already struggling to keep the doors open—would consider it "modest" to have just seven days to find legal representation and prepare their case to present to the NLRB?

Is it fair to tell workers the views of their employers are less important than the views of the union?

Is it modest to delay important questions, such as voter eligibility, until after the election?

Is it fair to provide to the union an employee's phone number, work location, and email address, further subjecting workers to union pressure and jeopardizing their privacy?

Is it fair to tell workers they may have as little as 10 days to consider all of the ramifications of joining a union before they cast a ballot in the election? These are the questions that lie at the heart of the board's proposal and I believe they lead to a resounding and categorical "no."

I have in my hand a document released by the NRLB's General Counsel titled, "An Outline of Law and Procedure in Representation Cases." It is broken down into 24 different sections and spans nearly 450 pages. Keep in mind, this represents merely an "outline" of the legal morass an employer confronts during a union election. It is a challenge for any large business with a team of skilled attorneys on staff, let alone the small employer who lacks the legal knowledge and resources necessary to navigate the complexities of federal labor law. Forcing employers and workers to grapple with the full consequences of all this in as little as 10 days will undermine an employer's ability to communicate with their employees and cripple a worker's ability to make a fully informed decision.

I am confident we will hear our friends on the other side of the aisle criticize today's hearing. It is certainly their right to do so. However, we all have a responsibility to oversee the board's activities and ensure it is working for the best interests of all workers. The board's recent proposal is part of an ongoing effort to promote a culture of union favoritism that is creating greater uncertainty among America's job creators. We cannot sit by and become willing accomplices in the NLRB's job-destroying agenda. I look forward to hearing from our witnesses today, and with that, I will now recognize Mr. Miller, the senior Democrat of the committee, for his opening remarks.

Mr. MILLER. Thank you, Mr. Chairman.

Today's hearing is about an NLRB proposal for a fair workplace election process. You are right. The proposal is a modest one. It closes a few loopholes that have allowed some parties to either unnecessarily delay elections or undermine them entirely, and it brings some procedures into the 21st century.

Before this hearing gets into attacks against workers and their unions, we should examine why this proposal is needed. Many union elections are uncontested. However, current rules provide multiple opportunities for bad actors to purposely delay and stop an election.

These delays intensify workplace conflict. They provide opportunities for unfair labor practices, like threatening to fire workers in order to undermine workers' freedom of choice. The proposal would simply reduce these opportunities for delay by modernizing procedures, increasing transparency, and reducing wasteful litigation.

Specifically, the rule allows parties to file petitions and other documents electronically. Imagine that. Americans can file their tax returns electronically. They email their elected representatives in an instant. With electronic filing, the NLRB should at least be allowed to the late 20th century.

The rule would also insure a timely exchange of information so that all parties understand the process and are able to resolve any issues early on. It would reduce unscrupulous employer's ability to delay elections just for the sake of delay. Finally, it would provide a more timely delivery of voter lists, as well as phone numbers and emails.

All of these improvements are modest, but very important. The rule does not change the wildly unfair imbalance of employee access. A union might get a number and an email address a few days before the election under this new rule, but access to workers will otherwise remain slanted in favor of the employers.

Unions have a very restricted access to workers. They are not entitled to enter the property where workers assemble every day, the workplace. And workers themselves continue to be restricted to campaigning in non-work times and non-work areas. Meanwhile, the employers still have complete access to their employees.

They can campaign 24 hours a day, on work time in work areas. They can conduct captive audience meetings with the workers. They can legally fire workers for not attending these meetings. In reality, the anti-union campaign does not start on the date of the election petition.

It often starts from the date of hire, when employees' handbooks and orientation videos urge a union-free workplace. None of this is changed by the proposed rule. Nothing in this proposal affects what employees can do and say to workers, or when they can do that.

And nothing in this proposal changes the election itself. What the proposal does is down the ability of those who simply want to derail the election. Let us not kid ourselves. The claim this proposal will result in management's inability to make their case for workers is almost laughable to anybody who is familiar with this process.

What critics are really saying is that this proposal takes away the long-time union-busting tactic of using frivolous litigation and delaying an election for months and even for years. It is a union-busting first principle that the longer you can drag it out, the more successful you will be in denying the union the election. As they put in their handbooks, "The time is on your side."

With delay, you wear down the workers with fear and intimidation, and you show them how futile their efforts are. Every move gets tied up in litigation and forces them to give up. The proposal limits that weapon. No more delay for the sake of delay.

Let us be frank. A great deal of money is made in making a proposal like this one controversial. Making this controversial by the same union-busting consultants and law firms that take millions of dollars from businesses so that they can show them how to destroy the election process and keep their business union-free by frightening their employers into fearing the changes that might come about.

Today's hearing speaks to the power of the special interest. Any proposal for slight improvement in workers' rights will result in a public outcry and partisan hearings. Letting workers vote when they ask to vote should be a no-brainer. If workers want an election, they should get an election.

They should not be met with fear, intimidation, firings, and delay for the sake of delay. And I look forward to today's witnesses' testimony. Thank you.

[The statement of Mr. Miller follows:]

Prepared Statement of Hon. George Miller, Senior Democratic Member, Committee on Education and the Workforce

Today's hearing is about an NLRB proposal for a fairer workplace election process.

The proposal is a modest one. It closes a few loopholes that have allowed some parties to either unnecessarily delay elections or undermine them entirely. And it brings some procedures into the 21st century.

Before the hearing gets into attacks against workers and their unions, we should examine why this proposal was needed. Many union elections are uncontested. However, current rules provide multiple opportunities for bad actors to purposefully delay or stop an election.

These delays intensify workplace conflict. They provide opportunities for unfair labor practices, like threatening or firing workers, in order to undermine workers' freedom of choice. The proposal would simply reduce these opportunities for delay

by modernizing procedures, increasing transparency and reducing wasteful litigation.

Specifically, the rule allows parties to file petitions and other documents electronically. Americans can file their tax returns electronically and email their elected representatives in an instant. With electronic filing, the NLRB should at least be allowed to join the late 20th century.

The rule would also ensure the timely exchange of information so that all parties understand the process and are able to resolve any issues early on. It would reduce unscrupulous employers' ability to delay elections just for the sake of delay. Finally, it would provide for a more timely delivery of voter lists as well as their phone numbers and emails.

All of these improvements are modest.

The rule does not change the wildly unfair imbalance in employee access. A union might get a phone number and an email address a few days before the election under this new rule. But access to workers will otherwise remain slanted in favor of employers.

Unions have very restricted access to workers. They are not entitled to enter the property where workers assemble every day: the workplace. And workers themselves continue to be restricted to campaigning at non-work times in non-work areas.

Meanwhile, employers still have complete access to their employees. They can campaign 24 hours a day, on work time, in work areas. They can conduct captive audience meetings with workers. And, they can legally fire workers for not attending these meetings.

In reality, the anti-union campaign does not start on the date of the election petition. It often starts from the date of hire, with employee handbooks and orientation videos urging a "unionfree workplace."

None of this is changed by the proposed rule. Nothing in this proposal affects what employers can say to a worker or when. And nothing in this proposal changes the election itself. But what the proposal does begin to do is drawn down the ability of those who simply want to derail an election.

Let's not kid ourselves: The claim that this proposal will result in management's inability to make their case to workers is laughable. What critics are really saying is this: This proposal takes away a long-time unionbusting tactic—using frivolous litigation to delay an election for months and even years.

It's a unionbuster's first principle: time is on your side. With delay, you wear down workers with fear and intimidation, show them how futile their efforts are as every move gets tied up in litigation, and force them to give up.

This proposal limits that weapon. No more delay for delay's sake.

Let's be frank. A great deal of money is made by making a proposal like this one controversial. And a great deal of money is made by frightening employers into fearing these changes.

Today's hearing speaks to the power of the special interests: Any proposal for a slight improvement in workers' rights will result in public outcry and partisan hearings.

Letting workers vote when they ask for a vote should be a no-brainer. If workers want an election, they should get an election. They shouldn't be met with fear, intimidation or delay for the sake of delay.

I look forward to the witnesses' testimony.

Chairman KLINE. I thank the gentleman. Pursuant to committee rule 7-C, all committee members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow statements, question for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

[The statement of Mr. McKeon follows:]

Prepared Statement of Hon. Howard P. "Buck" McKeon, a Representative in Congress From the State of California

Thank you Mr. Chairman for holding this important hearing on the National Labor Relation Board's (NLRB) proposed rule that will rush union elections at the expense of the nation's employers. The proposed rule would substantially shorten

the time between the filing of the petition and the election date, and would substantially limit the opportunity for full evidentiary hearing or Board resolution of contested issues, including appropriate bargaining unit, voter eligibility, and election misconduct.

Tampering with representation elections in the workplace is not just bad policy, it is foolish policy. The NLRB is demonstrating to American business-owners that they are uninterested in fair elections with due time to communicate with their employees. Rather than allow an employer to make their case against unionization, the NLRB would rather have them bogged down in 146 pages of onerous regulations. Most small businesses do not employ in-house counsel, and will have the added burden of hiring attorneys in a short period of time in order to comply with the new election rules. There is simply no justifiable reason for this regulation. As Board Member Brian Hayes noted in his dissent to the proposed rule, "by administrative fiat, in lieu of Congressional action, the Board will impose organized labor's much sought-after "quickie election" option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition. Make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining."

Lest we forget, unions do not create jobs; employers do. In this economic environment, where millions of Americans are looking for work, employers should not have to fear more government regulation that will cost them time and resources to sort through and comply with. At a time of 9.2% unemployment, with 14.1 million Americans looking for work, the federal government should be finding ways to remove barriers to job growth, so employers are free to hire employees without fear of federal government retribution.

This is yet another regulation in a long line of executive branch overreach into the private sector. From the student loan business, to housing and banking, and to our nation's healthcare system, the Obama Administration has made it clear that moving forward a liberal agenda is more important than the well-being of the American people and the American economy. This regulation not only limits an employer's free speech, but it fundamentally challenges an employee's freedom to choose. I vigorously oppose this regulation and strongly urge the NLRB to reconsider their proposal.

Chairman KLINE. It is now my pleasure to introduce our distinguished panel of witnesses. Mr. Peter Schaumber was a member of the National Labor Relations Board from December 2002 to August 2010, and chairman from 2008 until January 20, 2009. He began his career as an assistant corporation counsel for the District of Columbia.

Later, Chairman Schaumber served as assistant United States attorney for the District of Columbia. He taught as an adjunct professor at the National Law Center of George Washington University and Georgetown University School of Business. He graduated from Georgetown University, and received his J.D. from Georgetown University Law Center. Welcome.

Mr. Larry Getts is a tube press technician for the Dana Corporation. In 2007, the United Auto Workers attempted to unionize the Dana Corporation. Mr. Getts successfully led the decertification of UAW after Dana voluntarily recognized the UAW following a card check campaign.

Mr. Kenneth Dau-Schmidt is a professor of labor and employee law at Indiana University. He has authored six books and numerous articles on labor and employment law and the economic analysis of law. He received his B.A. in economics and political science from the University of Wisconsin, M.A. in economics from the University of Michigan, J.D. for the University of Michigan, and PhD in economics from the University of Michigan. Welcome, doctor.

Now I would like to turn to my colleague from Wisconsin, Mr. Petri, to introduce our next witness.

Mr. PETRI. Mr. Chairman, thank you very much for extending me the courtesy of recognizing a gentleman who is not actually a constituent, but whose company certainly is, and very active in northeast Wisconsin, John Carew, who is on the panel, is president of Carew Concrete & Supply Company, which was started some 35 years ago.

It is a ready mix concrete company that operates 14 plants in 13 northeast and central Wisconsin cities. And during the construction season, at least if we have a normal construction season, employs about 170 people and operates a fleet of some 150 vehicles. He will be testifying both on behalf of himself and on behalf of the National Ready Mixed Concrete Association.

Welcome.

Chairman KLINE. Thank you, Mr. Petri. And welcome, Mr. Carew.

Our final witness is Mr. Michael J. Lotito. He is a partner at Jackson Lewis. He practices all aspects of traditional labor relations. He has written extensively on numerous labor and employment issues, including the Employee Free Choice Act and the Americans with Disabilities Act. He received his B.S. and J.D. from Villanova University.

Before I recognize each of you to provide your testimony, let me again briefly explain our lighting system. You will each have 5 minutes to present your testimony. When you begin, the light in front of you will turn green. When there is 1 minute left it will turn yellow. And when your time is expired, the light will turn red and I would ask you to wrap up your testimony at that time.

After everyone has testified, members will each 5 minutes to ask questions of the panel. Okay, we are ready.

Let me recognize Chairman Schaumber. You are recognized for 5 minutes, sir.

STATEMENT OF PETER C. SCHAUMBER, FORMER NLRB MEMBER

Mr. SCHAUMBER. Got it? Thanks.

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 here today.

Chairman Kline, I particularly want to thank you for your continued oversight of the National Labor Relations Board. At a time of economic anxiety, actions and decisions of Executive Branch agencies such as the NLRB impact on whether the country has a legal and regulatory climate conducive to business development and job creation.

Only 6 weeks ago I was in Canada, speaking to a group of 60 business people from some of Canada's largest companies. A few with whom I had an opportunity to speak afterwards expressed real concern about doing business in the United States as a result of the agency's complaint against the Boeing company.

Unfortunately, the Boeing complaint is only emblematic of the agency's actions. And your committee's continued oversight will allow it to evaluate this agency's actions and consider appropriate legislative responses. As you know, I had the honor and privilege of serving on the board from December 2002 until August 2010.

I had the added honor and responsibility of being its chairman for a period of time. For 28 months, the board's current chairman, Wilma Liebman and I were a two-member board. We were widely commended by both union-and management-side labor law bars for our ability to work together collegially despite our ideological differences, and to reach agreement on 90 percent of the cases brought to us for decision.

Although I have strongly criticized recent board actions, and I will do so here today, I respect Chairman Liebman's intellect, her passion for labor law, and her commitment to public service. And I value my experience working with her for 8 years.

The Wagner Act was substantially amended in 1947 by the Taft-Hartley Act, which expanded the Wagner Act's notions of collective action with broader notions of workplace democracy, volunteerism and neutrality. For example, the Taft-Hartley Act expressly gave workers the right to refrain from union and other concerted activity.

And an employer's First Amendment right was protected to noncoercively its opposition to unionization. Archibald Cox, the preeminent labor law scholar observed that the Taft-Hartley Act, quote—"represented a fundamental change in philosophy with rejects outright the policy of encouraging collective bargaining."

To the extent that Professor Cox viewed the Taft-Hartley Act as requiring the board to maintain complete equipoise on questions of union representation, he was absolutely correct. As the Supreme Court said, quote—"The act is wholly neutral when it comes to the basic choice of union representation."

Unfortunately, the current board consistently demonstrates that it is not neutral on this question of unionization. Its animating concern is the loss of union density in the private sector. It takes refuge in the language from the act's preamble, quote—"to encourage the practice and procedure of collective bargaining, to issue decisions and take actions that serve the interests of organized labors, but which trumps specific provisions of the act, including the Taft-Hartley Act's provisions and the individual rights set forth therein."

Since the majority was formed in April of last year, the board has limited speech by giving partial effect to New York State neutrality statute. It has increased the ability of unions to engage in coercive, sedentary activity. It has reached out and issued unprecedented requests for amicus briefs as precursors to stripping employees (sic) of their right to challenge their employees' recognition of a union by card check through a secret ballot election.

And one requested, and is suggesting that it is considering as presumptively appropriate, the creation of microunits of any two or more persons doing the same job in the same location. This threatens to Balkanize the workplace and increase work stoppages by a tiny group of employees going out on strike and holding the employer a hostage to their demands.

And now we have the majority's proposed rule, crafted in isolation by the board majority, to drastically shorten the time for board's election. It is a startling display of the current board's activism on an outcome long favored by organized labor. The major revisions the majority has proposed change an elegant and uncom-

plicated procedure developed over many decades for one that will deprive employers of a meaningful opportunity to express its views on unionization, workers the opportunity to make an informed choice, and employers—particularly small employers—the right for legal representation and due process.

And these revisions, in my view, will undermine workers' and the public's trust in the integrity of board elections. That complete my opening statement. I would be pleased to answer your questions. Thank you very much.

[The statement of Mr. Schaumber follows:]

Prepared Statement of Peter C. Schaumber, Former Chairman, National Labor Relations Board

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, my name is Peter Schaumber. I am a former chairman and Board member of the National Labor Relations Board (NLRB). I was nominated by President George W. Bush and confirmed by the United States Senate for two terms on the Board beginning in December 2002 and ending in August 2010.

I began my legal career in government service as an Assistant United States Attorney for the District of Columbia and Associate Director of a Law Department Division of the Office of the Comptroller of the Currency. I subsequently entered private law practice in Washington, DC, where I was director of my firm's litigation department. Before my appointment to the NLRB, I served as a neutral and a labor arbitrator on a number of industry panels and through national arbitration rosters.

I have been an adjunct professor at the National Law Center of George Washington University and in Georgetown University's MBA Program. I also taught arbitration practice to union advocates at the George Meany Center for Labor Studies in Silver Spring, Maryland.

For 28 months, the Board's current chairman, Wilma Liebman, and I were a two-member board. We were widely commended by both the union and management labor law bars for our ability to work together collegially despite our ideological differences and to reach agreement on 90% of the cases brought to us for decision.[1]

In my testimony today, I will describe the growing politicization of the Board, how it manifests itself in the decisions and actions of the current Board majority, most recently in its proposed rule to shorten the time from a petition to an election. The latter proposal would drastically change many decades of Board election law and procedure although there is no demonstrated need to do so and would interfere with the fundamental rights of employers and employees under the Act.

I. Background to the Board's Newly Proposed "Quickie Election" Rule

One would normally commend an agency for undertaking a thorough review of its election law and procedures and recommending revisions to streamline the process. Such a commendation is out of place here.

The Board's proposed rule was developed by the majority in "star chamber" fashion. This is now followed by an expedited comment period and a hearing in Washington, D.C. twenty-eight days later during the middle of the summer that will deprive the public and those who will be most affected by the rule—particularly the tens of thousands of small business owners and their employees across the nation who undoubtedly remain unaware of the proposal's existence—of the time necessary to study the proposal and consider attending the hearing or commenting on the proposed rule.

Some of the proposal's less consequential changes are sensible enough and worthy of adoption. But the majority has made no effort to demonstrate the necessity for so substantially shortening the period of time for a Board election. And the reasons it asserts for the drastic changes in Board law and procedures it proposes are unpersuasive.

The proposed rule accomplishes its result principally in two ways:

- by moving Board resolution of virtually all pre-election issues from before the election to after—even though those issues can affect an election's outcome
- by limiting the opportunity for full evidentiary hearing and Board review of contested issues

When put in context with other recent Board actions, it does not require a fertile imagination to conclude that the purpose for this radical manipulation of the

Board's election process is to tilt the process in favor of organized labor and, as described by dissenting Board Member Brian Hayes: "[T]o effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining."[2]

The proposed rule demonstrates once again that the current Board majority feels unconstrained by the limits of the law and its role under the Act to be completely neutral on the question of unionization. This is not a sudden phenomenon: it has developed over the last 30 years as a result of several factors—such as the decline of unionization in the private sector, changes in the process for selecting Board members, and the impact of the political response chosen by organized labor to address its decline.

A. Unionization in the Private Sector Continues To Decline

Organized labor has made important contributions to the workplace and to our country. However, union density in the private sector has declined from 35% in the 1950s to less than 7% today, mirroring a decline in most western democracies.[3] Nevertheless, American unions continue to represent roughly the same number represented in the 1950s—approximately 16 million workers.[4]

I maintain, as some others have argued, that the decline of unionization in the private sector is the result of several social, political, and economic factors, including:

- the plethora of workplace legislation, both state and federal, that has improved working conditions—which in no small part was fought for by unions—but contribute to the view that unions are no longer necessary
- the decline in our country's manufacturing base, which provided a fertile ground for unionization
- the high-visibility failure of some unionized industries
- the desire of many contemporary workers, particularly more skilled workers, to have a cooperative relationship with their employer, which is inconsistent with the predominant union model that presupposes an antagonistic struggle between employees and management[5]

B. Changes in the Selection of Board Members and the Impact of the Political Response Chosen by Organized Labor to Address Its Decline

Congress carefully considered the qualifications it wanted for members of the NLRB and explicitly rejected calls for a Board composed of partisan representatives of management and labor. Instead, Congress determined that the Board would function best if composed of "impartial government employees." Now, most Board members are drawn from union and management labor law backgrounds. Most came from private law practice, but a few who worked for labor organizations were nominated after serving what has been referred to as a "period of detoxification" in government service.

The nomination of Craig Becker by President Obama broke with this tradition. Member Becker, who was recess-appointed to the Board after his nomination was filibustered in the Senate, is the first person to be nominated for a full Board term to come directly from a union. In fact, Mr. Becker comes from two of the nation's largest international unions, the AFL-CIO and the Service Employees International Union.[6] The move toward choosing appointees who previously represented one side or the other has coincided with—and arguably helped cause—the delay in filling vacancies on the Board and the packaging of Board nominees. This delay is contrary to the statutory scheme that contemplated the nomination and confirmation of one new Board member each year.

Some have cited these changes in the selection of members as causing the instability in Board law when control of the Board moves from one political party to the other. Although these changes have made oscillations in board law possible, they are not, in my view, its cause. Apart from the decline of unionization in the private sector, which is the stage upon which this has been played out, the dramatic changes in Board law and procedure we are witnessing today stems from:

- the decision of organized labor to use the political process to arrest that decline
- the concomitant publically expressed expectation of organized labor that Democrats on the Board are there to serve its interests[7]

These factors have worked to undermine Board neutrality and bring us to where we are today.

C. The Board's Proper Role Under the Act

The Wagner Act was not the last word on these issues: Congress has amended the Act three times. As the law has changed, the role of the Board has also evolved. The most significant amendment was the Taft-Hartley Act of 1947, which moved the Wagner Act into the mainstream of American political thought. It expanded the Wagner Act's notions of collective action with the broader notions of workplace de-

mocracy and neutrality. For example, the Taft-Hartley Act gave workers the right to refrain from union and other concerted activity and protected an employer's First Amendment right to non-coercively express its opposition to unionization.

The amended Act and the court decisions interpreting it reflect an evolving view of the role of the Board. Originally, the role was to maintain a singular focus on promoting collective bargaining; today, the Board's role is to balance and accommodate competing, conflicting interests. Archibald Cox, the pre-eminent labor law scholar, observed that the Taft-Hartley Act "represent[ed] a fundamental change in philosophy, which rejects outright the policy of encouraging collective bargaining." The amended Act and the court decisions interpreting it reflect an evolving view of the role of the Board. Originally, the role was to maintain a singular focus on promoting collective bargaining; today, the Board's role is to balance and accommodate competing, conflicting interests. Archibald Cox, the pre-eminent labor law scholar, observed that the Taft-Hartley Act "represent[ed] a fundamental change in philosophy, which rejects outright the policy of encouraging collective bargaining." The amended Act and the court decisions interpreting it reflect an evolving view of the role of the Board. Originally, the role was to maintain a singular focus on promoting collective bargaining; today, the Board's role is to balance and accommodate competing, conflicting interests. Archibald Cox, the pre-eminent labor law scholar, observed that the Taft-Hartley Act "represent[ed] a fundamental change in philosophy, which rejects outright the policy of encouraging collective bargaining." [8]

Thus, as result of these amendments to the original Act, the Board's role of promoting collective bargaining begins after employees have made a free and informed choice for unionization as the means to improve their terms and conditions of employment.

D. The Current Board's Consistent Demonstration of Partiality on the Question of Unionization

In my view, the current Board consistently demonstrates that it is not neutral on the question of unionization. Rather, its majority members appear to remain mired in a period when the Wagner Act reigned supreme, when unions had rights but no obligations, when employers did not have the right to non-coercively express their opposition to unionization, and when employees had no express right to refrain.

The majority's animating concern is the loss of union density in the private sector. It takes refuge in the language from the Act's preamble "to encourage the practice and procedure of collective bargaining" to issue decisions and take actions that trump specific provisions of the Act, including the Taft-Hartley Act and the individual rights set out therein. The following are recent examples:

• Limiting employer speech. The new Board majority moved quickly to limit an employer's ability to engage in non-coercive speech opposing unionization.[9]

• Stripping employees of the right to a secret ballot. In response to the increasing use by unions of an employer's voluntary recognition based on a card check (often after a corporate campaign) and recognizing that the secret ballot election is the most reliable indicator of employee free choice, in September 2007, the Board made an incremental change in Board law.[10] The Board modified its bar to election petitions following a voluntary recognition to give employees or a rival union a 45-day window within which to challenge the recognized union's majority status with a secret ballot election provided the petition is supported by an adequate showing of interest (supported by 30% of employees).

Within a few months of forming a majority, the current Board granted requests for review that sought to reverse this Board law and issued an unprecedented request for briefing. The Board found that the petitioners raised "compelling circumstances" warranting review despite the fact that the only reasons offered by the petitioners were the same reasons that were asserted and found insufficient by the prior Board.Board.Board.Board.Board.

• Expanding the ability of unions to engage in coercive secondary activity inconsistent with the plain language of the Act. The Board overturned decades of Board law defining unlawful secondary picketing, even though this precedent was consistently affirmed by the U.S. Supreme Court and the Federal circuit courts.[13] In addition, the Act requires no proof of actual or potential loss. It proscribes conduct that "threatens, coerces, or restrains" for a secondary object. The majority, however, ruled that absent traditional picketing—carrying signs on pickets and moving in a circular ambulatory fashion—the Board will find a violation only if the union engages in conduct that "directly caused or could reasonably be expected to directly cause, disruption of the secondary's operation."

• Authorizing premature law suits against two states for constitutional amendments that guarantee the secret ballot election. The same Board that gave partial effect to a New York state neutrality statute in Independence Residences, see fn 7,

authorized premature lawsuits against Arizona and South Dakota for state constitutional amendments that appear to do no more than the Act: guarantee the secret ballot election. The Act recognizes the secret ballot election as the preferred method for determining employee free choice and guarantees it. An employer need not recognize a union based on a card check. It may insist on a secret ballot election. Similarly, under current law, employees can challenge their employer's recognition of a union based on card check.[14]

• Re-defining an "appropriate bargaining unit." The Board has invited amicus briefs on whether it should change decades of Board law as to what is an appropriate bargaining unit. The request was made in a case that never raised the issue.[15] Under longstanding Board law, a unit can be all the employees of the employer or something less, but the Board is considering adopting as presumptively appropriate a unit of two or more persons doing the same job in the same location. Such a change would make it easier for a union to gain access to a non-union employer: it is easier to organize 2 to 5 employees than it is 20 to 30. However, it is inconsistent with the right of workers to have a bargaining unit with sufficient collective strength to effectively negotiate with their employer; moreover, it threatens a proliferation of units and the balkanization of the workplace that will be detrimental to workers and dramatically increase a business's labor relations costs.

And now, we have the majority's proposed rule to dramatically shorten the time for Board elections as its most recent demonstration of partiality on the question of unionization. It is a startling display of the current Board's activism on an outcome long favored by organized labor. Consider this: the proposal was put forth on the majority's own initiative citing unreasonable delay but without defining what constitutes "delay" and without analyzing the very small number of representation cases in which such delay has occurred and the causes for it. Dissenting Board Member Brian Hayes observed:

"[T]he majority makes no effort whatsoever to identify the specific causes of delay in those cases that were unreasonably delayed. Without knowing which cases they were, I cannot myself state with certainty what caused the delay in each instance, but I can say based on my experience during my tenure as Board member that vacancies or partisan shifts in Board membership and the inability of the Board itself to deal promptly with complex legal and factual issues have delayed final resolution far more often than any systemic procedural problems or obstructionist legal tactics."[16]

A brief overview of the Board's current election practices and procedures and the agency's timeliness in processing election cases demonstrates that there was little need for the sweeping changes the majority proposes. And the isolated manner in which the proposed rule was crafted further detracts from its legitimacy.

E. Current Board Election Practice and Procedure

Two principal time periods are involved in the Board's representation (election) case process:

• Pre-election: the time from the filing of a petition to the election. Pre-election procedural and legal issues are resolved either by agreement or by a decision of the Regional Director and then the Board.

• Overall: the time from filing the petition to the completion of the representation case. Challenges and objections to the election are considered by the Region and then the Board.

During the pre-election period, current Board practice encourages the informal resolution of pre-election issues—including the time and place for holding the election, the form of the balloting, whether the unit sought is appropriate, unit placement, voter eligibility, and exclusion. After the petition is filed, a hearing is promptly scheduled; in 86% to 92% of all cases, elections proceed by agreement of the parties without the need for a hearing.

Under current Board procedures, pre-election issues that are not resolved by agreement of the parties are heard by a designated hearing officer agent and then decided by a Regional Director, who issues a decision after the hearing. The Board's "best practices" contemplate that hearings will commence between the 10th and 14th day.[17] The hearing may take place on several consecutive days on any of the pre-election issues, such as jurisdiction, representation showing, a question concerning representation (e.g. contract bar), unit composition and unit scope. The Regional Director either dismisses the election petition or proceeds with a Decision and Direction of Election directing an election for approximately three to four

The pre-election hearing is not adversarial. Its purpose is to enable the hearing officer, who is an agent of the Board, to identify the issues with the assistance of the parties and develop a full record so they may be decided by the Regional Director consistent with Board law.

"The hearing officer is an agent of the Board who has an affirmative obligation to develop a full and complete record and may, if necessary to achieve this purpose, call and question witnesses, cross-examine, and require the introduction of all relevant documents. See Mariah, Inc., 322 NLRB 586 n. 1 (1996). Once on notice of a substantial issue, the hearing officer is obliged to conduct inquiry. Pontiac Osteopathic Hospital, 327 NLRB 1172 (1999). The hearing officer is, of course, required to be impartial rulings and in conduct." An Outline of Law and Procedure in Representation Cases, Section 3-820 Hearing Officer's Responsibilities.[19]

The agency conducts the vast majority of its elections in a remarkably timely fashion. The median time for conducting initial Board elections in Fiscal Year 2010 was 38 days; for all elections, it was 31 days; and 95% of all elections are held within 2 months. Based on my experience, in a very small number of cases, elections have been substantially delayed as the result of a union filing unfair labor practice charges that block the election or for circumstances beyond the control of the parties, such as delays by the Board in issuing a decision.

II. Looking at the Proposed Rule and How It Was Crafted

The Board proposes to reduce the time for Board elections from the current period of roughly 6 to 8 weeks to as little as 10 to 14 days.[20] It achieves this result by substantially limiting the opportunity for a full evidentiary hearing or Board review of contested issues, by deferring resolution of most pre-election issues—some of which can impact an election's outcome—to after the election and then limiting the Board's standard of review. The process the Board proposes tilts heavily against employers' rights to engage in legitimate free speech, it threatens to deprive large numbers of employers of due process and the right to petition the government for redress of grievances. 21 It will deprive the Regional Director, the Board, and reviewing courts of an adequate record upon which to base their decisions. And at the end of the day, it is far from certain that these proposed changes will reduce the time required to process representation cases, which should be a primary goal of any electoral reform. For these reasons, in my view, the proposed rule's principal revisions are ill-conceived and misguided.

A. The Proposed Rule Was Crafted in Isolation without Input from Key Agency Personnel or Public Discussion of its Need

It is clear from the majority and dissenting opinions that the Board majority crafted its proposed rule in isolation. The majority appears to have assiduously avoided triggering the public meeting requirement of the Government in the Sunshine Act, 5 U.S.C. 552 b. A Board agenda with Republican Board Member, Brian Hayes, apparently was never held.[22] Under the Government in the Sunshine Act, such a meeting would have required notice and been open to the public. The majority members may have avoided deliberating among themselves because that too would have required notice and an open meeting. Presumably, the majority conducted deliberations through their staffs and in meetings of only two majority members at a time, excluding the minority member.

The Board also excluded key agency personnel and outside labor law practitioners whose views are routinely solicited by the Board when considering changes in its rules of procedure. The majority side-stepped the Board's Rules Revision Committee, a group of agency officials responsible for recommending and considering proposed changes in existing and proposed new rules. And the Board did not bring its proposal to the attention of the Practice and Procedures Committee of the American Bar Association, composed of experienced union-side and management-side labor lawyers, which for many years has been consulted on proposed changes in the Board's rules of practice and procedure. 23

The Board did not seek input from those who will be most affected by the proposed rule before issuing the proposed rule, which is contrary to President Obama's Executive Order 13563. Although the Executive Order does not apply to independent agencies, the NLRB and other agencies have been "encouraged to give consideration to all of its provisions, consistent with their legal authority."[24]

All this has now been followed with a notice and comment period that meets the bare minimum requirements of the Administrative Procedure Act. 5 U.S.C. Section 553 The public has been given 60 days to comment; 14 days have been given for replies. A 2-day public hearing is scheduled for July 18 and 19, just 27 days after notice of the proposed rule was published in the Federal Register. On June 27, the agency announced that registration for the meeting must be filed four days later—by 4 p.m. on July 1. If an interested person wanted to make an oral presentation, a brief outline of the presentation must be submitted with the registration.

The manner in which the Board majority proceeded and its expedited period for public comment gives little time for consideration and comment by those most af-

fected by the proposed rule. The dissenting member understandably took strong issue with his colleagues:

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

Sadly, my colleagues reduce that cornerstone to rubble by proceeding with a rule-making process that is opaque, exclusionary, and adversarial. The sense of fait accompli is inescapable."[25]

B. The Proposed Rule Will Deprive Employees and Employers of Fundamental Rights that Permit an Informed Choice in a Board Election.

The proposed rule, if implemented, will deprive employers of a meaningful opportunity to express their views on unionization, which is protected under Section 8 (c) of the Act, and the employee's right under Section 7 of the Act to hear his or her employer's views and to make an informed choice. It will impermissibly limit the free and robust debate on the issue of unionization that Congress sought to ensure. As relied upon by Member Hayes in his dissent, the Supreme Court said in Chamber of Commerce v. Brown, supra, 554 U.S. at 67-68:

"From one vantage, § 8(c) 'merely implements the First Amendment,' NLRB v. Gissel Packing Co., 395 U.S. 575, 617, 89 S. Ct. 1918, 23 L.Ed.2d 547 (1969), in that it responded to particular constitutional rulings of the NLRB. See S. Rep. No. 80-105, pt. 2, pp. 23-24 (1947). But its enactment also manifested a 'congressional intent to encourage free debate on issues dividing labor and management.' Linn v. Plant Guard Workers, 383 U.S. 53, 62, 86 S. Ct. 657, 15 L.Ed.2d 582 (1966). It is indicative of how important Congress deemed such 'free debate' that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word * * * has been expressly fostered by Congress and approved by the NLRB." Letter Carriers v. Austin, 418 U.S. 264, 272-73, 94 S. Ct. 2770, 41 L.Ed.2d 745 (1974).

The union will covertly collect employee signatures on authorization cards[27] for its petition without the employer's knowledge. The predominant story that workers will hear before the election will be the union story; unlike the employer, the union can promise employees increased wages and benefits with few restraints under the law. The employee may not be told that changes in the terms and conditions of employment are the product of collective bargaining; that wages and benefits may be the same, less or more. Nor is the employee likely to hear that to be a member of the union the employee will have to support the union's political and social agenda or that the union may seek to further its own business during bargaining and ask for a neutrality card check agreement. The employee may not have been exposed to the experiences the union has had with other employers and its impact on their profitability and competitive position in the marketplace.

After achieving the requisite number of signatures, the union will select the date and time for filing the petition, catching the employer and unsolicited employees by surprise. The employer will have to prepare for an adversarial proceeding, described below, only days away and for an election as little as three or four days later. The employer will have little opportunity to become informed about the union and the issues involved, respond to union claims, and communicate with its employees on the issue of unionization. Other employees who were unaware of the union solicitations will find themselves in a similar situation.[28] They will not have enough time to clarify the facts, openly debate the issues, hear from their employer, and effectively express their concerns.

C. The Proposed Rule Replaces a Non-Adversarial Hearing Focused on Developing a Full Record for a Limited Adversarial Hearing with Formal Pleading Requirements.

As mentioned above, under current Board procedures, in the relatively small number of representation cases that require a hearing, the hearing is non-adversarial. Its purpose is for the Board agent to identify the issues with the assistance of the parties and impartially develop a full record to enable the Regional Director to issue

a decision on the issues consistent with Board law.[29] The Board agent has the authority to subpoena witnesses and request documents. Prior to the hearing, the only document to be produced is a questionnaire to be completed by the employer confirming that it meets the Board's statutory jurisdictional requirements.

The proposed rule changes all of this. It requires that the employer file a detailed Statement of Position identifying the issues it wants to raise. Those issues can include:

- whether the employer is a religious organization exempt from the Act's coverage
- whether the petitioner is a labor organization
- the appropriateness of the petitioned-for unit
- exclusions from the petitioned-for unit
- the existence of a bar to the election

If the employer contends the unit is inappropriate, it is required to state the basis for its contention and to "identify the most similar unit it concedes is appropriate."concedes is appropriate."concedes is appropriate."concedes is appropriate."concedes is appropriate."

These issues can be varied and complex, as the Board majority readily concedes,[32] requiring inquiry and consultation, hopefully leading to a resolution in the pre-election process. But the proposed rule gives little time for that process to play out, mandating a hearing seven days from service of the petition and the Statement of Position Form "absent special circumstances."[33]

If the employer fails to raise an issue in its Statement of Position, it forfeits its right to do so.

"No party would be permitted to offer evidence or cross-examine witnesses concerning an issue it did not raise in its Statement of Position or did not join in response to another party's Statement of Position."[34]

As to the hearing, the Board adopts for its model Rule 56 of the Federal Rules of Civil Procedure and proposes that "[t]he duty of the hearing officers [under the proposed rule] is to create an evidentiary record concerning only genuine issues of material facts."[35] Those are issues raised by the employer in its Statement of Position, contested by the union and on which the employer has made a sufficient offer of proof. As mentioned, under current Board procedures, the Board hearing officer is charged with impartially developing the record on the issues presented by the petition. Under the proposed rule, that burden is shifted to the employer, as the non-petitioning party, requiring that it make an offer of proof and thereafter introduce evidence on the issues it has identified.

According to the Board majority:

"The proposed amendments would not prevent any party from presenting evidence concerning any relevant issues if there is a genuine dispute as to any material fact. In other words, the proposed amendments would accord parties full due process of law consistent with that accorded in federal courts."

The Board majority's statement cannot be taken seriously. The Board majority suggests cutting in half, if not further, the time for a hearing and now shifting to the employer the obligation to identify the issues and present evidence supporting its position in an adversarial hearing.[36] Although larger companies with in-house legal staffs may be able to respond and protect their rights in that short time frame, many of the Board's representation cases involve the employees of smaller business owners who do not have legal counsel with traditional labor law expertise or labor consultants readily available to them. Many may not have heard of the National Labor Relations Board despite the wide controversy over the agency's recent Boeing complaint.[37] Few will be familiar with the Board's arcane legal concepts such as "appropriate unit," "contract bar," or "statutory supervisor." They are not likely to have the wherewithal to contact knowledgeable labor counsel; even if they do, seven days is insufficient time to locate, engage, and prepare counsel for an effective representation.[38]

The difficulty for employers timely securing knowledgeable counsel will be compounded if the Department of Labor's proposed new interpretation of the "advice" exemption of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 433, takes effect. See "Labor Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption" that issued in the Federal Register on June 21, 2011. Historically, legal advice given to an employer by its attorney during a union organizing campaign has been treated as exempt from the LMRDA. Under the Department's proposed re-interpretation many of these legal services will be considered "persuader activities." "Under the proposed interpretation, when such a person prepares or provides a persuasive script, letter, videotape or other material or communication * * * for use by an employer in communicating with employees, the advice exemption does not apply and the duty to report is triggered." FR at p. 36. The regulations would apply to drafting or reviewing written materials and speeches for legal

sufficiency so as to avoid unfair labor practices, as well as conducting supervisory training and seminars regarding union organizing, collective bargaining and converted activity, such as strikes. The current reporting requirement as a result of performing persuader activities already requires reporting not only by and for that particular client, but for all labor relations services for all clients whether or not those services involve persuader activities. Since this information is considered subject to the attorney-client privilege, it is anticipated that many attorneys will simply stop providing such advice. In sum, the new, incredibly broad interpretation of reportable persuader activities would eviscerate the current "advice exemption" and would further chill employer free speech, thus preventing employees from receiving needed information to make a fully informed decision regarding union representation.

What will happen is exactly what Member Hayes predicted in his dissent: "The proposed rules, if implemented, will unconscionably and impermissibly deprive these small business owners of legal representation and due process." 39 If the Board's proposed rule is implemented, this scenario will play out in countless workplaces across the nation, and it will undermine public trust in the fairness of Board elections. The majority's effort to draw support for its expedited hearing procedures on the summary judgment procedures of Rule 56 of the Federal Rules of Civil Procedure is decidedly unimpressive. Parties to a civil lawsuit under the Federal Rules are given an opportunity to develop their case and engage in discovery. Complaints are often amended afterwards as issues reveal themselves. Motions for summary judgment are generally filed after discovery is complete. If the non-moving party has not had an opportunity for discovery, the court will generally withhold ruling on the motion until its discovery is complete and it has had an opportunity to file an opposition or a cross motion. The situation encumbering an employer seven days after a union has filed a petition is hardly analogous.

D. The Proposed Rule Will Unfairly Constrain Employers from Exercising their Legal Right to Board Review

Under extant Board law, an employer's obligation to bargain with the union attaches from the election date. As a result, an employer acts at its peril if after an election and without bargaining with the union it changes any terms or conditions of employment ("unilateral changes"). If the Board ultimately certifies the union, the employer, at the union's request, will be required to return those changed terms and conditions to the original status quo ante.

Returning to the status quo ante can be costly and can undermine the employer's competitiveness. Making changes in terms and conditions of employment is part of an employer's normal business operations—for example, making changes to retain employees who could be lured away by a competitor's offer of higher wages or better benefits, making changes to control rising health care costs, or making changes to respond to market conditions that may require work reassignments and so forth.

The resolution of some pre-election issues will determine whether an employer has a collective bargaining obligation at all. Thus the proposed rule's shift from before to after the election of the resolution of most pre-election issues unfairly burdens an employer. In short, the employer might have to choose either to exercise its right to Board review while it continues to conduct normal business operations or to forego its right to Board review or its right to conduct normal business operations.

E. The Proposed Rule Is Likely to Result in More Elections Being Overturned.

The proposed rule, if implemented, is likely to result in an increase in the number of elections being overturned after the results have been announced, threatening to disrupt the workplace and waste the Board's and parties' time and money.

Postponing resolution of some issues—such as whether there is a bar to the election or whether the unit is appropriate—will increase the likelihood of an election being set aside after Board review.

Up until the time I left the Board in August of 2010, the Board followed a guideline generally putting an upper limit of 10% on the number of employees who could vote under challenge.Up until the time I left the Board in August of 2010, the Board followed a guideline generally putting an upper limit of 10% on the number of employees who could vote under challenge.Up until the time I left the Board in August of 2010, the Board followed a guideline generally putting an upper limit of 10% on the number of employees who could vote under challenge.Up until the time I left the Board in August of 2010, the Board followed a guideline generally putting an upper limit of 10% on the number of employees who could vote under challenge.Up until the time I left the Board in August of 2010, the Board followed a guideline

generally putting an upper limit of 10% on the number of employees who could vote under challenge.

Furthermore, several courts of appeal have held that if a sufficient number of challenges are sustained so that the modified bargaining unit is fundamentally different from the bargaining unit that was proposed, employees will have been denied their right to make an informed choice, requiring a new election:

"Where employees are led to believe that they are voting on a particular bargaining unit and the bargaining unit is subsequently modified post-election, such that the bargaining units, as modified, is fundamentally different in scope or character from the proposed bargaining unit, the employees have effectively been denied the right to make an informed choice in the representation election." NLRB v. Beverly Health and Rehabilitation Service, Inc., No. 96-2195, 1997 WL 457524 at 4 (4th Cir. 1997)(citations omitted).

F. The Proposed Rule Inappropriately Narrows the Standard of Board Review of Important Election Issues.

Currently, pre-election issues that are heard by a designated hearing officer and decided by a Regional Director may be reviewed by the Board on a request for review filed by either the union or the employer. The Board's review is a summary one based on a review of the requesting party's papers which is required to include a summary of all evidence and rulings bearing on the issues.[42] While an opposition may be filed, the Board may rule on the request without awaiting an opposition.[43] The Board will grant review only for "compelling reasons."[44]

After the election, objections either to the conduct of the election or to conduct affecting the results of the election as well as challenges to outcome-determinative individual voters are heard and decided at the regional level. Either party may file exceptions to the region's decision with the Board which will consider the exceptions on a de novo review of the record. If the exceptions are found to have merit, the Board may overturn the election results and order a new election.

The proposed rule changes the Board's post-election scope of review from an automatic de novo review upon the filing of exceptions to a discretionary review based on "compelling reasons." This is a significant and unwise revision to long-standing Board practice and procedure.

According to the majority, it "anticipates that the proposed amendments would leave a higher percentage of final decisions about disputes arising out of representation proceedings with the Board's regional directors who are members of the career civil service."According to the majority, it "anticipates that the proposed amendments would leave a higher percentage of final decisions about disputes arising out of representation proceedings with the Board's regional directors who are members of the career civil service."According to the majority, it "anticipates that the proposed amendments would leave a higher percentage of final decisions about disputes arising out of representation proceedings with the Board's regional directors who are members of the career civil service."According to the majority, it "anticipates that the proposed amendments would leave a higher percentage of final decisions about disputes arising out of representation proceedings with the Board's regional directors who are members of the career civil service."According to the majority, it "anticipates that the proposed amendments would leave a higher percentage of final decisions about disputes arising out of representation proceedings with the Board's regional directors who are members of the career civil service."

The Board does not explain the significance of its comment that it anticipates a higher number of final decisions on election disputes will be made by "members of the career civil service." The concern of some with such a proposed change will not be easily assuaged given the fact that the highly controversial Boeing complaint was recently-filed by a long-time member of the Board's career civil service.

The two principal functions of the National Labor Relations Board are to enforce the unfair labor practice provisions of Section 8 of the Act and to hold elections pursuant to Section 9 of the Act to determine whether a majority of workers in an appropriate unit wish to be represented by a labor organization. Board's elections have long been considered its "crown jewel." Section 3 (b) of the Act permits the Board to delegate its authority to conduct elections to regional directors but subject to subsequent Board review.

For decades pre-election issues heard and decided at the regional level were subject to the Board's discretionary standard of review and its summary process. The post-election issues that directly impact on the results of the election and involve the integrity of the election process itself—consideration of outcome-determinative challenges to individual voters, as well as objections to the conduct of the election and to conduct affecting the results of the election—were subject to de novo review by the Board upon the filing of exceptions by either party. The discretionary highly

deferential standard of review and its summary process that being proposed by the majority for all contested election issues is inappropriate. The post-election issues currently heard automatically on exceptions go to the heart of employees' right under Section 7 of the Act to make a free and uncoerced choice for or against unionization. Final agency decisions should not be entrusted to "career civil servants" but to presidential appointees who have been entrusted with the agency's quasi-judicial functions.

A regional director's pre-election consideration of an eligibility issue is less significant than when that same issue is presents itself post-election. Regional directors defer consideration of eligibility issues to post-election challenges because they raise difficult factual or legal issues, the consideration of which may delay the election. When they are subsequently considered post-election, their complexity remains but they have added significance, only outcome-determinative challenges are considered.

Objections over the conduct of an election are generally investigated by a region that did not conduct the election. This avoids a conflict with the region alleged to have been responsible for the misconduct investigating itself. Nevertheless, the party that filed the objection may be concerned that one "career civil servant" may not want to offend another. Automatic de novo review by the Board alleviates that fear and preserves public confidence in the integrity of the election process.

Conduct affecting the results of an election—pre-election misconduct by either the union, the employer or others, that can reasonably be expected to have affected the election outcome—deprive employees of the fundamental employee rights the Act granted, "the right to self-organization, to form, join, or assist a labor organization * * * and * * * the right to refrain from any and all such activity," see 29 U.S.C. Section 157, and intended the Board to protect. If the party filing an exception from a Regional Director's decision reasonably believes that the Regional Director erred, the Board should not look for "compelling reasons" requiring its review, it should automatically review such objections de novo.

Finally, the review of contested issues that was traditionally considered post-election, on a discretionary request for review standard with its summary procedures, is less-apt to be dissented to. Such dissents are critical for a reviewing court less familiar with the intricacies of Board law.

III. Conclusion

The above are my views on what I believe to be an increasing politicization of the Board that began a few decades ago and the reasons I attribute to it. Oscillating Board law and the public perception that the Board members serve a constituency undermines the Board's credibility and its effectiveness as an instrument of good government. At a time of enormous economic anxiety, many of the Board's recent actions and decisions reverse long-standing Board law and procedures and destabilize, or threaten to destabilize, labor-management relations. They can, and I believe will, impact on the willingness of entrepreneurs and other businesses to "make here what they sell here."

The Board's proposed rule to shorten the time for a Board election proposes drastic changes in election law, practice and procedures that have been in place and guided the parties for many decades. It will take time for the thought, discussion and debate necessary to fully consider all the elements of the proposed rule and flesh out their implications. My comments are preliminary in that they reflect my opposition to the principal provisions of the proposal. There are a variety of other provisions, however, which I have not had an opportunity to fully consider that raise concern, such as, the elimination of a Regional Director's ability to transfer cases to the board, the required disclosure of employees' personal e-mail addresses and the requirement that pre-election hearings "continue day to day until completed absent extraordinary circumstances."[47]

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.

ENDNOTES

[1] The Supreme Court ultimately found that a board of two persons did not constitute a quorum under the Act. New Process Steel L.P. v. NLRB, 560 U.S._____, 130 S. Ct. 2635 (2010).

[2] See p. 45 of the Board's Notice of Proposed Rulemaking (hereafter called "Notice of Proposed Rulemaking") that issued in the Federal Register on June 22, 2011. I fully agree with the dissenting opinion of Board Member Brian Hayes and respectfully refer members of the committee to it.

[3] See Jelle Visser, "Union Membership Statistics in 24 Countries," Monthly Labor Review (Jan. 2006). The period for Board elections in the 1950s was more than twice what it is today.

[4] Bureau of Labor Statistics, Economic News Release, "Union Members Summary" (January 21, 2011).

[5] Some have argued that the decline of unionization in the private sector is the result of unions not selling themselves adequately to workers, and their failure to commit sufficient resources to organizing activities. Studies show that the percentage of union funds devoted to organizing shrank from 40% in the 1930s to 4% in the 1990s. See Peter Francia, The Future of Organized Labor in American Politics (Columbia University Press, 2006); Bruce Nissen, Which Direction for Organized Labor (Wayne State University Press, 1999).

[6] I mean no disrespect to Board Member Becker with whom I worked collegially for many months but his situation is different from that of Michael Bartlett who came to the Board from the U.S. Chamber of Commerce. Mr. Bartlett was nominated specifically to serve as a short-term recess appointee pending the nomination and confirmation of five new board members to serve full terms.

[7] "We are very close to the 60 votes we need. It [sic] we aren't able to pass the Employee Free Choice Act, we will work with President Obama and Vice President Biden and their appointees to the National Labor Relations Board to change the rules governing forming a union through administrative action. * * *" (Stewart Acuff, "Restoring the Right to Form Unions and Bargain Collectively," The Huffington Post, February 3, 2010).

[8] Archibald Cox, "Some Aspect of the Labor Management Relations Act of 1947," 61 Harv. L. Rev. 1, 24 (1947).

[9] Independence Residences, 355 NLRB No. 153 (2010) (Members Schaumber and Hayes dissenting therein).

[10] In Dana Corp, 351 NLRB 434 (2007)(Members Liebman and Walsh dissenting therein), 50% of employees in one case and 35% in the other filed petitions for an election within weeks of being notified of their employers' voluntary recognition of a union by card check.

[11] According to statistics provided by the Board's Office of the General Counsel, as of April, 2011, roughly 25% of elections held in response to employee decertification petitions resulted in the union's claim of majority status being defeated.

[12] Rite-Aid Store 6473—Lamons Gasket Co., 355 NLRB No. 157 (2010) (Members Schaumber and Hayes dissenting therein).

[13] Carpenters local 1506 (Eliason & Kurth of Arizona, Inc), 355 NLRB No. 159 (2010). (Members Schaumber and Hayes dissenting therein).

[14] Then-Board Member Liebman filed a dissent to the Board's filing of an amicus brief in pending federal litigation that argued that a California statute was pre-empted by the Act because it required employer neutrality during a union organizing campaign. Chamber of Commerce v. Lockyer et al, 225 F. Supp. 2d 1199 (D.C.Cal 2002). The decision of the District Court finding the state statute pre-empted was affirmed by the Supreme Court. Chamber of Commerce v. Brown, 554 U.S. 60 (2008).

[15] Specialty Healthcare and Rehabilitation Center of Mobile, 356 NLRB No. 56 (2010) (Member Hayes dissenting therein).

[16] Notice of Proposed Rulemaking, Dissent at pp. 45-46.

[17] "Representation Cases Best Practices Report," Gen. Couns. Mem. 98-1, at 2 (Jan. 26, 1998). weeks later.weeks later.weeks later.

[18] When the Regional Director directs an election after a hearing, the election normally should not be scheduled prior to the 25th nor later than the 30th day after issuance of the decision to allow for the filing of requests for review with the Board. NLRB Casehandling Manual, Section 11190-11209.

[19] See also National Labor Relation Board's Rules and Regulations, Section 102.66.

[20] The 10 to 14 days' time is derived as follows: Consistent with current practice and the proposed rule, a pre-election hearing will be scheduled for seven days following the date the petition is filed. Absent an election agreement, after a one day hearing, the employer is given two days to provide the union with an Excelsior List of employees. A Final Notice of Election must be posted for at least two work days prior to the election. Although the union must have the Excelsior List for at least ten days before the election, the union can waive that requirement.

[21] Notice of Proposed Rulemaking, Dissent at p. 49.

[22] Notice of Proposed Rulemaking, Dissent at p. 43-44.

[23] Id.

[24] See May 23, 2011, letter from Board Executive Secretary submitting the Board's Preliminary Plan to Review Significant Regulations to the OMB Office of Information and Regulatory Affairs in response to Section 6 of Executive Order 13563, available at *http://www.slideshare,net/whitehouse/nation-labor-relations-board-reform-board.*

[25] Notice of Proposed Rulemaking, Dissent at p. 44.

[26] Canadian law provides for elections in five to ten days. It is often relied upon by proponents of "quickie elections" in the United States. Canadian law, however, does not implicate the Canadian Constitution as the NLRA implicates the U. S. Constitution. And it can prove problematical to import one element of another country's labor relations law without considering all of its constituent parts.

[27] An authorization card is a form signed by an employee that typically designates a union as the employee's bargaining agent. If signed by at least 30% of employees, the union can use the authorization cards to file a petition for an election. If signed by over 50% of the employees, the union may use the cards to demand recognition by the employer. The employer does not have to recognize the union: it may, at its option, file for a secret ballot election or wait for the union to do so.

[28] The proposed rules apply to all petitions for an election, including decertification petitions and petitions filed by rival unions. Since the vast majority of election petitions are filed by a union seeking to organize a unit of an employer's employees, however, and those petitions are the focus for my comments, I refer only to them.

[29] Sec. 101.20 (c) of the Board's Statement of Procedures provides in pertinent part: "The hearing, which is nonadversary in character, is part of the investigation in which the primary inter-

est of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case."

[30] Notice of Proposed Rulemaking at p. 25.

[31] Id.

[32] Notice of Proposed Rulemaking at p. 15.

[33] The Regional Director may require its completion at some time before the hearing. Notice of Proposed Rulemaking at p. 25.

[34] Notice of Proposed Rulemaking at p. 28. However, the hearing officer has the discretion to permit a party to amend the Statement of Position for good cause, such as newly discovered evidence, and during the election a party can challenge the eligibility or inclusion of a voter even if not raised in the Statement of Position.

[35] Notice of Proposed Rulemaking at p. 27.

[36] This can inure to the detriment not only of the employer but the employees and the union as well. No longer will there be an obligation on the part of the hearing officer to make sure that the record is fully developed for the Regional Director and ultimately the Board to decide the issues involved consistent with Board law. Thus, for example, the employer may claim that a lead person is ineligible to vote because he or she is a supervisor, but a fully developed record would show otherwise.

[37] The Boeing complaint alleges that the Boeing Company's opening of a new second production line in South Carolina for its highly successful 787 Dreamliner aircraft was retaliatory and seeks a Board order requiring Boeing to produce all of its 787 aircraft at its unionized facilities in Washington state. The Acting General Counsel relies on statements made by some senior Boeing executives that one of the reasons it opened a second production line in South Carolina was to avoid the economic consequences of future strikes. Although the work in South Carolina is new work, not unit work, and Boeing's collective bargaining agreement permitted Boeing to choose the location for the production of its aircraft, the Acting General Counsel nevertheless claims Boeing could not do it for "retaliatory" reasons. The complaint is unprecedented and inconsistent with controlling law.

[38] In the absence of legal counsel, small business owners may engage in unintentional, innocent, unfair labor practices. Few people would suspect that it is a violation of law to ask a long-term employee with whom you have a relationship whether he or she supports the union and the reasons why. The union could use such innocent unfair labor practices to extract concessions from the employer concerned the union may file charges with the Board.

[39] Notice of Proposed Rulemaking, Dissent at p. 48.

[40] In its Notice of Proposed Rulemaking, the Board majority cites Northeast Iowa Telephone, 341 NLRB 670, 671 (2004), for the proposition that "[t]he Board has permitted regional directors to defer resolution of the eligibility of an even higher percentage of potential voters." Notice of Proposed Rulemaking at p. 53. The majority's description of Northeast Iowa Telephone is far off the mark. That case was unique and does not represent the norm as the Board majority (then Member Liebman and former Member Dennis Walsh) took great pains to explain. The case involved a unit of eight workers, including two managers who the employer claimed were statutory supervisors. The Regional Director permitted the managers to vote under challenge finding the "record inclusive." The employer sought review asking that the hearing be re-opened because the Regional Director scheduled the hearing when one of the two managers was recuperating from surgery and unable to testify. Over the dissent of former Chairman Robert Battista, the Board majority voted to deny review. They faulted the employer for not filing a special appeal to the Board to reschedule the hearing and held that in light of that failure and "given the case's present posture"—which would have required setting the election aside, reopening the record and ordering a new election—"resolution of the supervisory issue through the challenge procedure is the best use of the Board's limited resources." The majority concluded that it recognized "allowing 25 percent of the electorate to vote subject to challenge is not optimal." 341 NLRB at p. 671.

[41] The Board majority interprets the Act's pre-election hearing requirement; see Section 9 (c)(1), as limited to "questions of representation." Such an interpretation fights with decades of Board law that until the majority's Notice considered an "appropriate hearing" under the Act one that required consideration of all election issues and a record developed by an impartial agent of the Board.

[42] "Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity or recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. * * * [S]aid request must contain a summary of all evidence or rulings bearing on the issue together with page citations form the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director." See Notice of Proposed Rulemaking at p. 73.

[43] Id

[44] See Notice of Proposed Rulemaking at p. 72, National Labor Relations Board, Rules and Regulations, Section 102.67 (c).

[45] Notice of Proposed Rulemaking at p.37.

[46] Notice of Proposed Rulemaking at p.37, n. 56.

[47] Notice of Proposed Rulemaking at p. 27.

Chairman KLINE. Thank you, sir.

Mr. Getts, you are recognized.

STATEMENT OF LARRY GETTS, TUBE PRESS TECHNICIAN, DANA CORPORTATION

Mr. GETTS. Mr. Chairman, members of the House Committee on Education and Workforce, I thank you for the opportunity to speak before you today on the National Labor Relations Board's ambush election proposal, and allowing me to speak and share my experience with union officials during their effort to unionize my place of work.

Based on my experience with union organizers, it is clear to me that the rule changes, as the NLRB has proposed, would only further the interests of the union officials who are undermining those of workers. Let me start by telling you that I am a former member and union steward myself.

Currently, I work in a small plant north of Fort Wayne, Indiana that is owned by Dana Corporation, where we pack and ship parts. When I took the job, I was told by other employees that we had never had any kind of a push for a union before in our plant in anyone's memory.

All that changed in October of 2007, when the United Auto Workers began a card check organizing drive at our plant. That fall, the UAW official came to our plant, explaining that he had cards for us to sign to unionize our plant, and telling us the reasons that he thought we should sign the cards.

The union official, during our first meeting, was so brazen, and constantly, without hesitation, cursed and used foul language during this initial presentation to us. Normally, this would not be unusual in that kind of an environment, but in our plant we are like 80 percent—I hate to use "elderly" because they are about my age, but female.

And they were clearly offended by these claims, so much so that they brought new officials in after that and we never saw him again. Despite the unpleasant beginning, I was initially inclined to support the unionization effort as a union member from the previous job.

As time went by, though, I clearly became extremely put off by their general approach and strategies that officials—the UAW officials—and grew skeptical of their claims. In the end, the experience taught me something all too many workers have learned first-hand. Union organizers have the uncanny ability to harass, misinform, mislead, manipulate in the pursuit of their goals.

On a database, my coworkers and I found the UAW officials waiting in our break room. They would approach during out lunch breaks. They would even follow us out to our vehicles before and after work, some even to our homes, all on the order to give us their side of things and inform of so-called benefits their representation would bring us.

They would say that they would start negotiating the moment the cards were signed, and that our small group would make about the same as the workers in a much larger Fort Wayne plant. To many of us, that did not seem possible because we were making $12 an hour, and in the Fort Wayne plant they were making over $21 an hour.

Of course, much of what they told us proved to be false. But it is fair to say that we were not lacking information of the union offi-

cials. What neither my coworkers nor I knew at the time was, the company was under a so-called "neutrality agreement." This meant that the only information they were allowed to receive was the side of the UAW.

Honestly, my coworkers and I would have appreciated the views of our employer in hearing the other side. After all, this is an important decision. In order to make the decision that would be right for ourselves and our families, we needed to all be—all the information that we could get.

Because we were not hearing from the opposing points of view from our employer, I took it upon myself to research and verify everything that I could. The period of harassment that my coworkers endured at the hands of the UAW officials were intolerable. Under proposed rules, I would have been subjected to even more intimidation and harassment and mistruths.

You see, if these rules go into effect, union officials would have access to workers' personal information. They would have not only our names, home addresses, but personal email addresses and home telephone numbers, as well.

As it was, I was combating the falsehoods of the UAW officials—would have put nearly an insurmountable task had it not been for the help I found in the National Right to Work Foundation's Web site. My coworkers and I were ultimately able to reject the unwanted representation of the UAW.

We came to the decision, and the benefit, only after looking at all the facts and only because we were afforded the time to do so and have the secret ballot election. If the NLRB's recommendation for union elections goes into effect, even if our workers enjoy the benefit of hearing points of view, we will be denied the ability to fully research the information needed to come up with a good decision that is best for them.

In reality, I understand these rules in addition burden the already busy workers to prohibit from making informed decision. Mr. Chairman, members of the committee, the fact that the National Labor Relations Board has gone far beyond its authority in serving big labor's agenda, Congress must stop this runaway NLRB and its assaults on workers and business in this country.

Thank you.

[The statement of Mr. Getts follows:]

Prepared Statement of Larry Getts, Employee of Dana Corporation

Mr. Chairman, members of the House Committee on Education and the Workforce, thank you for the opportunity to speak before you today on the National Labor Relations Board's "Ambush Election" proposal, and allowing me to share my experience with union officials' during their effort to unionize my place of work.

Based on my experience with union organizers, it is clear to me that the rule changes the National Labor Relations Board has proposed would only further the interests of union officials while undermining those of workers.

Let me start by telling you that I am a former union member myself. Currently, I work at a small plant in Fort Wayne, Indiana that is owned by Dana Corp, where we pack and ship auto parts.

When I took the job, I had been told by other employees that there had never been any push to form a union in our plant in anyone's memory.

All that changed in October of 2007 when the United Auto Workers began a "Card Check" organizing drive at our plant.

That fall a UAW official came to the plant explaining that he had cards for us to sign that would unionize our plant, and telling us all the reasons he thought we should sign the cards.

This union official was so brazen as to constantly and without hesitation curse throughout his presentation. This might not sound outrageous to some people, however you must understand that approximately 80% of the workforce at the plant is elderly women—and they were clearly offended.

Despite this unpleasant beginning, I was initially inclined to support the unionization effort as I'd been a union member at a previous job. As time went by however, I became extremely put off by the general approach of the UAW officials and grew increasingly skeptical of their claims.

In the end, the experience taught me something all too many workers have learned first hand: Union organizers have an uncanny ability to harass, misinform, mislead and manipulate in pursuit of their goals.

On a daily basis my coworkers and I would find UAW officials waiting in our break room. They'd approach us during our lunch breaks. They would even follow us to our vehicles at the end of the day and some of us even to our homes—all in order to give us their side of things and inform us of the so-called "benefits" their "representation" would bring.

They would say that they'd start negotiating the moment the cards were signed and that our small shop would make the same as the workers in the other—much larger—Fort Wayne plant.

To many of us, that didn't seem plausible because we were making twelve dollars an hour, and in Fort Wayne they were making twenty-one dollars an hour.

Of course, much of what they told us proved to be false, but it's fair to say we weren't lacking information from the union officials.

What neither my coworkers, nor I knew at the time, was that the company was under a so-called "neutrality agreement." This meant that the only information we were allowed to receive, the only side of the story we were told, was that of the UAW.

Honestly, my coworkers and I would have appreciated hearing the views of our employer. After all, this was an important decision. In order to make a decision that would be right for ourselves and our families, we needed all the information we could get.

Because we weren't hearing any opposing points of view from our employer, I took it upon myself to research and verify everything I could.

The period of harassment my coworkers and I endured at the hands of UAW officials was intolerable. But, under the proposed rules, we would have been subjected to even more intimidation, harassment and mistruths.

You see, if these rules go into effect, union officials would have access to workers' personal information. They'd have not only our names and home addresses, but personal email addresses and home telephone numbers as well.

As it was, combating the falsehoods of UAW officials would have been a nearly insurmountable task, had it not been for the help I found through the National Right to Work Foundation's website.

My coworkers and I were ultimately able to reject the unwanted "representation" of the UAW. We came to that decision after we had the benefit of looking at all the facts—and only because we were afforded the time to do so.

If the NLRB's recommendations for union elections go into effect, even workers who enjoy the benefit of hearing both points of view would be denied the ability to fully research the information needed to make the decision that's best for them.

In reality, under these rules, the additional burden on already busy workers will prohibit them from making an informed decision—especially where there is an absence of information from employers, as was the case in my experience.

These rule changes are aimed at furthering the interests of Big Labor at the expense of workers' ability to make a fully informed decision on an important matter.

They are intended only to make it easier for union officials to harass and force workers like myself into joining their union, into paying dues and increasing the union bosses' power.

Mr. Chairman, and members of the Committee, the fact is the National Labor Relations Board has gone far beyond its authority in serving Big Labor's agenda. Congress must stop this runaway NLRB and its assaults on workers and businesses in this country.

Chairman KLINE. Thank you, sir.

Dr. Dau-Schmidt, you are recognized.

STATEMENT OF KENNETH DAU–SCHMIDT, PROFESSOR, INDIANA UNIVERSITY, MAURER SCHOOL OF LAW

Mr. DAU-SCHMIDT. Thank you. I thank you for the invitation to speak today before the National Labor Relations Board, or before the committee, about the board's proposed rules for conducting 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 30 years now.

And as an economist, I have also studied labor markets and the impacts of union and collective bargaining on the distribution of wealth, the health of the middle class, and the general health of the U.S. economy. And I look forward to sharing what I know about these subjects with you today.

It is my strong opinion that the board's proposed rules represent a model of agency administration of federal law. Under the National Labor Relations Act, the board is charged with administering the act so as to give employees a free and fair say as to whether they want to be represented by a union.

In order to meet this charge, and in order to save taxpayers money, the board must develop fair and efficient rules for conducting employee elections. In this case, the board has done just that. The board's proposal seeks to update its antiquainted rules on election procedures to reflect modern administrative and judicial procedures and methods of communication accepted by administrative agencies and courts across the country.

To this end, the board has developed rules for the timely and orderly development of issues between the parties, developed rules to allow the parties and the board to narrow the issues and deal only with genuine issues of material fact, develop rules which unify the appeal process into a single discretionary appeals process, done away with unnecessary waiting periods, and updated the methods of service and notice to include modern electronic means of communication.

The rules do nothing to limit employers' rights to communicate with their employees, or the many means by which they can do that now. In developing these proposed rules, the board's actions have not been rushed or ill-considered. The proposals draw on elements of the board's practices that have previously been used on a trial basis in some regions, and other practices that are already included in the agency's case-handling manual.

Thus, like any good administrator, either in the private or public sector, the board's rules draw on past experience to develop a new, simplified, and efficient procedure. Moreover, even though the board is not required to by law, it has voluntarily undertaken a 60-day notice and comment period on the rules and committed to a two-day public hearing.

People talk about this being developed in secret. It does not seem like much of a secret to all of us here in the room today talking about it, does it? Through this process, the board will take input from the parties as to how better to improve the proposals, and perhaps change them. I comment the board for a job well done.

But the board's rules accomplish much more than just fairness and efficiency. They also actively promote respect for the law and integrity for board processes. They do this by eliminating unneces-

sary opportunities for delay in the board's procedures that some employers, advised by union busting or, as they like to be called, "union avoidance specialists," used to unfairly delay the board's election process to discourage employee organizations.

Professional union avoidance firms, retained for the purposes of keeping employer union-free, promote delay and coercion as a way of controlling the election process. They seek to impose on the employees the employer's will not to have the workplace organized. And thus they undermine the free choice, the employees' free choice, through elections.

Consultants commonly counsel employers to challenge everything in order to delay the election and buy more time to engage in anti-union campaigning. Mere delay can sometimes deter employees from freely choosing union, but also these anti-union campaigns include illegal acts such as discriminatory discharges, illegal interrogations, and unlawful intimidation.

Now by streamlining and modernizing the election process, the board will eliminate unnecessary opportunities for delay in the election process and preclude opportunities for coercion and lawbreaking. Thus, the streamline process has helped limit illegal behavior and promote respect for board's elections.

Now, some here have argued that the board's proposed rules will increase employee organization and cost the United States jobs. Although I do not think the board had that in mind, they certainly did not draft these procedures to try to increase organization. These people may well be right that if the employees get the right to freely choose as to whether or not to be in a union, many of them will decide to do so.

But I think these people are very wrong about the impact of union organization on the American economy. The American economy is stalled right now in no small part because of the collapse of the middle class. Businesses are making record profits, and enjoy access to cheap capital. But they are waiting on the sidelines to hire workers until they know whether the demand for their goods and services will be there.

In every recovery in modern times, the American economy has been led out of recession by the middle class consumption and government stimulus. But the middle class right now is in trouble. They have suffered decades of stagnant wages and are mortgaged to the hilt just to try to keep afloat.

We need to find ways to increase the share of income going to the middle class so that they can once again serve as the foundation for our economy. Unions are a good way to do this. When unions are strong, wages are high and a larger share of the national wealth goes to the middle class.

High wages encourage job training and capital investment, which causes the economy to spiral up, not to spiral down. If an employer organizes businesses in a low-wage economy they invest less capital and training in their workers, and you end up with low-wage jobs.

If they organize a business in a high-wage economy they invest more in capital and employee training, and you get high-wage jobs. Why would we want our children to try to compete with the Chinese on low wages and low job security when, with training invest-

ment, they could instead compete with the Germans and Japanese and provide high-quality goods and services that developing countries want to buy.

I see my time is up. I am sorry for going over. Thanks for your attention.

[The statement of Mr. Dau-Schmidt follows:]

Prepared Statement of Kenneth G. Dau-Schmidt, JD, Ph.D., Willard and Margaret Carr Professor of Labor and Employment Law, Indiana University Maurer School of Law

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 ap-

peal 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 postelection 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 poselection 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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Chairman KLINE. Thank you, sir.

Mr. Carew, you are recognized for 5 minutes.

STATEMENT OF JOHN CAREW, PRESIDENT, CAREW CONCRETE AND SUPPLY COMPANY, TESTIFYING ON BEHALF OF HIMSELF AND THE NATIONAL READY MIXED CONCRETE ASSOCIATION

Mr. CAREW. Good morning. Chairman Kline, Ranking Member Miller, and other members of the committee, thank you for this opportunity to share my views on the new union election rules being considered by the NLRB.

My name is John Carew. I am president of Carew Concrete, a second-generation, family-owned ready mix concrete company founded in 1977 and based out of Appleton, Wisconsin. Before becoming president of Carew Concrete 10 years ago I successfully worked my way up through the ranks of my family's business, originally starting out as a yard laborer and, later, driving concrete trucks.

We currently employ 170 employees spread throughout 13 Ready Mix concrete and aggregate plants. We operate a fleet of over 150 vehicles, and deliver more than 90,000 yards of concrete annually. I am also here on behalf of the National Ready Mix Concrete Association. Founded in 1930, NRMCA represents more than 1,300 member companies and their subsidiaries that employ more than 125,000 American workers who manufacture and deliver ready mix concrete.

The association represents national and multinational companies that operate in every congressional district in the United States. The industry is currently estimated to include more than 65,000 ready mix concrete trucks. As with most small businesses, owning and operating a ready mix concrete company means that you are responsible for everything, whether it is ordering inventory, hiring employees, meeting environmental and safety regulations, dealing with an array of government mandates and, when appropriate, even educating employees about union organizing decisions, and their rights.

As someone that has experienced a union organizing drive, I would like to share my story and how the proposed rule would have hurt and complicated the process. In mid-September 1999, during one of our busiest times of the year, we received word that a union was attempting to organize our employees. We consulted with an attorney, who advised us to seek legal counsel specific to union organizing drives.

Being a small business without in-house labor counsel, and with limited resources, we were advised to hire a labor attorney, although the firm was located over 100 miles away. From that point on until the election took place 42 days later we were very busy. Countering misleading or inaccurate union claims and educating every employee became an around the clock job.

To accomplish this, we had to educate all the company supervisors and managers in case they were approached by confused employees. We also had to create specific responses to specific union claims and relay them back to the employees. This required utilizing the bulk of company management's resources. And at one point, we were even forced to shut down offices, certain offices, in order to respond to many onerous union claims.

From the time we received the election petition until the actual election we ran down the clock in the allotted time in order to reach plant and communicate with every employee. Employees were commonly told inaccurate statements, and received false promises by union agents. Specifically, employees received mail containing wrong and misleading information on striking, health care, wages, and pensions.

Employees were even inaccurately told that they would receive increased wages similar to cities with higher wages nearly 100 miles away. Our response to hand out fax sheets about pros and cons of joining a collective bargaining unit and exactly what, if anything, the union could promise. We would send out blast alerts to each of our plant locations, where they were then posted at each site.

The alerts responded to specific information employees had been told, or read in documents they received in the mail. We felt it was necessary to supply these educational materials in order to give our employees more information so that they could make an educated decision.

The process was long and arduous. But, thankfully, we were allowed the amount of time we had so we could hire representation, identify areas of concern with the election, draft and file appropriate documentation, respond to union rhetoric, and communicate with our employees.

Due to this process, Carew Concrete was able to successfully and legally respond to, and overcome the union's actions, which resulted in the union losing the election by a two-to-one margin. I take pride in knowing that still today Carew Concrete is a healthy businesses, with 170 well-paid, happy employees.

If Carew Concrete's union organizing experience had been subject to the changes contained in the proposed rule it would have been dramatically different. Under the new rule, the shortened time frame would not have allowed us to hire an attorney, accurately identify all the issues needing consideration, draft our statement of

position, prepare a preliminary voter list, or discover relevant evidence.

The flexibility in the current system allows companies to accurately and thoroughly assess the process, actions, and options associated with petition of election, and thus it should be kept intact. Carew Concrete and NRMCA support employee rights to make informed decisions about their employment future.

We also believe in protecting the employer's right to be part of the process. Creating a collective bargaining unit should not be a snap decision. Carew Concrete and NRMCA urge the NLRB to refrain from issuing a final issue on these proposed changes.

Thank you for allowing me to testify today.

[The statement of Mr. Carew follows:]

Prepared Statement of John Carew, President, Carew Concrete & Supply Co.

Chairman Kline, Ranking Member Miller, and other members of the committee, thank you for this opportunity to share my views on the proposed new union election rules currently being considered by the National Labor Relations Board (NLRB).

My name is John Carew, I'm President of Carew Concrete & Supply Co., a second-generation, family owned ready mixed concrete company founded in 1977 and based out of Appleton, Wisconsin. Before becoming President of Carew Concrete & Supply Co. ten years ago, I successfully worked my way up through the ranks of my family's business originally starting out as a yard laborer and later driving concrete mixer trucks. We currently employ 170 employees spread throughout thirteen ready mixed concrete and aggregate plants. We operate a fleet of over 150 vehicles, and deliver more than 90,000 yards of concrete annually.

I'm also here today testifying on behalf of the National Ready Mixed Concrete Association (NRMCA). Founded in 1930, NRMCA represents more than 1,300 member companies and their subsidiaries that employ more than 125,000 American workers who manufacture and deliver ready mixed concrete. The Association represents both national and multinational companies that operate in every congressional district in the United States. The industry is currently estimated to include more than 65,000 ready mixed concrete trucks.

The current makeup of the ready mixed concrete industry is top-heavy; meaning that a large majority of the ready mixed concrete produced in the United States comes from a small number of large, vertically integrated companies. These companies amount to nearly fifteen percent of the ready mixed concrete companies in the United States. The other roughly eighty-five percent of the industry is made up of small businesses similar to Carew Concrete & Supply Co. As with most small businesses, owning and operating a ready mixed concrete company means that you are responsible for everything whether it's ordering inventory, hiring employees, meeting environmental and safety regulations, dealing with an array of mandates from federal, state and local governments, and when appropriate even unilaterally educating employees about their rights and informing them about union organizing decisions.

As someone that has experienced an organizing drive I would like to share my story, and how the proposed rule would have hurt and complicated the process.

In mid-September of 1999, during one of our busiest times of the year, out of the blue we received word that a union was attempting to organize our entire employee base. Shortly thereafter, we consulted with an attorney who advised us to seek legal counsel specific to union organizing drives. Being a small business without in-house labor counsel and with limited resources it wasn't until about a week later when we finally were able to hire an attorney, although the firm was located 100 miles away in Madison. From that point on, until the election took place 42 days later in October, saying we were busy would be an understatement.

Due to the high number of employees, the thirteen employment sites, and the fact that the organizing drive was for the entire employment base, not just a certain set of employees, countering false union claims and educating every employee when they were on-duty was an around the clock job. To accomplish all of this the first step was to educate all of the company's supervisors and managers, in case they too were approached by a confused employees with questions. Next we had to create specific responses to specific union claims and relay them back to the employees.

This required utilizing the bulk of the company's management resources, and at one point we were even forced to temporarily shut down certain offices in order to respond to the many onerous union claims.

From the time we received the election petition, up until the actual election, we ran down the clock on the allotted time to reach each concrete plant and communicate with every employee about the organizing drive. Employees were commonly told inaccurate statements, and received false promises by union agents. Specifically, employees would receive mail containing not enough information, misinformation, and misleading information on issues such as striking, health care insurance, wages and pensions. At times employees were inaccurately told they would receive increased wages, similar to cities with higher wages nearly 100 miles away. Our response to this, in coordination with our new attorney and in accordance with the law, was to draft and hand out "fact sheets" about the pros and cons of joining a collective bargaining unit, and exactly what, if anything, the union could promise. We sent out numerous blast alerts to each of our plant locations which would then be posted at each site. The alerts, after we cleared them with our attorney, responded to specific information employees had been told or read in documents they had received in the mail. We felt it was necessary to supply these educational materials in order to give our employees more information so they would be able to make an accurate and educated decision.

Although the process was long, arduous, and aggravating, the fact that we were allowed and needed that time to hire representation, identify the areas of concern with the election, draft and file all appropriate documentation, respond to union rhetoric, and communicate with our employees, was essential. Due to the process afforded to Carew Concrete & Supply Co., we were able to successfully, and legally, respond to and overcome the union's actions, which resulted in the union losing the election by a 2 to 1 margin. I take pride in knowing that still today Carew Concrete & Supply Co. is a healthy business with 170 well-paid, happy employees. Like many small, family-owned businesses our employees have become an extension of our family. This relationship is the backbone of our thirty-four years of success.

Carew Concrete & Supply Co. and NRMCA support employees' right to make informed decisions collectively about their employment future, however we believe the newly proposed union election rules proposed by the NLRB do not support this same principle.

If Carew Concrete & Supply Co.'s union organizing experience had been subject to the changes contained in the proposed rule it would have been dramatically different. In particular, the overall time frame allowed and needed between the notice of election and the execution of the election was critical to accurately inform our employees about the issues. The time frame allowed the company to fully assess and subsequently hire the right legal representation for our situation. Most small ready mixed concrete companies and small companies in general, do not know what they can and cannot say to their employees about or during a union organizing drive. When an employer receives an election petition, which is often when they first become aware that their employees are facing a union organizing election, it frequently takes longer than seven days to find and hire a consultant to advise them on their rights, abilities, and the complexity of union election regulations. Under the new rule the shortened time frame does not even take into account the time it takes to accurately identify all the issues needing consideration, the drafting of the employer's statement of position, preliminary voter list, and discovering relevant evidence. The flexibility in the current system allows companies to accurately and thoroughly assess the process, actions, and options associated with a petition of election and thus, it should be kept intact.

Already, unions have the advantage of subtly working behind the scenes for months without an employer's knowledge to persuade employees to unionize. It is only fair that an employer be allowed the current time frame to accurately communicate with employees. Employers are already at a disadvantage and under this new rule would be disadvantaged even further. Drastically limiting any amount of employee/employer communication brushes too close to infringing on the freedom of speech rights of both parties.

Just as Carew Concrete & Supply Co. and NRMCA support employees' right to make informed decisions collectively about their employment future, we also believe in protecting an employer's right to be a part of that process and to have the ability to honestly and effectively communicate an employer's position to employees without obstruction.

Carew Concrete & Supply Co. and NRMCA urge the NLRB to refrain from issuing a final rule on these proposed changes. Employees deciding their employment future should not be a snap decision. It is only fair that before a group of employees de-

cides on their collective bargaining rights that they receive information from both union and their employer about what unionizing really achieves.

Thank you again for allowing me to testify today. I would be happy to answer any questions the committee may have.

Chairman KLINE. Thank you, sir.

Mr. Lotito, you are recognized.

STATEMENT OF MICHAEL J. LOTITO, ATTORNEY, JACKSON LEWIS, LLP

Mr. LOTITO. Thank you, Mr. Chairman, Ranking Member Miller, members of the committee. It is an honor to be with you today. Much has already been said by my fellow witnesses. And I think my written testimony speaks for itself so I will try to be concise.

I would like to just comment on three points. First, will the proposed rule further our national labor policy of permitting employees to choose whether they wish to be represented by a union or not, based upon fact? Second, while the board's MPRM claims to minimize litigation, will it in actuality do so? And third, should the Congress consider redefining how much responsibility and authority the board should have delegated to it, especially when the board is not at full strength with five Senate-approved members?

Regarding the right to choose, in the 1920s and 1940s my father was happy to be a member of the union. He had no other employment laws to protect him. Companies did not think that employees were their most important asset, and the union provided a value proposition to him at Todd Shipyard in New York.

In the 1950s and the 1960s, my father's interest in union representation declined. He told my mother that he had prepared for one strike too many. So he finished his working career as a hardware salesman for a mom and pop store in Levittown, Long Island. So work, and unions, went hand-in-hand in my home.

And it seemed natural to me to want to become a labor lawyer when I entered law school, and go on and represent unions and the worker man and women. So when I graduated in 1974, I could not get a job. Rich Trumka and I were in the same class at Villanova, so I probably should have asked Rich for a position then. I doubt that he would hire me today.

So I wound up working on the management side because, quite frankly, I had to repay student loans. But I found out very quickly that I was really on the same side because I was helping contribute to a positive workplace environment. Because our clients were asking for guidance on how to do the quote, unquote—"right thing." How to ensure that people were quote, unquote—"being treated fairly."

How to train management to respect the rights of employees and, in a union situation, how best to communicate with employees legally and factually to help decide if they wanted a union. Today, with roughly 93 percent of employees in the private sector dealing directly with their employer, the vast majority of the people in the workplace really have no idea how unions operate, what union rules are, what happens if a union is selected, and other basic information about the unions' track record.

If the employer does not provide that information, the employees will wind up making a decision without critical data. The board admits as much in its other notice of proposed rulemaking regarding a new mandated poster which, if enacted, will impact some 6 million employers. It is worth noting that we have an experience with employer neutrality in our history.

From 1935 to 1947, the law did not permit employers to communicate about unions with their employees. And I submit that this relatively brief experiment with neutrality led to a necessary correction when, in 1947, 8-C was inserted into the statute. Unions, quite frankly, have been in mourning ever since.

So while the notice of proposed rulemaking deals with many technical issues in the election process, at its core this proposal is an attempt to take us back without, in my view, congressional action, to the state of the law as it existed from 1935 to 1947. Congress has the right to do that, but the board does not.

How do employers communicate? In a variety of ways, but primarily through first-line supervisors. Determining supervisory status under section 211 of the statute is an extremely complex and difficult legal analysis. Knowing whether the person is a supervisor or an employee is about as basic as you can get.

Which gives rise to my second point, and that is the proposal that the board has to delay the holding of the hearing until after the election. Based upon this proposal, almost all elections are going to be conducted without clear understanding as to who is an employee versus who is a supervisor.

That, in my view, is going to lead to additional litigation post the election. It is true that, under this proposal, elections will take place in a shorter period of time. But I believe that as a result the lack of clarity, especially with respect to supervisory status and other issues, that we are going to wind up having more litigation post election than we do now.

Which gets me to my last point. I think that the time is now for the Congress to review section 9-C of the statute. I think the Congress should consider an amendment which defines an appropriate hearing as resolving issues before an election. The rulemaking process, in my view, should be held in abeyance until then.

And if this Congress wants to say that elections should be held within a set number of days after the filings of petition, absent extraordinary circumstances you would get my vote. At least I would know what I was voting for. Employees should be entitled to nothing less.

Thank you very much. Be happy to answer any of your questions.

[The statement of Mr. Lotito follows:]

Prepared Statement of Michael J. Lotito, Partner, Jackson Lewis LLP

Good morning, Mr. Chairman and Members of the Education and the Workforce Committee. I would like to thank Chairman Kline and Members of the Committee for inviting me to testify here today.

Counseling Employers to Communicate Openly and Honestly with their Employees

My name is Michael J. Lotito. I am a member of the nationwide labor and employment law firm of Jackson Lewis LLP. The Law Firm represents thousands of employers in a wide array of matters, including many in proceedings before the National Labor Relations Board (NLRB or the Board). I am a partner in the firm's San Francisco, California, office. I have been practicing labor law for thirty-seven years.

I have represented numerous employers in representation cases before the NLRB and have counseled many others in connection with union petitions for representation elections and related Board proceedings.

Nearly 40 years ago, the founding partners of our Firm (then known as Jackson, Lewis, Schnitzler & Krupman), Louis Jackson and Robert Lewis, authored "Winning NLRB Elections: Management's Strategy and Preventive Programs" (Practising Law Institute: New York, 1972), a guide for employers' counsel on responding lawfully to union organizing. It was unique in its time and would go through several printings and editions. The authors observed that the ability of employers to communicate with their employees was central to NLRB elections. In a chapter entitled, "The Employer Speaks Up," they wrote (at page 37):

By now, a significant aspect of union organizing may have become apparent. In most cases, the employee has not had the benefit of the employer's point of view before signing a [union authorization] card. Yet, if industrial democracy is to be meaningful, the choice which the employee must make—between individual and collective representation—should be an informed one.

Only after hearing both sides, can employees be reasonably certain that their decision is the correct one. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market * * *" [quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)]. The obligation of giving employees the other side of the story falls upon the employer.

Time has not diminished the truth of these words. Nevertheless, the Nation is presented today with a proposal from a majority of the Members of the National Labor Relations Board that, if adopted, would largely preclude employers from speaking to employees about unionization when it matters most—in the period leading up to an NLRB election.

The Proposed Rule Undermines Employees' Rights to Information

Workers would have to make decisions on representation based only on what, if anything, the union or fellow workers told them. Such information would be incomplete at best, misleading at worst. Not only that, by deferring resolution of many difficult representation case issues until after an election, if then, the proposal would not only leave employees without critical facts of union representation, but would deny them the right to know at the time they cast their ballots which employees would be included in their collective bargaining unit. This denial of responsibility undermines any stability in labor relations that an election result is intended to confer. I refer to the NLRB's Notice of Proposed Rulemaking, 76 F.R. 36812 (June 22, 2011).

I will not address all the problems raised by the NLRB rulemaking. I will address the overarching postulate of the proposal and why the rulemaking is against our national labor policy celebrating employee free choice. I will also speak to some particularly vexing practical problems arising out of the Board's intention to postpone difficult and perhaps time-consuming decisions until a time when their resolution may have little consequence.

Employers Have An Important Role in NLRB Elections

The Board's proposed rule assumes employers have no role to play in NLRB representation elections. This is the long-held view of one member of the Board who sits without benefit of Senate confirmation. In his opinion, employers should stand aside and keep quiet. That being so, the NLRB reasons, there is no hardship in mandating a "quickie election" perhaps within 10 days of a petition being filed as another member of the Board has suggested recently. That this all but shuts the door on employers' providing critical information to employees about the petitioning union, collective bargaining and potential strikes is of no moment. Of course the Board majority says nothing has really changed with election speech. The technical rules may remain the same * * * there is just no time for the employers to inform their employees.

The NLRA Guarantees Employers' Rights to Communicate with Employees

First, the National Labor Relations Act makes clear employers have an important role to play as part of the union selection process. Section 8(c) of the Act (included in 1947) rejected the concept of "employer neutrality" in NLRB elections. It expressly guarantees employers the right to communicate with workers about union representation and other issues. It says, "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 the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. 159(c). Congress would not have taken pains to end employer neutrality and exempt noncoercive employer speech from arguable viola-

tions if it did not intend employers to exercise that right—and exercise it vigorously. The Supreme Court has recognized as much. In Chamber of Commerce v. Brown, 554 U.S. 60 (2008), the Court wrote:

From one vantage, §8(c) "merely implements the First Amendment," NLRB v. Gissel Packing Co., 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), in that it responded to particular constitutional rulings of the NLRB. See S.Rep. No. 80-105, pt. 2 pp. 23-24 (1947). But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management." Linn v. Plant Guard Workers, 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NRLB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word * * * has been expressly fostered by Congress and approved by the NLRB." Letter Carriers v. Austin, 418 U.S. 264, 272-73, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

Id. at 67-68. Brown is particularly pertinent, for there, the Court was dealing with a state law that also would have restricted employers' (state contractors') right to communicate with employees on unionization. The Court struck it down as preempted by the NLRA. It relied on Section 8(c) to reach that result.

In its proposed rule, the NLRB resurrects the same discredited contention not by withholding funds, but by withholding the time necessary to allow for employees to make an informed choice from all available information.

Workers Need to Hear the Other Side

Second, as the Court's decision in Brown suggests, the employer's guarantee of free speech really is intended to assure that employees are able to hear all points of view before casting their ballots. By depriving employees of views that are likely to be very different from the union's, and information about the union that the union may be reluctant to divulge, the NLRB would impinge on employees' right to make a free and informed choice.

The NLRA in Section 7 safeguards employees' right to reject unionization as well as to embrace it. While Congress gave employees the right "to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," it also gave employees the corollary right "to refrain from any or all such activities." 29 U.S.C. 157.

The Board has long held in a variety of contexts that knowledge is necessary to make an informed choice.

In its background statement to its December 2010 Notice of Proposed Rulemaking (NPRM) mandating a regulation requiring employers to post notices informing their employees of their rights under the NLRA, the Board quoted a commentator who observed: "American workers are largely ignorant of their rights under the NLRA, and this ignorance stands as an obstacle to the effective exercise of such rights. * * * In sum, lack of notice of their rights disempowers employees." Peter D. DeChiara, "The Right to Know: An Argument for Informing Employees of Their Rights under the National Labor Relations Act," 32 Harv. J. on Legis. 431, 433-434 (1995) (footnotes omitted). The Board explained that its intent with the proposed notice posting was "to increase knowledge of the NLRA among employees, to better enable the exercise of rights under the statute, and to promote statutory compliance by employers and unions." NLRB's Notice of Proposed Rulemaking, 75 F.R. 80410 (December 22, 2010). Ironically, the Board on the one hand wants employers to post a notice to educate employees but, on the other hand, wants to do everything it can to minimize such education before an election.

Employers are in a position to supply information needed by employees to weigh the pros and cons of union representation and make a reasoned choice. Cutting off that source of information interferes with the accomplishment of the NLRA's objectives and emasculates Section 8(c) of the Act. Employees need to hear both sides of the story and to evaluate the information for themselves, as the Board has recognized. Under the Board's suggested approach, unions will have unlimited time to engage in organizing and then pick the unit for which the union feels it can prevail in an election. The employer, on the other hand, has virtually no time to respond. The employees are victimized as they are less informed—if truly informed at all.

Problems with Mystery Bargaining Units

Third, the proposed procedural amendments also contribute to the impairment of employee Section 7 rights. Implicit in Section 7 is the right of employees to know

who they are acting in concert with to form a union. But under the Board proposal, employees would not be certain which of their co-workers would share collective representation with them if the union were selected. The Board's proposed rule requires the employer, in particular, to identify any issues it has with the union's petition. These issues frequently involve the scope and composition of the unit—which groups or individuals are eligible for inclusion because they share a community of interest with other petitioned-for employees or are ineligible because they are supervisors or managerial employees, and similar issues.

The NLRB's current rules provide the parties with a right to litigate all the issues before an election is conducted, 29 CFR 102.66, see Barre National, Inc., 316 NLRB 877 (1995), with some limitations, see Bennett Industries, Inc., 313 NLRB 1363 (1994). The proposed rule, however, would severely abridge this right. The NLRB Hearing Officer would determine where the parties were in disagreement and limit evidence to those issues. But if the disagreement concerned the eligibility of employees who did not constitute at least 20 percent of the bargaining unit, the matter could not be litigated pre-election. This exception has the potential for much mischief.

Legal Compliance Will be Difficult if Supervisory Status is not Determined Pre-Election

The supervisory status of many individuals—charge nurses, assistant supervisors, assistant managers, team leaders, and many others—may be in issue, but fail to meet the 20 percent threshold for consideration. Other individuals and groups whose eligibility status is in doubt also will fail to make the cut. Singly and together, however, they may count for much in any prospective bargaining unit. Employees will be asked to vote on collective bargaining in a unit "to be named later."

Employers communicate with employees most often through front line supervisors. But how does the employer identify these supervisors when their status is contested and the NLRB refuses to make a decision before the election? If the employer determines incorrectly who are supervisors, and treats them as such, and the union loses the election, the employer risks objections to the election (which, if sustained, can result in a new election), unfair labor practices for interfering with the rights of employees, and possibly, sanctions under the Labor-Management Reporting and Disclosure Act (LMRDA) for engaging in "persuader activities" regarding these individuals. But if the employer treats these individuals as rank and file employees, and it turns out they are supervisors, it may also face objections and unfair labor practices on account of their participation in union meetings or appearance at the polling place during balloting. Either way, the employer is at risk. How does the employer exercise its Section 8(c) right to communicate when it matters most? Faced with a Board that evades its decision-making responsibility, the answer is: with great difficulty.

The chilling effect is manifest. Employers will be inhibited from engaging in the vigorous debate the NLRA envisions and depends upon. Employees will be the worse off. They will have to vote without benefit of the core Section 7 right of access to needed information and argument from their employer. Furthermore, because of the uncertainty surrounding the disputed individuals' roles, the employer may forego training these workers on avoiding unfair labor practices and objectionable conduct. If they threaten, interrogate, make promises to or surveil unit employees, their misconduct as supervisors may be imputed to the employer, even if the company was entirely unaware it was taking place. While the employer faces further Board proceedings, the rights of employees will have been compromised unnecessarily by supervisors who were uneducated and untrained in Board law.

Beyond this, there remains the quandary employees face in voting on representation when they cannot tell who will share the bargaining unit with them. Can employees make a rational, informed choice on collective representation when the unit is indeterminate, and may not be decided for months after the election, if at all? I think not. The composition of a bargaining unit is a weighty factor in employee voting decisions in NLRB elections; employees often choose or reject representation based on who will be with them. Unit scope and composition may also influence a union's interest in representing employees. Frankly, I fail to see how employees may be expected to make the choices section 7 affords them on collective representation, or how the Board can comply with its responsibility under section 9, in this state of affairs.

The Board suggests the parties might work these issues out in first-contract negotiations after the union prevails in the election and is certified. This is far too Pollyannaish for my taste. Statutory rights cannot be treated so lightly. Even if the Board can delegate (slough off, might be a better term) its statutory responsibilities to private parties, which we doubt, these unresolved issues over groups and individ-

uals are far more likely to lead to further discord, stalled negotiations and agency proceedings than dissolve in the comforting embrace of labor-management amicability.

The proposed rule sows the seeds for further organizing in the event the current union attempt is unsuccessful and might impose an "easement" on employer electronic communications systems. It requires employers, before and after the pre-election hearing (beginning only 1 week after the petition is filed), to provide detailed information regarding the identities and contact information, for all employees who would be (or might be) covered by the petitioned-for unit, or any unit the employer suggests as an alternative. The post-hearing requirement that the employer provide the necessary information within 2 days after the Regional Director issues a decision and direction of election includes e-mail addresses. We find it especially worrisome. The proposal is unclear whether the Board is referring only to employees' private e-mail addresses or their business e-mail addresses, as well. If the latter, the rule would represent an unexplained retrenchment from the NLRB's decision in Register Guard, 351 NLRB 1110 (2007), enforced in part and remanded in part, 571 F.3d 53 (D.C. Cir. 2009), where the agency held an employer need not permit the use of its private e-mail system for union-related activity.

This sets the stage for further problems. Can the union send e-mails during employees' work time? How often can they access the e-mail system? How many e-mails can they send? What kind of e-mails can they send? Will they include lengthy attachments? Do they include videos? What if they contain offensive content? What protection will the employer be afforded against viruses transmitted by the union, interference with normal business traffic, or malicious attempts to crash the system? Also, what safeguards can the Board offer to make sure that a union that loses the election will not avail itself of e-mail addresses to continue to communicate with employees—an action that very well could run afoul of Register Guard? The Board may yet consider this issue, among others, for which it has invited comment.

Tradition and Prudent Judgment Counsel Caution While Board Membership is in Flux

Board Chairman Wilma Liebman has cautioned elsewhere that Board Members serving interim appointments (such as Member Craig Becker) and those approaching the end of their term of office (as is the Chairman herself), should be wary of making significant changes in the law made by earlier Boards. We note, too, that one seat on the Board already is vacant. We think the Board would be wise to heed the Chairman's advice, about the proposal generally. The panel should not advance such a major change in the Board's administration of Section 9(c)(1)and its attendant de facto amendments to Section 9, Section 7 and Section 8(c) with the NLRB as presently constituted. If and when a full Board consisting of confirmed members determines change is needed and those changes comply with the Board's Section 6 rule making authority rather than usurp the prerogative of the legislature, that will be time enough. That the current proposal would work changes not unlike those Congress refused to approve in the ill-named Employee Free Choice Act, makes forbearance all the more compelling.

Labor Department Proposal Also Targets Employer Speech

The Board's proposal does not appear in isolation. One day before the NLRB published its proposed rules in the Federal Register, the Department of Labor issued it proposed regulations for revamping its "advice" exception to the LMRDA. 76 F.R. 36178 (June 21, 2011). Those proposed rules would define much essential legal advice an attorney renders to an employer-client in an election context (to avoid interfering with employee rights), and many directions an employer gives to its supervisors about the election issues, as "persuader activity" requiring compliance with the financial reporting requirements of LMRDA. While the Labor Department's action is not the subject of today's hearing, the NLRB and Labor Department proposals, if adopted, would effectively nullify Section 8(c).

The Proposed Rule Purports to Solve Problems that do not Exist

The Board justifies its proposed rule changes by saying they "are designed to fix flaws in the Board's current procedures that build in unnecessary delays, allow wasteful litigation, and fail to take advantage of modern communications technologies." The Board's arguments, however, make sense only if one starts with the proposition that the Board's role is to facilitate the certification of unions, rather than to vindicate employee free choice by an informed electorate in secret ballot elections.

That the parties cannot predict with certainty when a pre- or post-election hearing will take place, because practices vary by Region, is not a major problem. That the Board has lacked discovery, such as that available in the federal courts blinks

at the fact that the Board has consistently spurned efforts to apply the Federal Rules of Civil Procedure to its proceedings; and in any event, nowhere in federal court practice is complete discovery and refinement of issues required routinely within seven (7) days after a complaint is filed, upon pain of waiver and preclusion!

The Board also scores pre-election litigation over voter-eligibility issues that are "unnecessary" and may not affect the outcome of the election. The Board says parties should wait until the election is over, then worry about them. But as we have shown above, the Board's procedural "simplification" is ill-considered and will do more harm than good to the protection of employee Section 7 rights. Kicking the can of unresolved issues down the road in the expectation it will disappear down a storm drain is no way to conduct agency business.

Providing lists of voters by name before an election is unnecessary to the identification and resolution of eligibility issues; the proposal merely facilitates further organizing by unions, during the same campaign or in a later one. The elimination of pre-election Board review of regional determinations permits uncertainty to persist through the balloting, and fosters contested results. Respect for Board elections will suffer. It is far better to promote certainty than uncertainty. Employers may be pressured unfairly to abandon their post-election arguments based on a union victory, even though they are substantial. Further, there will be an inevitable tendency to sustain the outcome of the election, regardless of the merits of post-election contests.

The asserted current 25-30 day "delay" the Board complains of to allow parties to seek review of Regional Director rulings does little harm, since it runs concurrently with the current 17 day period for providing and allowing the union access to the eligibility list and the posting of the pre—election notice. It merely permits the employees, with the unit now generally defined to consider countervailing facts and arguments for union representation.

The agency also criticizes the current arrangement whereby it is required to decide most post-election disputes; instead, it would prefer discretion to deny review of post-election rulings that, one suspects, it would invoke liberally. The Board should not avoid performing necessary duties. Regional officials, unfortunately, have a tendency to sustain the results of elections they have conducted for the understandable, if not wholly satisfactory, reason of avoiding the administrative burden of scheduling another election. Board review is an important safeguard for aggrieved parties. Finally, there is no need to hurry the provision of names and addresses and other information to the Board and union after an election is directed, whether in electronic form or otherwise. Many employers will have difficulty in assembling the necessary information within two (2) days, especially with the uncertainty attending Regional Directors' decisions under the proposal. The Board has not even assured that the current mandatory 10-day period for providing employees with critical information following receipt of an Excelsior list will be continued. The information is intended to foster the communication of information to employees; it is not for the union's benefit or for the union to waive.

Conclusion

All this is calculated to hold elections before employees have an opportunity to think twice or perhaps even once.

The Board's arguments do not persuade. They are, as Abraham Lincoln said of an argument by Senator Stephen Douglas during their 1858 debates, "as thin as the homeopathic soup that was made by boiling the shadow of a pigeon that had starved to death." They do not warrant infringing on employee and employer statutory rights of expression, and the constitutional rights to free speech and assembly undergirding them. They prescribe a remedy for a disease that does not afflict anyone. Board elections already are held promptly. The median time for conducting Board elections is a little over five weeks from the time a petition is filed. Ninety-five percent of all elections are conducted within 56 days. Unions do not appear to be suffering at the current pace. They succeed in nearly two-thirds of all Board elections in which they participate. This data hardly suggests the need for radical change. Further haste serves no good purpose. And it would exact a terrible cost.

The House of Representatives should consider steps to assure that the Board does not lose sight of its responsibilities under the Act. Legislation providing further guidance on Section 9(c) might be appropriate. It could direct the NLRB to resolve all substantial issues affecting the bargaining unit and eligibility prior to a Decision and Direction of Election, specify a minimum period after the filing of a petition before an election may be directed, among other issues. The rights of employees and employers must be safeguarded by preserving the intent of the National Labor Relations Act so that right of employee not only to make a choice but to make an informed choice will be preserved.

Thank you for your consideration. I would be pleased to answer questions any Committee member may have.

Chairman KLINE. Thank you, sir.

I thank all the witnesses. We will move now to members of the committee. Opportunity to ask questions, watching the clock relatively closely for all members. And let us try to limit ourselves to the 5-minute rule.

I will start, Mr. Lotito, kind of where you finished up. Under the current election system, following the petition for an election what kind of contact do you and your clients have with the regional director? How often do meetings lead to compromise or voluntary election? What happens?

Mr. LOTITO. Well, most of the contact, Mr. Chairman, is not with the regional director, of course. It is with the staff, whoever is assigned to handle the particular case. As the board's statistics demonstrate, in the vast majority of time an election arrangement is agreed to, usually to a stipulation for certification upon consent election.

And the parties agree as to when the election is going to take place. My concern, under the proposed rule, is that there is going to be less time to engage in that kind of back-and-forth because if you do not submit a position statement within this very condenses time period that articulates every single conceivable position that the employer might want to make down the road the labor board is going to consider that to be waived.

That is going to mean that there is going to be way more time spent in the early stages in order to try to preserve people's positions down the road as opposed to agreeing to these voluntary election arrangements. I also think that the practical effect, as I alluded to here, is, most of these elections are held—the median is within—30, 38 days.

And the unions are winning 65 percent of these elections. Which, in my view, is a pretty darn good track record. I think having clarity before you go into the election on these type of unit issues is important. And one more point, if I could. It is also very important for the employees to know who they are voting with.

It is important for the employees to know what the unit is going to be. And if the employees do not know that ahead of time, they are going to be voting for a union, for a unit, to be decided upon later. And I think that that interferes with their free choice.

Chairman KLINE. Thank you. As I understand, a large part of your role is to go to your clients and help them understand this as they move through the representation cases. And under the proposed rule, an employer would have 7 days to recognize the requirement to do something, find you or somebody you—I think the example here that Mr. Carew or somebody gave referred to somebody who lives some miles away.

Somebody who not only understands the outline of law and procedure, but understands the law and procedure. And in that 7 days, the employer finds some representation, some expertise, get to know each other, understand what has to be submitted, get submitted. And once submitted, it cannot be changed.

Mr. LOTITO. That is correct, Mr. Chairman. I think it is going to be a challenge. Many even large employers today that have in-house staffs of attorneys do not have attorneys that are skilled in labor law. Quite frankly, in the 35 or so years that I have been doing this, with the decline of unions generally there are not that many people who practice this specific area of the law.

There are many employment lawyers, but there are not very many labor lawyers. Understanding the nuances of taking a case before the labor board is very, very difficult. And I think that this proposal is going to make it even more of a challenge, especially for the smaller employer.

And I think it is going to drive up costs. Because now, we are going to have to file a position statement that is going to have to cover every conceivable issues or else it is going to be waived. And in order to protect the employer under those circumstances, it is going to take more time up front in preparing for that kind of a statement that is going to have to go before the board.

Chairman KLINE. So we have only a few seconds left. Taken together, all these proposed changes—the increased cost that you are talking about because now you have to cover for a whole lot more contingencies since you cannot add or detract once the 7 days are up—when you put all this together, in your opinion what do these changes do?

Will it help stabilize the economy? Will it help create jobs?

Mr. LOTITO. Well, I am not an economist, and I do not know about job creation perhaps as I should. I can say that——

Chairman KLINE. Well, you know about this. Maybe that is enough, sir. Enough to ask.

Mr. LOTITO. I certainly think I know what the labor board procedures are. What I feel comfortable in saying to you, sir, is I believe that this, whether it is intended or not, is going to dramatically increase the number of elections that unions win. Because many employers are going to give up.

And I think many employers are going to wind up going forward in these processes without the benefit of counsel. They are going to be afraid about the increased costs that are going to come about. They are going to go into these elections without knowing who their supervisors are.

Those supervisors are going to make mistakes during the election process. They are going to commit unfair labor practice in objections to the election. And I think we are going to have the antithesis of labor stability.

Chairman KLINE. Thank you, sir.

Mr. Miller?

Mr. MILLER. Thank you very much.

Mr. Dau-Schmidt, let me ask you. We have received some stories from people who have——

Chairman KLINE. Mr. Miller, if I could just comment on that, too, just a minute. I actually think the process does not do anything to change consent elections or anything like that. What it is aimed at is the abuse of the long-term, 124-day, 200-day elections that go on.

When they have come up with this simple unified process for proceeding through the election, and then having one simple process of appeal, they are acting like any other court or administrative

agency in the country, where they start out with what are the issues between these parties and then we try to narrow those issues.

So I could not disagree with Mr. Lotito more on his—his last answer. But go ahead. I am sorry to interrupt.

Mr. MILLER. Where do you find 7 days in the rule?

Mr. DAU–SCHMIDT. The 7 days? The 7 days is the notice after the board gets the employer notice of a hearing, a preelection hearing, they have 7 days in which to prepare for that hearing. And they will have to produce a statement of position at that hearing.

Now, they can—the rules specifically specific that it can actually be done at that hearing, with the board's help, if they need help. But that is where the 7 days comes from.

Mr. MILLER. But not 7 days to an election.

Mr. DAU–SCHMIDT. No. Oh, no. Oh, no.

Mr. MILLER. The suggestion has been, in the press and elsewhere, that somehow from the date that you are on notice from the union that there is 7 days, and then——

Mr. DAU–SCHMIDT. Oh, no. The——

Mr. MILLER [continuing]. The regional director has an unlimited amount of time, in fact.

Mr. DAU–SCHMIDT. Yes. The standard in the proposed rules is practicability. In other words, the election will be held as soon as practicable. And that actually puts more limits on it than is currently under established rules. Under established rules, the board is supposed to consult with the parties and then set the election in its discretion.

And here, under these rules, the board is supposed to consult with the parties and set it as soon as practicable. So there is an affixed schedule as to when the election is going to occur. There are certain minimum guarantees that you get certain days of notice for either the petition or the hearing or the list of voters.

There are some certain minimums. There are less minimums under these rules than under the old rules because there is less hearings and procedures. But the standard is practicability.

Mr. MILLER. But that does go, again, to the idea that the election somehow is going to be held in 7 days, and there is not going to be any opportunity for employers or employees to talk to one another, or to their employers, or to the union representatives.

Mr. DAU–SCHMIDT. It would be impossible to hold an election in 7 days under these procedures unless the employer voluntarily agreed to it.

Mr. MILLER. But that is a——

Mr. DAU–SCHMIDT. That is entirely different, yes.

Mr. MILLER [continuing]. Would almost—you know, most of the time, what you have is some kind of agreement that is reached, the vast majority.

Mr. DAU–SCHMIDT. Right.

Mr. MILLER. So we incite a timeline on how quickly elections are resolved in the past. You are including in that an overwhelming number of voluntary agreements that are reached.

Mr. DAU–SCHMIDT. That is absolutely right.

Mr. MILLER. And so again, this rule, as I read it, is trying to deal with outliers.

Mr. DAU–SCHMIDT. That is right.

Mr. MILLER. You are trying to deal with the outliers, where 4, 5, 6, and 7 years later you are getting determinations——

Mr. DAU–SCHMIDT. Right.

Mr. MILLER [continuing]. Where you have had people protest and appeal on almost every item, and in some cases, fall through or not fall through, but you get the delay that is associated with that.

Mr. DAU–SCHMIDT. Sure.

Mr. MILLER. That is what happened in a few percentages of the——

Mr. DAU–SCHMIDT. And actually, that relates to one of the statistics that has been cited here. Which is that we have heard, I think, from the chairman and also from Mr. Lotito that unions win about two-thirds of these elections. Which is true, but that is of the petitions that actually go to an election.

And when you look at it, actually 35 percent of petitions the unions give up on. And in large part, one of the primary reasons why they give up on it is the employer has delayed it long enough that the employees become frustrated, or there has been enough unfair labor practices committed that they no longer think they can win the election.

So you actually are not including 35 percent of the petitions that are frustrated by strategies of delay and intimidation.

Mr. MILLER. And again, in the reading of this rule, do mandatory meetings between employers and employees continue to be allowed?

Mr. DAU–SCHMIDT. Oh, yes. There is absolutely no limitations on the employer's ability to communicate with their employees like they do currently under law. They can—from day, when they hire those people, or from day one when they start to hear about the union organizing campaign they can—have captive audit meetings. They can——

Mr. MILLER. Can an employee refuse to go to a mandatory meeting?

Mr. DAU–SCHMIDT. Not except upon pain of losing their job. I mean——

Mr. MILLER [continuing]. Sanctions for——

Mr. DAU–SCHMIDT. They can be sanctioned, and fired.

Mr. MILLER. What happens if a—well, they could lose their job——

Mr. DAU–SCHMIDT. Yes.

Mr. MILLER [continuing]. If they refuse to go. Does the union have the ability to call a mandatory meeting?

Mr. DAU–SCHMIDT. No.

Mr. MILLER. Does the union have a right to go onto company property to meet with employees?

Mr. DAU–SCHMIDT. No.

Mr. MILLER. Mr. Getts testified that they were in his lunchroom and elsewhere. That is because the employer agreed to a neutrality agreement. The employer made a decision prior to the campaign for the unionization that led to those agreements, right?

Mr. DAU–SCHMIDT. That is absolutely right.

Mr. MILLER. The employers did not have to give up their right. The employers could have said he would not agree to a neutrality,

and then you would have no right to go onto the property of the employer, under existing law.

Mr. DAU–SCHMIDT. And those agreements would still be in existence under these rules.

Mr. MILLER [continuing]. Does the—well, my time has run out. I will come back on the second round. Thank you.

Chairman KLINE. Thank the gentleman.

Mr. Petri, you are recognized.

Mr. PETRI. Thank you, Mr. Chairman.

Mr. Carew, I noticed you are writing furiously. And I wonder if you have any response or comments you would like to make on the testimony of the other panel members.

Mr. CAREW. Well, thank you this morning for allowing me this opportunity to come in and tell our concerns for our industry, our company, our employees, and my family and, hopefully, my next generation, my kids that they are able to continue this business.

When I was writing things down, there were so many things that I felt were so important to say, and that, hopefully, I can remember them all. This, to us, this process, is vital. It can be life-changing for a small business owner. It has to be done right.

And to us, experiencing this process, it is critical that the employees are fully informed, get all the information they need, to make an educated decision which affects all of us. Our business, we are a ready mix concrete company in Wisconsin. Due to weather conditions, our main months of pouring are May through October, with the emphasis on September and October.

When we received our petition, it was during the busiest month of our year, in September. And our business is spread out. We got 13 locations, and there is about five to ten employees at each plant. And each plant, even though it is smaller, is as important as our largest locations.

And for us, we wanted to make sure we did things right. And I have such great concern about—we are not experts, but we want to do things right. We want to do things legally. We need help. And to rush this process, and still run a business during our busiest time of the year and get out to all of our locations so that our employees can ask questions, ask information.

That it is so important for all this. I am just so concerned that this is—it is too complex. It is not something that needs to be rushed. We went through the process as it currently is, and we feel we needed all the time that we were allowed to do this in a proper manner.

Mr. PETRI. Mr. Schaumber, you have spent your life working on these issues, and you raised some questions about the appropriateness of the Labor Relations Board making a change of this sort as opposed to the Congress. I wonder if you could expand on that, or comment on whether you think—what is the public policy objective that is being striven for by these changes?

Is it for greater opportunity for the workers, or a better outcome? Or what is the purpose of this whole exercise?

Mr. SCHAUMBER. Thank you, Congressman. Let me begin by saying it is not correct to say that there is no fixed time. There is a, if you will, almost a fixed time for elections. Elections will be held within 10 and 21 days. Many elections, the soonest it can be held

is 10 days. And many elections will be 10 to 14 days, depending on the circumstances.

What the rules do is, they provide fixed times for each element prior to the election. So in other words, they provide 7 days there must be a hearing. Two days, the employer must provide the employer's list of witnesses. Two days for the regional director to put up a notice of election.

It is up to the union as to whether or not it will rely, and need to use the excelsior list—that is, the list of employees—which could extend the election period. But that will be a choice for the union. So very much depends how the hearing plays out. But, if you will, it is a very fixed time, and a very short period of time.

I do not think that the proposal is consistent with congressional intent. The language in the statute about an appropriate hearing has, for the last many, many decades, been interpreted by the board to include a hearing which is non-adversarial. A hearing which, both before and during, seeks to develop the issues and develop a full record.

It does not contemplate what the board is imposing now. it also contemplates a hearing at which preelection issues are decided preelection. Mr. Lotito has mentioned some of the difficulties here. But let me mention, for example, one of them. Let us say you had a unit of 100 employees. And the union filed a petition with 30 employees, which is 30 percent of the employees.

And that is an adequate showing of interest. Then you have an election. Ten people in the unit vote. Six vote for the union, and four vote against the union. Then you have the board decide afterwards the eligibility of the employees who are on the eligibility generally of employees in the unit.

The board could conclude that the showing of interest was inadequate. That those employees who signed the cards were, in fact, not eligible. What is the board going to do with that?

Chairman KLINE. The gentleman's time has expired.

Mr. Andrews?

Mr. ANDREWS. Thank you, Mr. Chairman. I would first note the irony of a hearing that is about a fair and equitable decision-making process that has four people on one side of the question and one on the other. Mr. Dau-Schmidt, I do appreciate your efforts.

Let me start with Chairman Schaumber, if I might. I notice that, Mr. Chairman, you characterized the current board, majority's feeling, as unconstrained by the limits of the law in its recent decisions and behavior.

The present board, with its present majority, has achieved unanimity in 83 percent of its decisions. What was the percentage of unanimity in the board that you chaired?

Mr. SCHAUMBER. Ninety percent.

Mr. ANDREWS. I beg to differ. I think it was 67 percent.

Mr. SCHAUMBER. I was not chairman, Congressman, at the time. That was prior to my chairmanship.

Mr. ANDREWS. [Off mike.]

Mr. SCHAUMBER. Chairman Liebman agreed on 90 percent of cases.

Mr. ANDREWS. Excuse me. During the board tenure, where we most recently had Bush appointees to the majority, it was 67 per-

cent. Now, do you think that is evidence that that board majority felt unconstrained by the limits of the law?

Mr. SCHAUMBER. We are talking about two different things, and I—it is like I think you are trying to draw conclusions which are probably not appropriate.

Mr. ANDREWS. No, I am trying the state facts that you are claiming that this board is unconstrained by the limits of the law, yet a huge percent of its decisions are unanimous.

Mr. SCHAUMBER. There is a routine.

Mr. ANDREWS [continuing]. The board with the Bush majority had a smaller percentage of unanimous decisions. Were they unconstrained in making all these controversial decisions?

Mr. SCHAUMBER. When you are talking about 80 percent, Congressman, you are talking about routine, relatively minor cases.

Mr. ANDREWS. [Off mike.]

Mr. SCHAUMBER. You are not talking about the major cases, which changed many decades of board law. The board, for example, decided one case with regard to coercive secondary picketing, in that it adopted a standard which is plainly inconsistent with the language of the statute.

Mr. ANDREWS. Okay. I just do not think that, frankly, the record fits your characterization. You also describe the present situation as a radical manipulation of the board's election process. One of the provisions in the proposed rule is that within 7 days of the notice the election has to be called. Is that not right?

Mr. SCHAUMBER. No.

Mr. ANDREWS. Well, sure it is. What do the best practices call for right now under the board——

Mr. SCHAUMBER. It calls for a hearing to be scheduled 7 to 14 days, and some regional directories extend it.

Mr. ANDREWS. So do you think it is a radical departure to go from 7 to 7 to 14?

Mr. SCHAUMBER. Yes. Because what must happen, that is a very, very short period of time. They are reducing it to 7 days, they are making an adversarial proceeding, and they are telling the employer it must identify every issue, it must file a statement of position.

Mr. ANDREWS. [Off mike.].

Mr. SCHAUMBER. All of that is different.

Mr. ANDREWS. Chairman, the best practices manual presently says it has to be between 7 and 14 days. What is the radical difference between 7 and 14 and 7?

Mr. SCHAUMBER. If you are talking simply about the time, there is not. If you are talking about must happen in time, there is.

Mr. ANDREWS. Well, what must happen now under the present procedures?

Mr. SCHAUMBER. Under the present procedures, the region speaks with the employer and the union and they negotiate, in most cases, a preelection agreement. In 86 to 90 percent of the——

Mr. ANDREWS. And that is exactly what would happen now. They would try to negotiate an agreement. Let me get to the next issue which you claim is so radical. And I do not know. Maybe I am wrong, but my understanding is that, in federal court, if I file a complaint, a defendant files an answer.

First, the judge has a conference between the two sides, where I say what my point of view is and my adversary says what his or her point of view is. The radical departure that you describe here requires the two sides to do the same thing.

What is so radical about that? About the employer coming in and saying, "Here are my claims that I want to make in this hearing," and the union saying, "Here are our claims we are going to make in here." What is so radical about that?

Mr. SCHAUMBER. Congressman, you are an experienced litigator, I suspect, as I am. And as you know, litigators in civil court have an opportunity to develop their case. They have an opportunity to take discovery. There is nothing like that here.

Mr. ANDREWS. Well, there is no opportunity within the prehearing to develop any other issues. You are completely, res judicata, barred from raising any other issues from your initial list? Is that your testimony?

Mr. SCHAUMBER. The only issue that is that all issues must be identified by the employer, or they are waived. The employer can challenge employees during the course of the election, as can the union, even if they have not been challenged if eligibility has not been raised.

Mr. ANDREWS [continuing]. Understand that you talk about the challenge to eligible voters. If you are concerned about that, then everyone sitting up here has the same problem. Because in our elections we have what are called "provisional voters," where someone goes in, and they cast a provisional ballot.

And if their vote would make a difference in the outcome of the election, you litigate over whether the votes counts or not. What is so radical about that?

Mr. SCHAUMBER. Does that save time and money? I do not think it does. There has been the suggestion that it does.

Mr. ANDREWS. The question—is it radical?

Mr. SCHAUMBER. It is radical. Because currently, regional directors have discretion.

Mr. ANDREWS. Well——

Mr. SCHAUMBER. They exercise their discretion.

Mr. ANDREWS. [Off mike.].

Mr. SCHAUMBER. Excuse me, if I can finish.

Chairman KLINE. Asked and answered. The gentleman's time has expired.

Mr. ANDREWS. Then, Chairman, you have 435 radically-elected members of the House of Representatives, if that is the case.

Chairman KLINE. Much ado.

Mrs. Biggert, you are recognized.

Mrs. BIGGERT. Thank you, Mr. Chairman.

Mr. Carew, under current procedures, once an election is ordered, employers are requiring to provide the union with a list of the names and addresses of the employees who will be voting. As I understand it, under the proposed rule there is a requirement that employers will provide employee phone numbers, email addresses, work location, shift information, and classification.

Does this not raise questions about employees' privacy?

Mr. CAREW. Yes, it does. During our experience with this, we received several complaints from employees on such items as why am

I getting these letters, why are they calling me at night, why is my wife getting letters on the union. She is not an employee of our company.

Some of our employees asked us to stop. "Can you stop this?" And I said, "No, I can't." We do not have employees' personal email addresses. We do not have that. We are very concerned about our employees' privacy and what is to be shared with others.

Mrs. BIGGERT. Thank you.

Then Mr. Getts, do you have any concerns about your employer providing your phone number and email address to a union?

Mr. GETTS. Absolutely, yes. I would be very uncomfortable with that.

Mrs. BIGGERT. I know when the phone rings now, and the numbers show up, most people do not answer unless they know who it is.

Mr. GETTS. Correct.

Mrs. BIGGERT. But I do not know that that helps.

Mr. GETTS. My wife's a little nervous about answering the phone right now with me out here.

Mr. DAU–SCHMIDT. If I could comment on those?

Mrs. BIGGERT. Sure.

Mr. DAU–SCHMIDT. The rules do—I am sorry? The rules do expressly state that the privacy of this information is to be protected. And when you think about it, this is a lot like a congressional election. I mean, I get phone calls and advertising and things in the mail about congressional elections all the time. It is not surprising——

Mrs. BIGGERT. But this is where——

Mr. DAU–SCHMIDT. It is not surprising that you would get unsolicited——

Mrs. BIGGERT. But this is where——

Mr. DAU–SCHMIDT. In this election that you would get unsolicited mail, too.

Mrs. BIGGERT. Well, this is where the employer, though, is required to provide that information to the union so that it is not——

Mr. DAU–SCHMIDT. Yes, yes.

Mrs. BIGGERT [continuing]. That they are dreaming—you know, somebody has got a phone list.

Mr. DAU–SCHMIDT. And so why can a congressional campaign, where you can mail to your constituencies—here, the union could do a mailing to their constituency.

Mrs. BIGGERT. You can mail them, but they are not provided by somebody, the list.

Mr. DAU–SCHMIDT. I believe the secretary of state in Indiana will give you a list of addresses and phone numbers. We could ask Mr. Rokita. I think he sends mailings to his constituents regularly during election time. I get them.

Mr. ROKITA. You are completely wrong on Indiana law.

Mr. DAU–SCHMIDT. Okay. I get them all the time.

Mrs. BIGGERT. Reclaiming my time, then Mr. Schaumber what are the components of the proposed rulemaking? Is the set timeline for preelection hearings? What do you think would be the effect of imposing rigid timeline as opposed to allowing flexibility?

Mr. SCHAUMBER. Congresswoman, it is going to have two effects. One, a set period of 7 days is really, for many smaller employers, going to deprive the employer of an opportunity for legal counsel. Particularly with the new persuader reinterpretation, which the Department of Labor is talking about. Because there are going to be fewer attorneys practicing the area of traditional labor law.

Smaller employers are essentially going to be denied due process. They are going have to go to a hearing in 7 days. They will have to state what the issues are. And they are going to have to make an offer of proof, if they are lucky enough to identify an issue which the board agent finds is sufficient.

Mrs. BIGGERT. Mr. Carew said, in answer to another question, was that if the union picks a time, for example like in September where I can see a lot of companies with Christmas coming up and their plan—that is their busiest time, would these proposals have any delay for something like that? Is there something that is proposed in there?

Mr. SCHAUMBER. Excuse me. The proposed rules are fairly rigid. They do permit, for example, the hearing to be extended for I think the language used is "extraordinary circumstances." So the point that was raised, the interference with production, is a very real concern.

Mrs. BIGGERT. Thank you. I yield back.

Chairman KLINE. Thank the gentlelady.

Mr. Hinojosa, you are recognized.

Mr. HINOJOSA. Thank you Chairman Kline and Ranking Member Miller.

I strongly believe that we here in Congress must focus on a robust jobs agenda that improves the lives of the millions of unemployed or underemployed American workers who are struggling to feed their families and make ends meet. Now, more than ever, our nation can and must train workers for high-skilled, family-sustaining jobs and careers by improving our nation's public workforce and adult education system through the reauthorization of WIA.

In today's hearing, I respectfully ask my colleagues on the other side of the aisle to refrain from continuing to disparage the National Labor Relations Board and workers' right to organize. History shows that America's economy benefits when workers' rights are respected.

I would like to ask my first question of Professor Kenneth Schmidt. Republicans argue that shortening the time from petition to election will result in less-informed voters who have not heard all sides of the story. In your expert opinion, how much access to unions do the workers have, and how much time do they have to deal with employers? How much time do they have?

Mr. DAU–SCHMIDT. First, so that we can try and talk on a common basis here, I want to get to your question. But in terms of the deadlines here, I do believe that past chair Schaumber is incorrect that an election could be held in 10 days. That is impossible under these rules. That only looks at the minimums, and it assumes that board practices happen instantaneously.

And it does not look at the standard that the board applies in these rules. The standard is that it has to be held within a practical period. And as a result, I do not believe that these rules would

affect the vast majority of elections that are done within a timely basis.

What it is trying to do is prevent opportunities for the outlier cases. And so it is going to try to rule out the longer cases of 124 days, 200 days, 300 days, or whatever that goes on like that. That is what they are trying to take care of in these rules. So I respectfully disagree with him on that.

Now, as to access to the employees, employers have addresses and email addresses and all of that from the time they employ the employees. My employer gives me my email address. I do not think that is uncommon. So they do have access to the employees from the time that they are employed.

Certainly, any time they hear about a union organizing drive, and certainly after the petition has been filed, they can, as Representative Miller mentioned, have captive audience meetings where they compel employees to come and listen to presentations.

Mr. HINOJOSA. If I understand you correctly, the American workers receive the information from the employers they need to make an informed decision about whether to join a union. It seems to be lopsided as far as access to the employees by the employer.

Mr. DAU–SCHMIDT. Yes. The union has no similar access to the workplace, or to compel the employees to come to meetings and hear presentations.

Mr. HINOJOSA. I appreciate you confirming that. In today's hearing, I want to take advantage of my time and ask another question, this one addressed to Peter Schaumber.

In your National Review article last month you acknowledged that Canadian provinces provide for much faster elections than generally occur in the U.S. But you claim that this was only because Canadian provincial law does not have to satisfy the National Labor Relations Act or the U.S. Constitution.

This seems to imply that you think the U.S. Constitution forbids the NLRB's proposed changes to its representation procedure. So is there anything in these proposed rules that interferes with employers' ability to speak their employees whenever and however they want? That is my question.

Mr. SCHAUMBER. Thank you, Congressman. My point in the National Review article was that the Canadian law does not implicate the Canadian constitution. Whereas our act implicates the First Amendment, that is our act in H.C., the right of an employer to express its views implicates, as the Supreme Court has said, its First Amendment rights under the Constitution.

And the Court has said that that right suffices the entire act. And the idea of it was to have a full and open debate. That kind of full and open debate is going to be impossible here. I must admit, Professor Schmidt has made a number of remarks which are incorrect.

His last remark, with regard to an election not being able to take place in 10 days, is incorrect. If an employer is not able to raise an issue or make a sufficient offer of proof, that election can go forward in as little as 10 days unless the union decides it wants to have further use of the employer's list of witnesses.

With regard to——

Chairman KLINE. Excuse me. The gentleman's time has expired. I am sure we will have a chance to explore that a little bit more.

Mr. Platts, you are recognized.

Mr. PLATTS. Thank you, Mr. Chairman. Appreciate your holding the hearing, appreciate all of our witnesses being here. I will try not to be too repetitive, but a number of the issues that have been raised are similar to my concerns. One is the time frame.

You know, when I think of the decision whether to unionize or not, that is a systemic change regarding one of the most important aspects of an individual's life, their job climate, where they work, what the situation is where they work.

I am a former union member. Worked my way through college and after as a union member. So I appreciate the importance of unions. But when we are going to have an election, especially regarding something so important, I think more time, not less, is better.

And the analogy I would make, when we talk about analogizing to elections, would be to say, hey, we are going to have a presidential election. And by the way, it is going to be in two weeks, or 17 days, or 21 days. Obviously, everyone would say, "Well, that is not going to allow us to make an informed decision. We want to know more about the candidates."

And so I am concerned. My understanding, the average time frame today is 31 days from the petition being filed to the election being held, with 95 percent no more than 56 days. To me, given the importance of this decision, that is, I think, a pretty quick time frame.

So efforts to shorten it do concern me. Especially Mr. Carew, when you share as a smaller business, you know just getting notice out of the blue that a petition's been filed. Not having ready access to, in your home community, a labor attorney to get that counsel, to establish that relationship seems pretty significant. Especially shrinking it 7 days for that prehearing, and nothing can be changed.

So I think it is easy for us in Washington to come up with ideas that sound good. But where the rubber meets the road, as with your company, is what we need to really give great weight to. And so I guess rather than a question, it is a concern that I express about the time frame.

The other is on the issue of privacy and sharing the home phone numbers and emails. You know, I think people are very protective of that information. If they want to share it, they are free to do so. But to have someone do it for you I think is a little different.

And I guess Dr. Dau-Schmidt, I think you reference, you know, analogizing to elections, I do not know. As a professor, is your home phone number listed in the white pages?

Mr. DAU–SCHMIDT. I can tell you I have worked on unions, or on election campaigns. And they have a list of registered voters.

Mr. PLATTS. No, no. Is your home phone number listed in the white pages?

Mr. DAU–SCHMIDT. Yes, it is.

Mr. PLATTS. So Professor, all right. Students can call you at home any time they want?

Mr. DAU–SCHMIDT. Yeah.

Mr. PLATTS. You know, that is a choice you have made though. Do you think somebody should make it for you to say you cannot have an unlisted number so your students have to call you at the office as opposed to at home?

Mr. DAU–SCHMIDT. I have to admit, I was surprised by Representative Rokita's answer. Because I have seen lists of registered voters and their phone numbers in the State of Indiana.

Mr. PLATTS. No, I am not talking about, you know, a choice of an individual whether they want their home number made public, or not.

Mr. DAU–SCHMIDT. Well, I believe all those registered voters, those phone numbers are available to the public. At least to their representatives.

Mr. PLATTS. In Pennsylvania, it is not going to be. If you have an unlisted number, it is an unlisted number. I do not know about Indiana or any other state. But my point is, that is a choice. You have chosen to have yours listed, apparently. You know, that is great, but that is a choice you have made.

And that goes into privacy here. So you know, I think the effort here is to make sure union elections are fair to all sides. I agree, but I think we need to be reasonable in how we approach it, and would just voice my concerns both on privacy and, most importantly, on deliberation.

So you know, I think the proposed rules are not well thought out and, where the rubber meets the road, are going to have dire consequences for everybody. Most importantly, for the employees and the employer making informed decisions.

I have a few, maybe 30 seconds or so, left. Mrs. Roby, I would like to yield my remaining time.

Mrs. ROBY. Well, thank you for that. We need to focus in on this part about the phone numbers and emails because it is that important. And I have some questions, and when I get to my time I will ask them.

But in keeping employee records, Mr. Carew, can you provide a list of your employees within 2 days of the regional director ordering an election? Could you do that in 2 days?

Mr. CAREW. Well, for us we have manual employment records. And so we would have to pull those records, and then type up a list. And it will take some time. In addition, we do not have like personal email addresses and things like that.

I myself, our company, I feel is very different, some lists for some voting. This is our company being asked to share personal information, which is quite different.

Mrs. ROBY. Thank you so much for yielding your time.

And, Mr. Chairman, I yield back.

Chairman KLINE. And the gentleman's time and gentlelady's time has expired.

Mrs. McCarthy?

Mrs. MCCARTHY. Thank you, Mr. Chairman. Appreciate having this hearing.

I would like to begin my testimony with some testimony that I received from a worker, a nursing assistant, named Veronica Tench. Veronica has worked at St. Vincent Medical Center in Los Angeles since 1981.

She tells a story how she and her coworkers organized. Excuse me. On January 5, Veronica and a coworker filed a petition for an election with the NLRB. The election was scheduled for February 18, 2000. Veronica shared that with her employer, and they very quickly began an anti-union campaign and subcontracted out some of the work in her bargaining unit just days before the union elections to prevent employees from voting in the election, in violation of the NLRA law.

Ultimately, the NLRB found that St. Vincent had violated the federal law, but only in 2007, after 6 years of litigation. Despite this ruling, the hospital continued its campaign. It was only June of this year, 11 years after the petition for the election was filed, that Veronica and her coworkers were able to unionize.

Mr. Chairman, I ask unanimous consent to submit Veronica's statement for the record.

[The information follows:]

Veronica Tench
Lab Assistant
St. Vincent Medical Center
Los Angeles, California
Healthcare Employees Union, Local 399
Affiliated with the Service Employees International Union (now SEIU-UHW)

My name is Veronica Tench and I have worked for St. Vincent Medical Center in Los Angeles since 1981. I was a nursing assistant and did not have a union. Looking back, I remember why we wanted to organize, how the process was delayed for more than a decade and the intimidation that played a part in stifling our efforts to form a union.

Thankfully, 13 years after we began organizing, we were able to win a voice in the workplace. Today, St. Vincent is a different kind of employer, now allowing employees to vote in a fair and timely process. My experience in 2011 is also very different and my hope for great things to come is renewed.

Back in early 1998, my coworkers and I felt it was time that we had a voice on the job. We started the process to join SEIU-UHW to address staffing problems and other issues—such as the lack of proper billing codes and respiratory equipment. We felt these issues hindered us from properly doing our jobs.

Another issue we were facing at the time was communication with the employer. We were being treated unfairly and couldn't get a response from management. Yes, wages were an issue, but that wasn't the bottom line. There were other things that kept workers from doing their job well. It got to the point where people needed help.

We began to organize the hospital's technical staff, which included the Respiratory Care (RC) department. RC therapists are responsible for administering respiratory care treatment (i.e., administering intubations, ventilators, or life support system). They are also responsible for assessing each patient's health and reporting each patient's status to on-coming shift employees and doctors.

On January 5, 2000, we filed a petition for an election with the NLRB for the bargaining unit of 100 technical staff employees, including the 27 RC therapists. The election was scheduled for February 18, 2000.

The hospital administration very quickly began an anti-union campaign and subcontracted out the work of the hospital's respiratory care department just days before the union election to prevent employees from voting in the election— in violation of the National Labor Relations Act. Consequently, SEIU filed an unfair labor practice charge. Ultimately, the Board found that St. Vincent's had violated the federal law, but only in 2007, after more than six years of litigation that delayed our opportunity to vote while we waited for multiple NLRB decisions and a Ninth Circuit Court of Appeals opinion upholding our rights.

SEIU tried to move forward, but hospital management stopped us from every angle.

In the larger departments, religious leaders were known to hold meetings to tell workers they shouldn't join the union. Word got around that the hospital used other tactics like telling workers they'd have to pay more for parking if they joined the union. Management even pegged people as troublemakers.

The worst tactic was when the hospital subcontracted out the respiratory therapists just 13 days before the election. They knew the numbers of workers present to vote would go down.

My whole belief is that organizing is a way to get a voice in the workforce and all workers should be able to do that. I can't say I didn't get scared, but the injustice of what was going on with the workers is what moved me.

On June 24, 2011 – 13 years after we began organizing – 400 workers were able to vote to join SEIU-UHW.

This community needs quality jobs. Improving staffing ratios can create good jobs here. Now, we'll be able to make sure that experienced caregivers stay and continue to provide for our families. It was a good election and I've been floating ever since. I'd like to make sure future workers have a more reasonable and fair process available.

Chairman KLINE. Without objection.

Mrs. MCCARTHY. I would like to say something. I have been on this committee 15 years now, and for 15 years I have heard this committee constantly going after union members. I am from a union family. My father worked very hard, and he died very young because of complications from the work and asbestos.

My brothers are in the union, both. One retired, younger than me. The other one certainly about ready to retire because the work that they did basically broke them physically. I happen to think that—and as a nurse I will say that—we got unionized later in my years. I will say to you that the men and women of this country,

the middle-income families of this country, are what made this country great.

And it just seems that everybody is going after them, mainly because the economy is not well. Let me say to all of you in the audience, you had nothing to do with the economy failing. All you are doing is actually adding to the economy because you are the ones that are going shopping, you are the ones that are buying food.

So basically, what I am saying is that you can dislike the unions. Maybe because you do not like to see middle class move up. That one I have never been able to figure out. I want to follow, certainly, to Professor Schmidt. You have heard a lot of accusations here. And I notice that you have been writing a lot of things down.

And I notice that you had your hand raised a couple of times because you wanted to ask some questions. Please take my time and answer any questions that you feel were not answered correctly or that you did not have the time to answer them. But I have to say, when it takes 12 years to try to get a place unionized, something is wrong, and it is sure not leaning towards making our unions stronger. [Applause.]

Mr. DAU–SCHMIDT. I will tell you, actually I do have a note here of something I want to get to. But we have heard a lot of personal stories, and I will give you my personal story to a certain extent. I am at the point in my life where I have three kids who are graduating from college and law school and looking for jobs.

And as a taxpayer, I would much rather see this committee looking at ways to stimulus the economy and provide jobs for those kids rather than micromanaging the board. I cannot believe you are engaged in this, especially when the board has been responsible in its rulemaking process.

Now, the one thing that I had been waiting to comment on is, past chair, Schaumber, I thought made the one attempt at kind of bipartisanship here. And I wanted to acknowledge that. He s worked with Chairman Liebman, and he acknowledged that during the time they worked together she was an excellent colleague. And, in fact, they had high levels of agreement.

And in fact, I used to joke with my students when they had the two-person board. I used to joke, "Maybe we should always have a two-person board." Because the fact of the matter is, it worked. It worked pretty well when just the two of you were on the board, did it not? And what the relevance of that is.

I as an academic, get to follow these people in their careers. I hear them at conferences, I get to hear them give presentations, I read their opinions. And I would like to say both of them are very knowledgeable about the law and very, very reasonable people.

And the idea that Chairman Liebman here is of on some wild goose chase, she is actually being a very responsible civil servant and, with the board, trying to promulgate new rules that will make our procedures more efficient and more fair. And I think that should be commended rather than attacked.

Chairman KLINE. The gentlelady's time has expired.

Mrs. MCCARTHY. Thank you.

Mr. Wilson?

Mr. WILSON. Thank you, Mr. Chairman. And, Mr. Chairman, I want to thank you for your strong leadership in having this issue examined. I want to thank the witnesses for being here today.

I have had the extraordinary opportunity, in my service on the State Development Board, certainly as state senator of South Carolina now serving in Congress, to work to recruit industry to my home state of South Carolina. And one of the great selling points that we have is right to work, where persons who are working have the opportunity to join the union, or not.

And we have seen the extraordinary success. I worked with former governor, Jim Edwards, to recruit Michelin to South Carolina. Thousands of jobs created in our state, and we are very pleased that the North American headquarters is in South Carolina. The other success story that was so incredible is BMW.

The late governor, Carroll Campbell, recruited BMW to South Carolina at the time of the implosion of the American automobile industry. At the very same time, BMW in South Carolina announced a massive expansion, three quarters of a billion dollars, and providing thousands of new jobs. And it has been very, very successful because we are a right to work state.

But this year, my home state, South Carolina, has become an extraordinary target of NLRB. First, there was the threat of lawsuit, suing the voters of South Carolina. Last November, we had a referendum to amend our constitution to provide for secret elections in union elections. And I am very proud.

Eighty-six percent of the people, Democrats and Republicans, voted for secret elections. And NLRB had said that they will try to overturn this referendum. The same referendum occurred in Arizona, in Utah, South Dakota. Sixty-five percent in those states—South Carolina 86 percent. People understand.

We want to give people the opportunity to organize or not. But then the most outrageous assault on the workers of South Carolina by NLRB was the attempt to close the Boeing plant. It has already been built, 1.1 million square feet. A thousand people have been employed for the second line of 787 Dreamliners.

And so we have got families in our state who truly see the outrage of excess by big government of NLRB. Now that is how it affects a big company. But Mr. Carew, in your example, a small business, the consequence of the unionization efforts. Can you tell us how this affected your business?

Mr. CAREW. Yes, I was sitting here and hearing this, and trying to think for myself how would I do this. How could I implement this for our company and our employees. It is not as simple as sending out an email and me down at the auditorium at 10 o'clock that morning. Our guys are driving ready mix trucks out, cover 100-to 150-mile radius.

And what for us, for our company, what I found through our process, it was critical that we have face-to-face meetings with our employees, hear their questions. If they wanted more information, give them that information. It is so important that they have an informed decision.

And just given them the logistics and the time of the year, and how busy our business was, I would be so concerned that they just would give up. That is such an important decision. And I just feel

it should not be rushed. And as an employer, we really want to do things properly. There is a lot of complex issues and a lot of things that go into this, and we do not have that expertise.

But we want to follow the rules. And, and I am just so concerned that we are not going to have the time, it is not going to be done right. And my question is, why? So that is my feeling.

Mr. WILSON. Well, I am a former real estate attorney, and I know that ready mix is crucial. For the home building industry, for Realtors, thousands of jobs, millions of jobs can be affected. The unionization effort, as it was, was a diversion for you and for the people who work with you.

And so, again, how did you handle this? Or how did they handle it?

Mr. CAREW. Well, what we did is, we had a process and when these things started we pulled our family together. And we said, "What are we going to do?" And then we pulled our operations managers and our quality control managers and all our key decision-makers and said, "What are we going to do? How can we respond to this very important decision?"

And then we would come up with things we wanted to do. And then we would have to consult with our attorney to make sure it was done legally. And then we would send out faxes to try to get it out to the guys as soon as we could. And then we would try to schedule meetings.

And the meetings, trying to get ahold of the guys during the day, and deliver concrete, plus our plants are 20 miles, 25 miles apart. We got 13 of them. It was quite an exercise.

Chairman KLINE. The gentleman's time has expired.

Mr. WILSON. Thank you.

Chairman KLINE. Mr. Tierney?

Mr. TIERNEY. Thank you, Mr. Chairman. You know, we have these hearings, and I suspect one of the reasons we have these hearings is to try to get some idea of whether or not the rules that are proposed are appropriate. And for that, it would be helpful to have a fairly objective panel here and good cross-sections of opinions.

I am not sure we have that in this situation. Let me start with you, Mr. Lotito. You do not even purport to appear before us, as an uninterested or an unbiased party, do you?

Mr. LOTITO. I am certainly interested.

Mr. TIERNEY. Right. You certainly are. So I look at that. I look at your firm's biography of you. And it says you are one of the nation's leading authorities on preventative strategies in the workplace. Those preventative strategies include preventing employees from even organizing as a union, or union busting.

So I want to explore that a little bit. Your firm Web site has a client advice memo, and its title is "Time Is On Your Side." It explains that there are situations where pre-election hearings are to the employer's advantage. It says, and I quote—"In a recent campaign among 870 registered nurses at South Shore Hospital in Massachusetts, which was represented by Jackson Lewis, a 27-day hearing contributed to the 5-month period between filing the petition and the election."

The memo says nothing about the merits of the hearing. What it does say, and I quote again, "The hearing of some length can put valuable time between the union's moment of maximum support, when the election petition is filed, and the date of the election."

So it looks to the rest of us here that union-busting firms, like your firm, think a pre-election hearing is more about strategy than it is about substance, and it is something other than resolving the material issue. Is that not correct?

Mr. LOTITO. No.

Mr. TIERNEY. Okay.

Mr. LOTITO. First of all, we are not a union-busting law firm. In——

Mr. TIERNEY. In this case——

Mr. LOTITO [continuing]. The vast majority of——

Mr. TIERNEY. No, you have answered the question, and I appreciate your comment on that.

Mr. LOTITO. Well——

Mr. TIERNEY. In this case, the hearing, regardless of its outcome, appeared to be pretty good strategy for stopping the organizing drive, because your memo quotes one of the union spokesperson as saying the 5-month delay was a killer. Your biography also says that you help run the firm's "How to Stay Union-Free Program," which apparently is some sort of a seminar.

In 2007, a reporter named Art Levine apparently went to a union avoidance seminar conducted by you in Las Vegas, which cost him $1,595 to attend. He wrote about it in an article entitled "Union-Busting Confidential." And he quotes you, Mr. Lotito, as saying, and I quote—"It's going to cost you some money to remain union-free, sometimes big money."

So my question to you is, how much does it cost an employer, or how much does it cost a union, and how much does it cost us as taxpayers, when you have a 27-day hearing clause that puts, as was said, valuable time between the petition and the election? What is the cost to the company? What is the cost to the union?

Mr. LOTITO. There are a lot of questions there. I am——

Mr. TIERNEY. Well, no. It is very simple.

Mr. LOTITO [continuing]. Trying to——

Mr. TIERNEY. What is the cost to putting valuable time between a petition election for an employer and for you?

Mr. LOTITO. The vast majority of situations, there is no hearing whatsoever. In the situation that——

Mr. TIERNEY [continuing]. You are a lawyer, so you know how to answer a question.

Mr. LOTITO [continuing]. That you are describing, there were obviously very complex issues.

Mr. TIERNEY. The question, sir, is what is the cost. Do you have a——

Mr. LOTITO. I do not know what the cost of that hearing was.

Mr. TIERNEY. In 2004, the New York Times wrote about another client of yours, a South Carolina battery company called EnerSys. In the article, it said EnerSys was fighting an organizing drive, but it ended up paying $7.75 million to settle 120 labor law violations.

And the company ended up suing your firm, accusing Jackson Lewis, and I quote—"of malpractice, and of advising it to engage

in illegal behavior." And some of that behavior ostensibly was harassing union's top officials, improperly withdrawing union recognition, and moving the production to a non-union plant in retaliation.

Now, that lawsuit was, as I understand it, settled. Can you share with us what the terms of that settlement were?

Mr. LOTITO. No, I cannot because the settlement was confidential.

Mr. TIERNEY. So do you know whether or not your firm advised the pre-election hearing in that case in order to delay the election so the employer could do a string of actions?

Mr. LOTITO. I was not involved in that situation, so I do not know if we specifically advised them to have a hearing.

Mr. TIERNEY. Thank you—let us go to another document in your firm, then. It is a publication called "Union Know," but the N-O are set off in relief. It is in an issue dated September 2001. The first article in that is entitled "War is Hel—pful, H-E-L, dot, dot, P-F-U-L." So at least one-to-one to hear, you know, you also mention in that union avoidance war games.

So what war would that be? This would be a war of employers on employees? Is that what exercising rights as a worker should entail? That your employer goes to war with your employees, that creating conflict in the workplace is part of the union-busting game? But you said in your testimony that you were creating a positive workplace environment.

And the whole purpose of the National Labor Relations Board, one of them at least, is to provide more stable, less conflict-ridden labor relations, for both employers and employees, including a free and fair way for workers to decide upon union representation.

So having war games and having war be helpful to employers. You tell me how that is creating a positive workplace environment.

Chairman KLINE. The gentleman's time has expired.

Dr. Roe?

Mr. ROE. Thank the chairman, and thank the panel, for being here today. And fortunately I am not a lawyer, but I am an employer. And just as an observation, in 7 days, with all due respect to my colleagues, we could not agree without a lot of disclaimers, a bunch of lawyers could not, that the sun was going to come up in the east.

So you are going to need more time than that, I think, to do that. I want to talk just a second about the secret ballot. And I am a veteran, and I put on a uniform to leave this country and left a 12-week-old son to spend 13 months of my life near the DMZ in Korea so that we could all have a secret ballot.

And I think this is about protecting the unions' rights and the employers' rights and the workers' rights, employees' rights, about how to do this. And I feel so strongly about that it is the basic core of our country. And the NLRB should be a referee. The way I understand it is, they are an impartial referee.

Like if you go to a basketball game, you expect to have an impartial referee there. And that is what they are supposed to do so both sides get a free and fair hearing, and the will of the employees work out. I think that is exactly what is intended, at least I think.

And I do not believe that is what is going on right now. At least it does not sound like it to me.

Mr. Carew, I want to ask you a question. Could you have prepared for this, had an informed labor attorney, in one week and be able to put all this together to present to the board? Could you have done that in a week's time?

Mr. CAREW. It is a scary thought. I just do not know if we could have done it, and it is done that we get all the questions answered, that we include everything that apparently needs to be required, where we were still responding to issues during that 42 days.

Mr. ROE. So it did not sound like you could, in 7 days, get this done. I agree with you. I do not think it is possible to do it in that length of time to get a fair—to get all the information you need. How much did it cost you, your company, to—to litigate this?

Mr. CAREW. The whole process, it is unbelievable how much time it took from our family, from my managers, from my supervisors asking questions, to my employees having meetings and things to answer questions.

Mr. ROE. Did it—let me interrupt you. Did it help you create one job? Did it help you—except for the attorneys?

Mr. CAREW. It put a lot of stress on everybody.

Mr. ROE. Yes, it did not help you create new jobs.

Mr. CAREW. Yes.

Mr. ROE. Mr. Chairman, in your opinion, why is this done? It sounds to me like it is happening. I mean, a month, 6 weeks is not very long. Matter of fact, that is light speed compared to this place when it does anything. So why is it initiated?

Mr. SCHAUMBER. It was results-oriented. The reason was to limit the ability of the employer to express its views on unionization, limit the ability of the worker to hear those views and to make an informed choice.

The only story which the employee is going to hear, or the predominant story, is going to be the union story. And the union has very few legal restraints. It can make promises. It will not hear the other side. Now, this is a very difficult question. There are good reasons for a union, and there are good reasons not to have a union.

But some of the reasons not to have the union are reasons that the employee should hear. For example, the employer will—will tell the employees that they will not have a direct relationship any longer. He may tell the employees what this experience—what this union's experience has been with other employers.

He will tell the employee something they may not know. But if they want to be a member of the union, they are going to have to support the union's political and social causes.

Mr. ROE. Let me ask one—my time is short.

But Mr. Getts, why do you do what you did? And when the neutrality agreement, I understand that, but why did you lead to vote and have a secret ballot to vote out the union? Why did you do that?

Mr. GETTS. Well, first of all, Congressman, I want to thank you for your service to your country. I appreciate that.

Mr. ROE. Thank you.

Mr. GETTS. The reason I did it, and I am not anti-union whatsoever, I felt like it was all about the secret ballot election. Like I mentioned in my testimony, I could have gone either way. I was ready to go either way. But the secret—when they came in and forcefully tried to tell us what was good for us and feed it down our throats, I was deeply offended by that, and their tactics.

So that is what led to me leading the petition.

Mr. ROE. So that is why you led that petition.

And Mr. Lotito, why do employers employ your firm? Why would I need you in my business, which is non-union? Why would I need you?

Mr. LOTITO. Many technical reasons. Just to take the case before the labor board, the chairman, for example, showed the extensive document with respect to the processes and the procedures. I think under these proposals, it is going to become even more critical to have their labor relations specialist because of the waiver problem that is going to exist by having the hearing post the election process as opposed to ahead of the election process.

And the importance of this is critical. Because there was some discussion earlier, if I could, about the importance of this for these employees. It is not only for these employees, but it is for all of the employees that come after them. Because there is hardly ever a decertification election.

Chairman KLINE. I hate to interrupt. The gentleman's time has expired.

Mr. ROE. Sorry, Mr. Chairman. Yield back.

Chairman KLINE. Mr. Kucinich?

Mr. KUCINICH. Thank you very much, Mr. Chairman. I believe the right to organize and the right to collective bargaining are lynch pins in a democratic society. They actually hold a democratic society together, and they help to assure that workers will not be impressed upon by economic injustice.

I strongly support the National Labor Relations Board's proposed rule change. The NLRB has a long history of reviewing and revising its procedures in order to make resolution of union representation cases more efficient. These proposals are a result of the board exercising its congressionally-appointed responsibility under the National Labor Relations Act.

And the changes would bring forth a greater formality and certainty to the process for both employees and employers, forcing workers who seek to assert their right to collective bargaining to wait an average of 124 days after filing a petition for an election is an injustice that must be corrected.

According to the Bureau of Labor Statistics, less then 7 percent of American workers in the private sector are union members. There is a clear link between our suffering economy and the low, and declining, rate of union membership and an even clearer link to the steady weakening of the middle class. The proposed changes to election procedures represent progress towards empowering more workers and giving them a voice.

Now, I read the testimony by Mr. Lotito in which you quote from a work, and a chapter called "Employer Speaks Up." And in this quote that you gave, it says in most cases the employee has not

had the benefit of the employer's point of view between—before signing a union authorization card.

Why would your firm be involved in efforts to try to stop workers from getting the point of view of the union, when you are advocating that they have to get the point of view of the employer?

Mr. LOTITO. We do not advocate that the employee should not get the point of view of the union. As a matter of fact, if I were making the laws I would require that the union provided the employee, when they ask them to sign a union authorization card, with a copy of the union's concentration, with a copy of the union's bylaws, with a copy of the union's track record, with a copy of the number of first contracts that they have been able to negotiate, with how those first contracts compare with the promises that have been made.

Mr. KUCINICH. Okay, I have another question.

Mr. LOTITO. So would encourage that kind of information being provide.

Mr. KUCINICH. I am reclaiming my time. Is it not true that a worker can be fired for refusing to attend a meeting that is held by the employers to provide the employers'—quote—"perspective" on organizing?

Mr. LOTITO. There is case authority that supports that position, but it is something that we always advise our employers——

Mr. KUCINICH. Was it true or not? You are an attorney.

Mr. LOTITO [continuing]. Clients not to do.

Mr. KUCINICH. You can answer yes or no.

Mr. LOTITO. I am sorry?

Mr. KUCINICH. You can answer yes or no. Is it true?

Mr. LOTITO. Yes, it is true.

Mr. KUCINICH. Okay, so——

Mr. LOTITO. I am just trying to provide you with a totally unbiased answer, sir. [Laughter.]

Mr. KUCINICH. I think that is noteworthy. You know, you mention in your remarks the constitutional principles of free speech and assembly. How does that square with allowing an employer to require an employee attend and listen to speech, or respond to questions regarding their opinions on unions?

How is that consistent with free speech? Should——

Mr. LOTITO. A union can organize for months and months and months without even the employer knowing that the organizing activity is taking place. Under this proposal, if a union, let us say, has been organizing for a period of 3 months, just to be somewhat arbitrary in taking a time frame, that would probably be fairly consistent with what happens in many situations.

The employer is going to have essentially a period of 10, 12, whatever the precise number of days are in order to present additional information to the employees.

Mr. KUCINICH. Well, the bottom line here is that if the workers are not paying attention to what the employee says—or the employer says, their jobs can be in jeopardy and their right to organize is undermined.

Mr. LOTITO. No.

Mr. KUCINICH. So the question is: where is the free speech involved? Because free speech also means that I do not have to listen to what you say.

Mr. LOTITO. That is correct.

Mr. KUCINICH. I do not have to listen to you. I can ignore you. I can say, "I don't want to—don't tell me about that," and my job would not be in jeopardy.

Mr. LOTITO. The job should not——

Mr. KUCINICH. I yield back the balance of my time.

Mr. LOTITO. Sir, the job should not be in jeopardy based upon they do or do not wish to have a union.

Mr. KUCINICH. Time?

Mr. LOTITO. Because that is discrimination, and it is unlawful.

Mr. KUCINICH. People——

Mr. LOTITO. The right of free speech comes from section 8-C of the National Labor Relations Act, which this Congress inserted in 1947 after 12 years of forced neutrality from 1935 to 1947. The employer is only——

Mr. KUCINICH. Actually, you are right. Free speech comes in this Constitution.

Mr. LOTITO. And that is why it had to be clarified in 1947 with Taft-Hartley because there was considerable confusion as to how the First Amendment applies.

Mr. KUCINICH. You are continuing to respond to a question I did not ask.

Chairman KLINE. The gentleman's time has expired.

Dr. Foxx?

Mr. LOTITO. Thank you.

Mr. KUCINICH. Nice seeing you.

Mrs. FOXX. Thank you, Mr. Chairman.

Mr. LOTITO. The same, sir.

Mrs. FOXX. I would like to yield my time to Mr. Gowdy.

Mr. GOWDY. I thank the gentlelady from North Carolina. And I thank the chairman for calling this hearing and for providing more days of notice for this hearing than would be required under the new rules that are being promulgated by the National Labor Relations Board.

Union membership in the private realm is below 7 percent. It was 35 percent in the 1950s, when election time frames were not dissimilar to what they are today. But the National Labor Relations Board had an epiphany that 38 days is too long to wait for an election.

And I juxtapose that with the fact that a union last week has already made an endorsement in the 2012 presidential race that has not even officially begun. Nobody has been nominated, but yet they have made an endorsement 16 months before the election.

Chairman Schaumber, let me ask you this. Is the National Labor Relations Board supposed to be neutral? Are we naive to think that it is a neutral board?

Mr. SCHAUMBER. It is supposed to be neutral on the question of unionization. Unfortunately, it is not neutral today.

Mr. GOWDY. Where is the neutrality when you put a poster up telling employees that they can unionize, but you will not allow the

poster to say that they can also deunionize? Where is the neutrality there?

Mr. SCHAUMBER. I do not see it.

Mr. GOWDY. Where is the neutrality where you can tout the perceived benefits of unionization, but you cannot cite where your union dues go from a political standpoint? How is that neutral and unbiased?

Mr. SCHAUMBER. It is not neutral or unbiased.

Mr. GOWDY. Can you help this committee walk through the current constitution of the NLRB? How many members have been confirmed? How many were recess appointees?

Mr. SCHAUMBER. There are four members. There is one recess appointee, Craig Becker, who will be off the board in December. Chairman Liebman's term ends at the end of August. Mark Pearce is on the board. His term ends, I believe, the following year, as does Brian Hayes.

There are four members, one current nominee who has not been confirmed.

Mr. GOWDY. And Mr. Solomon, the general counsel for the NLRB, he has not been confirmed either. Correct?

Mr. SCHAUMBER. No. Mr. Solomon was not appointed by the president or the National Labor Relations Act. There is a specific provision for it. He was appointed by the president under the Vacancies Act. It is believed, under the Vacancies Act, he can be reappointed, whereas that is not the case if it had been under the National Labor Relations Act.

Mr. GOWDY. Mr. Chairman,ProfessorProfessor Dau-Schmidt implied in his opening statement—and I think this is a fair implication, it is almost a verbatim quote—that the NLRA is essentially a wealth redistribution statute. That we have to take money away from the companies because they are making too much. And funnel more of it to the employees.

Is that the purpose of the NLRA? Is there some statutory intent that I have missed?

Mr. SCHAUMBER. I do not believe so. The purpose of the statute is to protect workers' rights. And let me say, there has been a comment about being anti-union. I do not know of anyone who is anti-union here. We are not talking about being anti-union. We are talking about pro-worker and pro the legitimate management interest in this kind of an issue.

We can all point out, if you will, examples of management misconduct, examples of union misconduct. But we are not talking about this here. We are talking about having a fair election.

Mr. GOWDY. Professor Dau-Schmidt, can you give me some good reasons not to unionize?

Mr. DAU–SCHMIDT. I would actually like to respond to your first question.

Mr. GOWDY. I will settle for you answering the one I ask, which is can you——

Mr. DAU–SCHMIDT. But you do not want me—you want to ask other people questions on what I say, but——

Mr. GOWDY. Sure, if we have enough time. If we have enough time, you are welcome to.

Mr. DAU–SCHMIDT. All right. All right, so you want me to give you some reasons not to unionize?

Mr. GOWDY. Yes.

Mr. DAU–SCHMIDT. I would have to have a context in the workplace. I cannot think of——

Mr. GOWDY. Well, the gentleman—the gentleman on the end, Mr. Lotito—has been excoriated in his interest in being even-handed and fair. And he is given reasons to both unionize and not to unionize. I am just wondering whether or not you can cite any reasons not to unionize.

Mr. DAU–SCHMIDT. Any reasons not to, in the current economic environment. I would have to say no.

Mr. GOWDY. No, not a single reason——

Mr. DAU–SCHMIDT. I actually think——

Mr. GOWDY [continuing]. That a voter should vote not to unionize.

Mr. DAU–SCHMIDT. Unless I have a context for a specific workplace, I do not see how I can answer the question. But I would——

Mr. GOWDY. Well, let me ask you this question. Can employers factor in work stoppages and their decision on where to start a new line of work?

Mr. DAU–SCHMIDT. Now, if you are talking about the Boeing case——

Mr. GOWDY. I did not say what case I was talking about. I am asking you generically.

Mr. DAU–SCHMIDT. The implication of what you said, which is——

Mr. GOWDY. I am asking you generically. Can employers——

Mr. DAU–SCHMIDT. The implication is yes, they can take cost into account when moving. But they cannot actually actively act to discriminate against people because they exercise their collective right. And——

Mr. GOWDY. Right. How many jobs——

Mr. DAU–SCHMIDT [continuing]. Wait for the board to decide——

Chairman KLINE. The gentleman's time has expired.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. Holt?

Mr. HOLT. Thank you, Mr. Chairman. To try to bring some balance to the discussion here, you know, I would like to direct my question, preceded with some comments, to Mr. Dau-Schmidt.

It is interesting that they say unions win two-thirds of the votes, but 35 percent of petitions are given up. So really, when you look at the big picture, it is remarkable that organizing ever succeeds, it seems to me.

The 32BJ of the SEIU in New Jersey sent me a letter saying they like this rule to streamline and modernize the union election procedures. And the state AFL-CIO similarly talked about the advantages of having electronic filing and modern methods.

But they are making a bigger point. This is not just about efficiency. It is more than bureaucratic efficiency. The state AFL-CIO points out that the rules are important because companies use the average 2-month length of time before an election to hire union busters to run anti-union propaganda campaigns to harass and illegally fire supporters.

So this gets, I think, to the bigger point of what we are talking about here: that challenging everything does more than make it easier to delay and deny forming bargaining units. It really creates opportunities for abuse and a climate that is, well, as you said, less respectful of the law.

Now, you know, regarding opportunities for abuse, the other side will say, "Well, yeah, unions will abuse this time." The only abuse we heard actually discussed here was that unions sometimes spread misinformation. If so, that would be unfortunate and certainly hard to defend.

But employers are able to penalize workers through onerous work assignments, cutting wages, layoffs, contracting out, threatening shutdowns, and surveillance, threats, and harassment of leaders. And you know, in many cases, employers have targeted those who were election observers or witnesses at NLRB hearings.

This is not an even playing field. And it seems to me these regulations are a good, but small, step toward a more even playing field. But what I would like you to expand on, and I am sorry I have taken some of the time that I would like to hear from you about, is in addition to workers being threatened with plant closing, which occurs in 57 percent of campaigns, or workers being interrogated about how they are going to vote in 64 percent of the campaigns, I would like to hear you say a little bit more about what this does for respect for the law, and how this changes the climate in America.

Mr. DAU–SCHMIDT. Well, this actually goes to the comment I wanted to make with Representative Roe, when he spoke about the benefits of private ballot elections. And, you know, we could have a completely separate hearing about secret ballot elections versus neutrality agreements.

But certainly these rules are to amend the secret ballot procedure. And if you want people to use the secret ballot procedure rather than be in situations where they have neutrality agreements like Mr. Getts was in, you would want this system to work well so that people will work this.

As I mentioned in my written testimony, in the 1990s unions started to consciously abandon this process because it was so subject to abuse. And it is not the typical—it is not, you know, 90 percent of the cases or 80 percent of the cases—but it is a significant number of cases where employers can use the process to delay and intimidate employees.

And that is why unions have started—have started to abandon it. The stat I gave you—and I—I spent some time looking at the various people that have studied this—is about approximately half of the employees who organize now are organized outside of this process.

So if you want to bring them back in this process you need to make it work. Now, in terms of updating electronic filings and things like that, under the current processes I do not think my daughter would ever get notification of any of this. Because if it is not electronic she does not pay attention to it.

So for us to leave the board with a process where employers file things with the board, the board sends it to the union, the union

files things with the board, the board sends it to the employer—and they use the mails to do all that—is just ridiculous.

Mr. HOLT. And to give these things electronically, the names and addresses and so forth—things the company already has—there is nothing violating privacy there, is there?

Mr. DAU–SCHMIDT. No.

Mr. HOLT. Thank you.

Chairman KLINE. The gentleman's time has expired.

Mr. Gowdy, your time?

Mr. GOWDY. I thank the chairman.

Professor Dau-Schmidt, can an employer consider work stoppages as it contemplates where, or if, you start a new line of work?

Mr. DAU–SCHMIDT. You can consider labor costs.

Mr. GOWDY. Can it consider the fact that there have been work stoppages which have led to a prominent customer saying it would elsewhere for its airplanes?

Mr. DAU–SCHMIDT. If it affected labor costs.

Mr. GOWDY. Can it consider the fact that they are paying fines for delays in getting the airplanes to the customers?

Mr. DAU–SCHMIDT. Fines to the customers and sellers?

Mr. GOWDY. Sure.

Mr. DAU–SCHMIDT. Okay. That—if it affected labor costs. They are allowed to take into account costs in deciding where to locate. They are not allowed to punish people for engaging their collective rights.

Mr. GOWDY. Do you——

Mr. DAU–SCHMIDT. That is a question that will be determined when Boeing is actually heard.

Mr. GOWDY. I have not mentioned Boeing. I had not mentioned it a single time. [Laughter.]

Mr. DAU–SCHMIDT. I can draw the lines.

Mr. GOWDY. I may be one of the few people here who had not mentioned the name yet. I am curious. Since you have mentioned Boeing, do you know whether or not new workers were added in Washington State?

Mr. DAU–SCHMIDT. I do not know.

Mr. GOWDY. If I told you that 2,000 additional workers were—were added in Washington State, where is the discrimination? I think more states would like to be discriminated against if a company adds 2,000 jobs.

Mr. DAU–SCHMIDT. I am happy to defer to the board until they actually find the facts in that case. But since you are asking a hypothetical, if instead of 2,000 they would have added 3,000, absent discrimination, then there would still be an unfair labor practice.

Mr. GOWDY. So the employees have been elevated to the boardroom.

Mr. DAU–SCHMIDT. Adding 2,000—or adding 2,000 would be worse than adding 3,000, would it not?

Mr. GOWDY. Well, you just told me we can consider labor costs, we can consider work stoppages, we can consider the fact that customers are going to go to another airplane manufacturer. I am having a hard time seeing the cause of action in this case.

Mr. DAU–SCHMIDT. Back to letting the board develop the facts, sir, we are entirely in hypothetical-land here. But if——

Mr. GOWDY. Well, what we are not hypothetical about——

Mr. DAU–SCHMIDT [continuing]. If the board came in and showed—I am answering your question. If the board came in and showed the economies of scale were such that it would actually be cheaper to put it out in Washington, and the employer in fact made statements like is alleged here—that they were moving them because of the collective action—that would be an unfair labor practice.

Mr. GOWDY. Well, let me ask you this. Is it okay to think it, but just not say it? Is that where the executives got in trouble? Because it is okay to think it, it is okay when you are going through the calculus of where to start——

Mr. DAU–SCHMIDT. I guess you can think about murdering people, but you are not allowed to actually do it.

Mr. GOWDY. It is not a crime. It is not a crime to think about it. It is not even a crime to say you are going to do it. You could sit here and say you are going to murder me this afternoon. That is not a crime.

Mr. DAU–SCHMIDT. I think security would rush in and——

Mr. GOWDY. They might——

Mr. DAU–SCHMIDT. I would not venture to do that, Mr. Gowdy.

Mr. GOWDY. They might be. I would be the first one to say find in the criminal code where it is a crime to do that. So what my point is this. Well, let me ask you this. Have you considered the remedy that was sought by the NLRB in this case?

Mr. DAU–SCHMIDT. I am still letting the case develop, but I think——

Mr. GOWDY. Look, that is a fact question.

Mr. DAU–SCHMIDT. If it is fact they are discriminating against employees based on their exercise of collective action, there should be a remedy.

Mr. GOWDY. Have you considered the remedy asked for?

Mr. DAU–SCHMIDT. Yes.

Mr. GOWDY. Which was what?

Mr. DAU–SCHMIDT. It is—a line back in Washington.

Mr. GOWDY. So they want to get rid of the thousand employees who were hired in South Carolina, shut down a billion-dollar facility to send it back to Washington State.

Mr. DAU–SCHMIDT. That would be the only way to make the employees in Washington whole, yes.

Mr. GOWDY. So you support that remedy?

Mr. DAU–SCHMIDT. Yes.

Mr. GOWDY. Wow.

Mr. Lotito, have you ever had the pleasure of practicing criminal law or civil law outside the realm of labor?

Mr. LOTITO. No, sir. But I might, if I could. Based upon what we heard—a few, yes. Based upon what we heard a few moments ago, I think that those people in South Carolina have a darn good reason of deciding that perhaps they do not want to have a union.

Mr. GOWDY. I think there was one in South Carolina and they voted to deunionize.

Mr. LOTITO. I believe you are correct. I believe they were decertified, yes.

Mr. GOWDY. Of course, we cannot put that on the posters, can we? We cannot inform them of their right to deunionize. Have you ever heard of a criminal case in which you decided to board our juries after the verdict came?

Mr. LOTITO. No, sir.

Mr. GOWDY. How about having motions to suppress after the verdict came?

Mr. LOTITO. No, sir.

Mr. GOWDY. How about challenging whether or not there was an involuntary confession under Miranda after the verdict came?

Mr. LOTITO. No, sir.

Mr. GOWDY. Why is everything being moved post election under this proposed promulgation of rules?

Mr. LOTITO. I think the professor summed it up very well. He cannot think of a single reason why people should not be in a union today. And there are individuals who believe that our country would be better off if we were back up to 35 percent of union representation in the country.

I think there are many people who believe to the depth of their being that it would be a better, quote, unquote—"distribution of wealth." I can respect that point of view. I may disagree with it, but essentially that is what we did in the Wagner Act from 1935 to 1947. We did have a bias. We did say we are going to encourage the practice and procedure of collective bargaining.

And in 1947, we trumped that bias by saying the board has to be neutral. Because employees have the right to choose and they have the right not to choose. And that has to be——

Chairman KLINE. The gentleman's time——

Mr. LOTITO [continuing]. Based upon information.

Chairman KLINE. The gentleman's time has expired.

Mr. GOWDY. Thank you, Mr. Chairman.

Chairman KLINE. Mr. Bishop?

Mr. BISHOP. Thank you, Mr. Chairman. Mr. Chairman, I ask unanimous consent to enter into the record a statement from one of my constituents who is engaged in an effort to organize a T-Mobile workplace in my district.

[The information follows:]

Prepared Statement of William Reitz, T–Mobile USA Worker

My name is William Reitz and I am currently employed at T-Mobile USA in Long Island, New York. I appreciate having the opportunity to share my story, and that of my coworkers, with this Committee as it is relevant to the issues you are discussing aroundthe much needed update of the rules that the National Labor Relations Board (NLRB) is considering. In my experience, T-Mobile USA has abused the current rules at great cost to me, my fellow employees and the American taxpayer, and their behavior as a company is an example of the desperate need for change. They have used delay tactics to give the managers time to coordinate attacks on the union we are trying to join, threaten our jobs and our benefits, and even try to gerrymander our bargaining unit for the election. After several months of this verbal and emotional assault, I still stand firm in my commitment to gaining a voice at work. What I am asking for is a fair chance to vote.

On May 26, 2011 with the support of the Communications Workers of America (CWA), my co-workers and I filed a petition for a union representation election among T-Mobile USA technicians in Long Island, NY. Our bargaining unit has 14 workers. At the same time, fellow T-Mobile technicians in upstate New York and Connecticut filed for a union representation election as well. Immediately after we filed our petition T-Mobile USA management initiated a campaign of delay at the NLRB by requesting hearings and simultaneously using threats and pressure tactics

to intimidate me and my colleagues from organizing and joining the union of our choice.

The issues for which T-Mobile USA management has requested hearings are frivolous and were only requested in order to delay the union election. In their filing with the NLRB, the company is arguing that the work locations filed for by the workers are too small and that the Long Island workers should be included with technicians from Brooklyn, Manhattan, Bronx and Queens because they claim it's a more accurate reflection of the market we serve. In reality however, in determining assignments and workflow, we, the technicians from the Long Island market, are never sent to these other parts of New York City. Management's sudden claim that we are now part of a larger market is only designed as an attempt to further delay the election.

But this isn't their only effort to delay the election. They've gone so far as to challenge the Communications Workers of America (CWA) as a legitimate labor organization as named by the workers as their choice for the election. They claim that because CWA listed its affiliation with TU, the acronym for a joint partnership formed by the Communications Workers of America (CWA) and the German union, ver.di, that represents Deutsche Telekom (DT) (the parent company of T-Mobile USA) workers in Germany, in the filing, that it is not a legitimate labor organization. Such an affiliation is no different then previous filings where CWA has listed its affiliation with the AFL-CIO. This is nothing more than an attempt to request a hearing to determine the legitimacy of CWA to represent us in order to further delay our requested election.

In New York, the NLRB hearings have so far run five long days. We do not yet have a date set for our union election even though we filed for one well over one month ago. Nor is there yet a resolution to the claims the company made at the hearings. At those hearings, management:

- Refused to agree to an immediate election.
- Claimed that Long Island is not an appropriate unit.
- Challenged the workers' chosen bargaining representative, CWA-TU, despite years of working with TU leaders through ver.di, the union representing T-Mobile and Deutsche Telekom workers.

While I and my fellow coworkers on Long Island have faced these delay tactics by T-Mobile USA management, management has engaged in the same delaying tactics and filing of frivolous complaints for the election filed by my T-Mobile USA colleagues in upstate New York and Connecticut.

In Connecticut, the company is challenging the jobs included in the unit, trying to add some professional jobs to the eligible voters, even though technicians-only bargaining units are the norm and there are precedents in NLRB proceedings that demonstrate that units that include only technical workers are entirely appropriate. In fact, 10 years earlier T-Mobile's predecessor company agreed to the Connecticut bargaining unit containing only technicians.

Instead of deferring to the NLRB about the appropriate bargaining unit, T-Mobile has engaged in lengthy challenges. Even though the Connecticut NLRB ruled to recognize CWA-TU as a labor organization and determined that the professional engineers would not form part of the bargaining unit as requested by the T-Mobile USA management, the company management requested a reconsideration of the Board's findings, again causing additional delays in reaching a final election date.

In their request for reconsideration of the determination, T-Mobile USA is asking to include 5 professional engineers in the voting pool. This is an exceptional step in U.S. law. First, these 5 professionals never asked to join the union or have a vote. Second, under U.S. labor law, because they are professionals, they must first vote to be included in the same bargaining unit as the technicians; then they can vote on union representation. The employer is effectively asking the professionals to vote YES (to be in the unit of technicians) so they can vote NO to the union. In fact, the NLRB already has respected the choice of these professionals not to join the union by not including them in the original voting pool. The absurdity of what T-Mobile must ask these professionals to do (vote yes to vote no) underscores why its request will not be upheld. The sole goal of this request for reconsideration over the composition of the bargaining unit is to provide more time for management to create confusion and intimidation in the workplace, to prevent the counting of ballots, and to delay recognition.

These frivolous claims that the company is making in the pre-election hearings have created a delay of, at this point, more than 3 weeks. While we continue to wait as our fundamental right to a timely election procedure continues to be delayed unnecessarily, T-Mobile USA management has made good use of this time. This long delay has allowed the management time to design and implement a strategy of daily delivery of anti-union messaging. While on company time we have been obligated

to listen to management meetings and conference calls in which they made claims that we believe to be inaccurate about our chosen union. Some of those claims include:

• Gross exaggerations about union dues and their use;

• Statements that workers would lose existing benefits if unionized;

• Suggestions that if unionized the company would be forced to fire anyone who did not want to work under a union contract;

• Managers also told us that "It's in the company's and in the workers' interest, not to join the union." And that the union is "a third party and won't represent the workers' interests."

We receive daily messaging from the company in its attempt to persuade us to cease from seeking union representation.

• Supervisors have suggested that management will retaliate against workers if the workers elect to have a union.

• Supervisors hinted that if workers gained union representation, the company will either force technicians to stop home garaging their vehicles or it may change how they calculate personal mileage. This is an important part of our work and these types of threats matter to us.

Again, this situation is not unique to us on Long Island. My colleagues in upstate New York and Connecticut are also being subjected to a daily barrage of anti-union messaging from T-Mobile USA management. It's abundantly clear to us that the company is only engaged in this effort—the filing of frivolous complaints, and requests for appeals, in order to buy enough time to continue with an intimidation campaign of me and my colleagues as an effort to prevent us from exercising our right to organize and bargain collectively. We want to exercise our legal right, in a timely and efficient manner, to decide for ourselves through the established election process whether or not to join CWA. This process of delay and intimidation being exercised by T-Mobile USA management is wrong and should not be allowed to happen now or in the future.

I want to thank Congressman Bishop and the Committee for giving me this opportunity to share my personal story. I also want to thank my fellow technicians for their belief that in order to make our company better and our lives better, we will continue to fight for a voice on the job.

Chairman KLINE. Without objection.

Mr. BISHOP. I appreciate that, Mr. Chairman. Let me quote from it.

The gentleman's name is William Reese. "In my experience, T-Mobile USA has abused the current rules at great cost to me, my fellow employees, and the American taxpayer. And their behavior as a company is an example of the desperate need for change."

"They have used delaying tactics to give the managers time to coordinate attacks on the union we are trying to join, threaten our jobs and our benefits, and even try to gerrymander our bargaining unit for the election. After several months of this verbal and emotional assault, I stand firm in my commitment to gaining a voice at work."

"What I am asking for is a fair chance to vote. What I am asking for is a fair chance to vote." I would suggest that is the essence of our democracy, a fair chance to vote.

Now, Chairman Schaumber, one of the tactics that is being used in this particular organizing drive is a request on the part of T-Mobile to request a hearing to determine whether or not the Communication Workers of America constitutes a legitimate labor entity.

Now, that is a union that has existed for decades. My father was a member of that union, and he is long retired. It represents hundreds of thousands of workers. Would you consider such a request for a hearing to determine if that union is a legitimate labor entity to be a reasonable use of the board's time and taxpayer money?

Mr. SCHAUMBER. I do not want to be unfair to T-Mobile, but I would give it pretty short shrift. In other words, I would not——

Mr. BISHOP. May I infer from that response that you would consider that to be a delaying tactic on the part of T-Mobile?

Mr. SCHAUMBER. Yes. But let me say me say, Congressman, there are not instances cited by the majority of delayed preelection. And my experience is they very rarely, if ever, happen. The dissent only mentioned one, and that was not analyzed by the majority.

Mr. BISHOP. Let me try it a different way. In the chairman's opening statement he indicated—I believe I am quoting him exactly—"Any party causing a needless delay should be held accountable." Is that a pretty close quote, Mr. Chairman?

Chairman KLINE. You want to read it again?

Mr. BISHOP. "Any party causing a needless delay should be held accountable."

Chairman KLINE. That is your quote.

Mr. BISHOP. No, no, I am quoting you, sir. Would you believe—now, I think we are establishing that this constitutes a needless delay. I think that for CWA, any reasonable person would say that that is a legitimate labor entity. Let me get to my question.

If we are to hold any party that is causing a needless delay accountable, is not the proposal in the proposed rule to consolidate hearings a reasonable means of holding a party accountable that is causing a delay?

Mr. SCHAUMBER. I do not believe so. Because you are talking about the exception to the rule. I do not think you can establish your whole system on these exceptions. And the majority, by the way, never justified what it is doing by identifying exceptions and by analyzing them.

Mr. BISHOP. Let us just stay with this example.

Mr. SCHAUMBER. Okay.

Mr. BISHOP. If you were still a member of the NLRB, what would you consider a reasonable remedy to hold a T-Mobile, or others of its ilk, accountable for this kind of unreasonable delay?

Mr. SCHAUMBER. There are no remedies under the statute. I think I may comment on it in a footnote. And if it truly was a frivolous issue I think I could comment on it fairly strongly.

Mr. BISHOP. But the fact that there are no remedies in existing law, does that not build the case for why it is we need the kind of proposed remedy that is put in place by this proposed rule?

Mr. SCHAUMBER. No. Because once again, we are talking about outliers. When I became chairman, I asked for a list of cases. There was not a request redo. That is preelection pending. There were 16 post election challenges and objections, for within the last few months. Eleven were the last year.

None of them could not be decided because we did not have sufficient members on the board to decide them. It had nothing to do with the election process. There was one case, unfortunately, a 2004 case that was not decided upon until, I think, last year. But there particular circumstances there.

But again, we are talking about the outliers. We are not talking about——

Mr. BISHOP. I have about 5 seconds left.

Mr. SCHAUMBER. Okay.

Mr. BISHOP. Mr. Dau-Schmidt, would you—I know you wanted to comment on the allegation that you were proposing a redistribution of wealth. Would you care to take 5 seconds to comment on it?

Mr. DAU–SCHMIDT. Actually, there is a purpose section right in the National Labor Relations Act that Mr. Gowdy wanted to look at that says the purpose of the National Labor Relations Act is to promote industrial peace and equality of bargaining power between employers and employees.

And back when it was originally passed in the 1930s there was a conscious idea that if employees had free choice they would choose unions. If they had equality of bargaining power they would gain higher wages. And that that would actually be good for the economy and help get us out of the Great Depression.

So that is, in fact, part of the purpose of the act.

Mr. BISHOP. Thank you, Mr. Chairman.

Chairman KLINE. Thank you. The gentleman's time has expired.

Mrs. Roby?

Mrs. ROBY. Thank you, Mr. Chairman. I want to go back to this discussion that we were just having. Mr. Schaumber, what is the average time between the petition and the representation election?

Mr. SCHAUMBER. Between—today?

Mrs. ROBY. Right now.

Mr. SCHAUMBER. Well, it is measured by meeting in time. It is 38 days, meaning 50 percent are conducted before—38 days or before, 50 percent after. Ninety-five percent of the elections are conducted within 56 days.

Mrs. ROBY. So how many cases are delayed, and by how long?

Mr. SCHAUMBER. There is no analysis of that by the majority. The dissent mentions one preelection case. And the dissent mentions three post election cases which I mentioned earlier. We are really talking about a very, very small universe. In fact, I would say a tiny universe.

Mrs. ROBY. Right.

Mr. SCHAUMBER. But the point here is, it has not been analyzed at all by the majority as justification for the rules.

Mrs. ROBY. So in the rare cases, the time between a petition election—the petition and the election can be significantly longer, as you have indicated. What is the source of these election delays?

Mr. SCHAUMBER. I believe one of the sources of preelection delay is when the union files a blocking charge seeking to stop an election because of unfair labor practices. That was not analyzed by the majority. The majority did ask for comment on that.

That is the only thing that I know of. There may be unique and unusual circumstances which may have caused a particular case here or there to be delayed as long as they were.

Mrs. ROBY. So the exception, not the rule?

Mr. SCHAUMBER. Very much the exception.

Mrs. ROBY. So do any of the proposed changes to the election procedures in this proposed rule alleviate these problems?

Mr. SCHAUMBER. Well, we do not know that because they have not identified the problem, you know, and they have not analyzed or attempted to analyze that tiny universes of cases in which there has been delay. In fact, I think that the sum total of these rules is you are going to have far fewer preelection agreements, you are

going to have more hearings that the employer is able to pull his act together and identify issues and file a statement of position.

And you are going to have, after the election, many more elections set aside based on decisions being made by the board which should have been made preelection.

Mrs. ROBY. Thank you very much. I want to circle back. I know there was a lot of discussion in my absence about the proposed rule requirement with email addresses. And I want to ask Mr. Lotito, are they any legal implications to providing the unions with employee email addresses and phone numbers.

Mr. LOTITO. Well, I think that there are privacy issues, for sure. And on the proposal, the way I read it, they do talk about email addresses. I am not clear, based upon the proposal, whether the board is talking about home email addresses or company email addresses.

I think that that is something, regardless of I think there is privacy issues on both. But I think that that is an important distinction. And if the board's intent here is to also ask for company email addresses, that, it seems to me, is going to be an easement on the Register Guard decision that the board issued a few years ago with respect to the utilization of company emails.

Because once you get over the issue of whether or not they should provide the email address, the next question is it seems to me that if the union's going to use it the board's going to have to reverse Register Guard. And then you get into a whole series of questions over a period of the 10 days how often is the union going to be able to communicate.

What can they send by email? Can there be attachments? You can see that there is a whole host of very practical issues that are going to flow from this, and I do not think what they wrote is clear. But that just may be my deficiency.

Mrs. ROBY. Thank you very much.

Mr. Carew, are you concerned that this proposal will force you to spend even greater resources on union elections, when these resources in this time could be better spent expanding your business and creating new jobs for workers?

Mr. CAREW. Thank you. As a small business owner, do not forget about us. We create jobs, too. And I am just so concerned about this process that has become too short, too difficult to comply with, such that we will not have an informed legal and fair vote for everyone.

I am very concerned about it.

Mrs. ROBY. And particularly in this time, when we know the number one issue in this country is job creation. And yet, once again, this heavy hand, where those resources could go back into job creation in this country. So thank you for your answer.

Thank you to you all being here today. And, Mr. Chairman, I yield back.

Chairman KLINE. Thank the gentlelady.

Ms. Hirono?

Ms. HIRONO. Thank you, Mr. Chairman. It is hard not to notice that there are no union workers testifying at this hearing. So we have heard from the testifiers who are against these proposed

changes. And I appreciate your views, except for Professor Dau-Schmidt.

I did want to refer to a statement that I have from our Brian Bixby. He is with the Transfer Workers Union of America, Local 721 in Las Vegas. And he talked about his efforts to form a union in 2007 where he worked. I will not go through all of his statement, of course, but they filed their petition for an election in 2007 November.

The election was supposed to occur in December. It was delayed until mid-December, and he certainly does not know why. But while this period of delay was happening, the employer conducted mandatory captive audience meetings, sent letters to workers' homes criticizing the union, handed out many fliers, and instituted a new benefit that would help the dealers financially so that they probably could induce them not to vote for a union.

Many of his coworkers were from other countries, and they were threatened that they could lose their citizenship and be deported if they supported the efforts to form a union. And the union did get formed, with 84 percent of the people voting for it. This was, I assume, in 2007.

The union was certified, but they are still trying to bargain for a first contract. I think it would have been great to hear from those who are attempting to form unions as a valid part, or an important part, of what we are talking about today.

We also heard testimony that there is definitely a decline in union density in the private sector, and I think that was Chairman Schaumber who said that. That it declined from 35 percent in the 1950s to 7 percent today. Perhaps one of the reasons that is happening is because unionization, the process itself, is fraught with all kinds of problems which, I think, these proposed rules seek to address in some way to make the process fairer.

In fact, I am looking at the summary of these changes that are being proposed to the process, and I am looking at this modernizing the process by allowing people to file information electronically. That does not sound terribly onerous. Even as to the time frames that Chairman Schaumber referred to, generally in most of these cases, and correct me if I am wrong, that between the parties there can be a lengthening of the time.

It may require the administrative entity to agree to it, but these kinds of accommodations are made usually in all kinds of hearings of this nature. You are not——

Mr. SCHAUMBER. Excuse me. I am afraid the rule is pretty strict with regard to the hearing in 7 days, the requirement to statement of position.

Ms. HIRONO. Are you saying that there can be no——

Mr. SCHAUMBER. Absent extraordinary circumstance.

Ms. HIRONO [continuing]. Room for agreement as to lengthening?

Mr. SCHAUMBER. No. It is, absent extraordinary circumstances.

Ms. HIRONO. Do you agree with that, Professor Dau-Schmidt?

Mr. DAU–SCHMIDT. I actually—that is not the way I read the rules. I mean, he does bring up the clear exception, which is extraordinary circumstances. So the board can always extend that period under that rule. But if you had an agreement—in other words,

these rules do not prevent the parties from agreeing to the conduct of the election.

And they could agree to a different time period, as far as I am concerned, under these rules.

Mr. SCHAUMBER. That is absolutely incorrect. There is no room for the parties to agree to the timing of the election. It is set by the regional director. It is not set by the parties. And the regional director must comply, and must do so consistent with the rules.

Ms. HIRONO. Well, obviously we have a difference of opinion on the panel so I would have to look at the rule myself. But generally, in these kinds of proceedings, nothing is set in concrete. I am also a lawyer, in these instances that often the parties can agree to a lengthening of time.

So it would be rather astounding to me that such would not be the case. I think that it is very clear that we should all be concerned about wanting to streamline administrative procedures and hearings. And, in fact, the majority has made it a point to reference us to all kinds of regulations that they deem to be overreaching and unfair.

But as I said, when I look at the description of the current practices and the procedures and what is being proposed in these rules, nothing terribly untoward, as far as I can see, is happening here. That this is a board that is trying to streamline the process, and make the administrative process a lot clearer.

So, you know, obviously you disagree that——

Chairman KLINE. The gentlelady——

Ms. HIRONO [continuing]. That our panel disagrees except for one member of the panel. But I would suspect that if we had other people who are here with other views, we would get a more fuller picture. And I see my time is up. Thank you very much.

Chairman KLINE. The gentlelady's time has expired.

Mr. Kelly?

Mr. KELLY. Thank you, Mr. Chairman. And thank you for holding this meeting.

I just want to clear up a few things. First of all, Mr. Getts, you are a former union member.

Mr. GETTS. Correct.

Mr. KELLY. Okay. So we do have somebody on the panel that has actually been a union member. And if I were to look at the NLRB's boards, I know we want everything to be equal. There's three Democrats and one Republican on the NLRB board. Is that correct?

Mr. DAU–SCHMIDT. Yes, that is correct.

Mr. KELLY. So as far as the way things are structured, sometimes it comes down to who is the majority.

Mr. SCHAUMBER. I had a different take on it. I think that both management lawyers and labor lawyer—union-side labor lawyers are impacted by their experience. But there is a difference between a union-side labor lawyer that is on the board, particularly under current circumstances where there are so many comments made by organizations, by organized labor, that they are there to serve their interest.

That never happens with regard to a management-side attorney. I have never heard anyone in management or an employer organi-

zation ever say that. And if they did, I would take personal offense to it.

Mr. KELLY. Okay. Well, you know what? The title of today's hearing is "Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice." So I want to make sure. Because I think one of the things that truly makes America exceptional is, we really do have a great emphasis on what is fair.

So I looked up "fair," and fair means marked by impartiality and honesty, free from self interest, prejudice, or favoritism. And if you look at that term then, today's hearing is not about unions or about the employers. It is about is it fair to everybody concerned.

It kind of goes back to a—I belonged to Rotary for awhile, and that was one of their themes was is it fair to all. And I think what bothers me is—and I look at this, and I am trying to understand. And I am going to read this because I thought it really made sense.

In 2010, for all petitions filed, the average time from the filing of a petition to an election was 31 days. More than 95 percent of all initial elections were conducted within 56 days of the filing of the election petition. Now, acting general counsel Solomon has described these results as outstanding.

So—and I know we are in a town where we just always—we are not satisfied with the very good, we have to make sure everything is perfect. And I am asking. So what is so wrong with the current structure that we have to change these things? What is going on here?

Mr. SCHAUMBER. No case has been made by the majority in their papers for there being anything wrong. They do not describe delay, they do not define delay. What they—all they say is, it isn't taking place soon enough. They do not analyze those few outlier cases where there has been delay.

Mr. KELLY [continuing]. So the process that is outstanding right now is not good enough?

Mr. SCHAUMBER. I think the process right now is outstanding. That is not to say that there should not be some changes. Such has been suggested with regard to electronic filings and all that kind of thing. I think those are good ideas, but what they are trying to change is far more than that.

Mr. KELLY. Okay, and I appreciate that.

Mr. Carew, I got to tell you I been through the same situation you have been. I mean, it is easy to talk the talk, but you have to walk the walk. And now, a lot of people think of companies as these big entities, thousands of employees and all kind of revenues and all kind of ability—capital, that is free.

I went through the same thing. And when this happens to a small business person, these are the people that you work with every day. You have grown up with them, you have been to baptisms, you have been to first communions, you have been to funerals, you have been to all these things.

And all of a sudden, from out of left field, you get something in the mail that says, "Hey, your people want to organize." Say, "Why?" And I think what it does is, and what we are missing the point on, is it really does turn your world upside-down. This is nothing about unions, by the way. Listen, this is a law that has been in effect for 76 years.

I am not debating that, but I am telling you as an individual that has been through it and you know your people, and all of a sudden a new day dawns and your whole world is turned upside-down. I think your story is incredibly important. And the whole country needs to hear that. I am not anti-union, but I do say it does turn your life upside-down. Been through it.

Mr. CAREW. Well, thank you. When I was so fortunate to come here today, I received several emails from my colleagues thanking me, and telling me that this is such an important issue to them. And that it is so important that our industry and our type of businesses that our feelings be heard. And our experience with our campaign was that we needed every minute we had.

And I think because of that we had an informed decision made. And I am just so concerned about with shortening this process how that could affect us in our abilities to our employees to make an informed decision.

Chairman KLINE. Then gentleman's time has expired.

Mr. Kildee?

Mr. KILDEE. Thank you very much, Mr. Chairman. First of all, in the interest of full disclosure, I have to disclose that I was a member of the IBEW, and climbed many a manhole with the CWA in Flint, Michigan. So I welcome you here. It does give me a—maybe a perspective that others may not quite have.

But I still, nevertheless, try to be very objective. I have seen the pendulum. I was born in 1929. I remember very well the sit-down strike in Flint, Michigan in 1936-1937. The pendulum has swung. Back in those days, really, unfortunately the weapon of choice very often was a weapon. This is why we have come a long ways.

But sometimes the pendulum tends to swing back. The pendulum of choice for General Motors was Pinkerton detectives, the largest single contractor of Pinkerton detectives. And they were interspersed with the workers at the Buick motor plant in Flint, Michigan.

And the pendulum of choice at Ford was Harry Bennett and those he would hire, most of those whom came from Jackson Prison. That is where Walter Reuther was horribly beaten up on the Battle of the Overpass. Thank God came along the enforcement of the Wagner Act. And the Wagner Act worked quite well.

It was amended, of course, by Taft-Hartley and the Landrum-Griffin. But we have seen the pendulum swing back and forth. And I think what the NLRA is trying to do here is try to jiggle it just a bit, but it is a small jiggle to try to give some voice to labor.

Compared to Taft-Hartley and compared to Landrum-Griffin, this is just a little jiggle. A little jiggle, and all of a sudden you think that the economy of the United States is going to collapse because of this little jiggle. It is nothing compared to the Taft-Hartley or the Landrum-Griffin bills.

Now, my dad went to work for Buick in 1916. When he went to work for Buick, it was before unions, and you were very often fired if you talked about unions. By 1916, he could not even dream of buying that which he produced. He could not dream of buying the automobile.

But when he retired in 1950, the first retiree group from General Motors, the same week that he retired, he bought a brand-new

Buick, and that was, to a great extent, because of an equitable wage that he received from General Motors. All we are asking here—I think both sides, hopefully they are asking—is a balance. And I think that's what the NLRA is trying to do.

A little tickle, a little balance. It is not going to ruin the economy, it is not going to put one group at a severe disadvantage over the other. It is trying to, as we have done since 1935 when the Wagner Act was passed. It is gone just a little. You know, my dad—I am talking a lot here, but there were so many good questions I will tuck those away to my answers—when my dad first joined the union—I can recall this very well because he had to wear his button under the collar.

Because at General Motors, it has changed, thank God. I am co-chair of the automotive caucus so I worked very hard to help General Motors survive its problems. But he had to wear it under his collar, because he would be fired if the—it varied from one plant to another. But if you were going to be a union member, you were fired.

I say this to say that the Wagner Act came into being for a purpose. And the pendulum has swung, you know, hither and thither. But I do think that we—when we look at what is proposed here, I really cannot see—and Mr. Carew, you know, I recognize you are concerned about your business. And, hopefully, you can hand it on to your children.

And my dad was concerned about his children.

Chairman KLINE. The gentleman's time has expired.

Mr. Ross? You are recognized.

Mr. ROSS. Thank you, Mr. Chairman. I appreciate this opportunity.

In following up on my colleague, Mr. Kelly's, comments about why we are doing this procedure. And when I look back and I see that according to the acting general counsel, Leif Solomon, 95.1 percent of all initial elections were concluded within 56 days, 38 days from the filing of a petition, and some 86.3 percent of all representation cases were within 100 days, he responded saying this is outstanding.

And Mr. Schaumber, I guess my question to you is that this is such an outstanding procedure, according to the acting general counsel, then the shortening of it there must be some other reason. Would it be that maybe they are trying to start favoring the unions a little bit more?

Mr. SCHAUMBER. Well, I think the answer to the question is yes. And I wonder if, Congressman—before, a reference was made to the number of threats made by employers to close and things like that. I just would like, if I could, submit to the record—because one of the underlying things here is a presumption that unionization has declined because of an increased number of employer unfair labor practices.

There is no reliable statistical data to support that. And the person who performed the research, I am sure I will mispronounce her name, she is at the Cornell School. I called and asked if I could find out what the—how the research was performed, if I sent an email.

I never heard back, but I did get this paper from the U.S. Chamber, which discusses it. And I wonder if I could make it part of the committee record.

[The U.S. Chamber of Commerce white paper, "Responding to Union Rhetoric: The Reality of the American Workplace," may be accessed at the following Internet address:]

http://www.uschamber.com/sites/default/files/reports/0908_unionstudies_coercion.pdf

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Chairman KLINE. Without objection.

Mr. ROSS. Mr. Schaumber, just to follow up on that because I had a chance a couple of weeks ago when we were in Charleston and having a hearing with the acting general counsel of the NLRB, Mr. Solomon. And he said that, well, you know, he had to intervene, prevent the intervention of non-union employees from Boeing into that proceeding, even despite, despite his manual that says that when an interested party who has a direct benefit or interest in the outcome of it, the general counsel is not allowed to intervene on their behalf and prevent them from coming in.

Even despite his abuse of his own power in that regard, it seems to me that what we are seeing is a ceding of power from Congress to the NLRB and other agencies. And my question to you is that if this rule is promulgated and implemented, is there anything to stop them from going forward and requiring that they no longer have a secret ballot?

Mr. SCHAUMBER. They cannot do that. They can certainly favor the secret ballot. I do know, based on one of their decisions, they do intend to strip employees of their right to challenge their employers' voluntary recognition by card check using a secret ballot.

With regard to the Boeing complaint, when you talk about expansion, you know, an employer can tell its employees if they go out on strike it can hire permanent replacements. And—telling that to its employees does not make the employer's decision to hire those permanent replacements unlawful.

Essentially, what the general counsel is saying in the Boeing complaint is that by Boeing saying that one of the reasons it was going to South Carolina was because—to avoid the economic consequences of strikes, made their decision to go to South Carolina unlawful. And that is just not the law.

Mr. ROSS. I agree with you.

Mr. Getts, I note that as a former union member, if this law—if this rule is promulgated, implemented, do you feel it is going to help inform the union or prospective union workers any more so?

Mr. GETTS. No.

Mr. ROSS. In fact, it may work the adverse.

Mr. GETTS. Yes.

Mr. ROSS. And Mr. Dau-Schmidt, I have got to ask how you want to respond to something. But I got to ask you because I read your testimony in advance, and was here for it. But what strikes me is that we are right now at 9.1 percent unemployment. We have got 14 million Americans unemployed. The most pressing issue before Congress right now is the creation of an environment for sustainable private sector jobs.

Do you feel, in your opinion, that this rule as proposed will do anything to incentivize the creation of sustainable private sector jobs?

Mr. DAU–SCHMIDT. Can I make my response first? Chairman Schaumber, in the past, exercised his right to disagree with me. And I just wanted to exercise my right to respectfully disagree with him, too. In terms of the literature, when you look at the empirical literature there is good evidence that employer resistance in the United States and their ability to resist under the National Labor Relations Act has lessened union organization in this country.

If you compare Canada with the United States, the paradox has always been that workers in the United States want unions more then Canadians do, but the percent organized in Canada has always been much higher. And the only explanation for that is that American law is much harsher, and that employers are able to resist employee organization better under American law.

Mr. ROSS. And I appreciate that.

Mr. DAU–SCHMIDT. Now, on your question as to whether or not there is anything in here to help the current economic crisis, I do not think there is anything in here to either hurt it or help it, frankly. I would like to see—I think we have to look at——

Mr. ROSS. But that is not—I mean, really, let us face it. I mean, if it is going to put this burden on employers it is not going to do anything to incentivize them to create jobs.

Chairman KLINE. The gentleman's time has expired.

Ms. Woolsey?

Ms. WOOLSEY. Thank you, Mr. Chairman.

Mr. Lotito, in your testimony you said something that stuck with me through this whole time. And that was that there was nothing in the new bill to protect the employer. I am really unsure what you mean. Are you talking about the employer being protected against their workers, against simpler process, against moving into the 21st century electronically?

Protecting employers from not being able to coerce and threaten and intimidate voter—their labor voters, or infuse unnecessary conflict and disruption into the workplace? I do not know what they need to be protected from. I was a human resources director for 10 years, a company that grew from 13 to over 800 employees.

And I always—surprise, surprise to everybody—thought my job as the human resources director—I called my department the people department, so you can imagine. I knew my job was to make sure that the employees did not lose out.

So what is it that we need to protect the employer from?

Mr. LOTITO. Three things, if I could. First, thanks very much for representing me for the last 20 years because I live in San Rafael. And I wish you well in your retirement. Enjoy your grandchildren.

Secondly, we share a common background because in 2000 I was the chair of the Society for Human Resource Management and have dealt with human resource professionals for much of my career. The third point is, I do not have any recollection of saying that there is nothing in here to protect employers.

Ms. WOOLSEY. You did.

Mr. LOTITO. If I did that, I am not grasping the context that you recollected I said it in. I think the thrust of what I have been say-

ing here is that if the employee—which, to me, is really what the statute is all about—it is really not about unions and employers in the sense that they are not making the fundamental decision to join the unions.

It is about the employee making that decision. I believe that that decision should be based upon a full record, much as you are trying to develop here today. And I believe that if this proposal that the board is making goes into effect that it will substantially impair the ability of employees to have a full record before they ultimately decide to unionize.

Ms. WOOLSEY. Okay. And I work for you, but I disagree with you totally on——

Mr. LOTITO. That is all right. Most of the time I disagree with you, so we are on the same wavelength.

Ms. WOOLSEY. All right. So on record, right?

Mr. LOTITO. That is right.

Ms. WOOLSEY. There you go.

Mr. LOTITO. So we can still be friends.

Ms. WOOLSEY. Absolutely. And I still do work for you.

Mr. Dau-Schmidt, who and how—how do the workers of this country learn how important organized labor has been to them? I mean, who tells them that the reason that we have wage and hour protection, the reason we have minimum wage, the reason we have child labor laws, the reasons that we have safety and health programs is because at some point, Dale Kildee's father stood up for changing an old-fashioned system and making workers important in this country?

And giving workers a chance of earning a livable wage, of owning a home, sending their kids to college, having a retirement that they could live with, and know that that is what America stood for. How do we tell that to workers if we cannot even go on the work site?

Mr. DAU–SCHMIDT. I do not think that voice has been absent. I mean, when I saw the title here, "Big Labor," I was wondering who are they talking about. We are down to less than 8 percent organized in the private sector. I am not sure who big labor is anymore.

And I have got the tell you that, in my experience in growing up, I went to a high school, I grew up in the shadow of a pork plant. And most of the kids parents were unionized. We never learned anything in our high school history classes about the labor movement, or how any of that had been important.

So I do think that that is a voice that is absent. And I think the way that you respond to that is, I think that people that have benefited from unions, people who understand the history, have got to talk to their friends and family. And that we have to educate people about how important it is to have some balance in our society between—I will use the term "big capital" and "big business," and "regular working people."

You have got to have some balance in a society to have a healthy economy and have a healthy democracy.

Chairman KLINE. The gentlelady's time has expired.

Dr. Bucshon?

Mr. BUCSHON. Thank you, Mr. Chairman. Just a couple brief comments. First of all, my father was a United Mine worker for 37

years, so I have a good understanding, from that perspective, growing up in that environment.

And for me, this hearing is about fairness for the workers as well as the employers. And I think the indication is that, you know, that is a two-way street.

And it seems to me the NLRB's proposal, with the data Mr. Kelly has shown about fairness in the current system, this rule, probably seems unnecessary. Unless it is based on a specific political agenda, which it appears to me that it is.

With that, Mr. Chairman, I want to yield my—the remaining portion of time to Mr. Gowdy.

Mr. GOWDY. I would like to thank Dr. Bucshon, and thank the chairman again.

To the three attorneys on the panel, Linn v. United Plant Guard Workers, a 1966 Supreme Court case, is that still good law?

Mr. SCHAUMBER. You are are catching me off guard. Could you mention the name again?

Mr. GOWDY. Linn, L-I-N-N, v. United Plant——

Mr. SCHAUMBER. Yes, of course.

Mr. GOWDY. We acknowledged that the enactment of section 8-C manifested congressional intent to encourage free debate on issues dividing labor and management. As we stated in another context, cases involving speech are to be considered against the backdrop of a profound commitment to the principle of that debate.

It should be uninhibited, robust, and wide open. And it may well include vehement, caustic, and sometimes unpleasantly sharp attacks. I see nothing in that elucidation of our First Amendment rights that it should be shortened by an unelected group of recess appointees at the National Labor Relations Board.

So let me, Professor, give you one more chance to tell me whether or not you can think of a single reason not to join a union.

Mr. DAU–SCHMIDT. I think that has been asked and answered.

Mr. GOWDY. Has the answer changed?

Mr. DAU–SCHMIDT. If you want me to, I still would like to have a context. I will give you—I thought about it a little bit while I have been listening to the rest of it. If you have religious objections you might not want to vote for a union.

Mr. GOWDY. No economic reason.

Mr. DAU–SCHMIDT. There are people who have legitimate religious objections.

Mr. GOWDY. No economic reason that you can think of.

Mr. DAU–SCHMIDT. Actually, if I had the opportunity to vote for a union in my workplace, I would.

Mr. GOWDY. Do you know whether or not the National Labor Relations Board has jurisdiction in Brazil?

Mr. DAU–SCHMIDT. Has what?

Mr. GOWDY. Jurisdiction in Brazil.

Mr. DAU–SCHMIDT. Do not believe they do.

Mr. GOWDY. India?

Mr. DAU–SCHMIDT. In India? No.

Mr. GOWDY. China?

Mr. DAU–SCHMIDT. No.

Mr. GOWDY. France?

Mr. DAU–SCHMIDT. No.

Mr. GOWDY. So Boeing could go to Brazil and not South Carolina and there would be no Leif Solomon in their lives.

Mr. DAU–SCHMIDT. They would still have jurisdiction over them to the extent that they are still in the United States, yes.

Mr. GOWDY. Well, they can not make them tear down a plant in Brazil, can they?

Mr. DAU–SCHMIDT. They might make them open one in Washington. Maybe that is the solution——

Mr. GOWDY. So that is the point we have gotten to is that the general counsel of the National Labor Relations Board is going to tell a company like Boeing where it can put a facility, how many workers it needs to hire, how many planes it can build in Washington State versus South Carolina. That is where we are.

Mr. DAU–SCHMIDT. I do not think that is where we are. I think we have to wait and see how the facts develop in that case. But if, in fact, Boeing discriminated against their employees on the basis of their collective action, the board has the power and the obligation to make those employees——

Mr. GOWDY. Have you read the complaint?

Mr. DAU–SCHMIDT. And if they—if making them whole means we are going to make sure there are jobs in Washington, then that is the remedy that the board——

Mr. GOWDY. And then Boeing can move to Brazil, right?

Mr. DAU–SCHMIDT. No, I do not believe they would.

Mr. GOWDY. I said could they, not would they.

Mr. DAU–SCHMIDT. They, we still, would have a remedy over Boeing here in this country.

Mr. GOWDY. Mr. Chairman, after hearing about advocacy posters that tell you can unionize but do not tell you that you cannot unionize, after hearing about advocacy posters where employers cannot tell putative union employees how much of their money is going for political purposes, in an environment where the NLRB is pursuing an absolutely draconian remedy against the largest exporter this country has, and now shortening the election and litigation framework, and this newfound fascination with judicial economy, it appears to me, Mr. Chairman, the NLRB has become a political sycophant for labor unions.

And it might be well for Congress to revisit its attention to the NLRB. With that, I will yield back.

Mr. DAU–SCHMIDT. Excuse me.

Chairman KLINE. The gentleman yields back. We are going to be voting here shortly. By previous discussion with the ranking member, I will recognize him for any comments or even questions, if he likes.

Mr. Miller, you are recognized.

Mr. MILLER. Thank you very much, Mr. Chairman I would like to ask unanimous consent to put into the record the proposed notice of employee rights where it clearly states you also have the right to choose not to do any of these activities, including joining or remaining a member of a union.

[The information follows:]

EMPLOYEE RIGHTS

UNDER THE NATIONAL LABOR RELATIONS ACT

The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board, the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten you that you will lose your job unless you support the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take other adverse action against you based on whether you have joined or support the union.

If you and your coworkers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's website: www.nlrb.gov.

Click on the NLRB's page titled "About Us," which contains a link, "Locating Our Offices." You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or (TTY) **1-866-315-NLRB (6572)** for hearing impaired.

***The National Labor Relations Act covers most private-sector employers**. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

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U.S. Department of Labor

Mr. MILLER. So with all of the talk about how it does not tell people they have a right not to join the union, it clearly says they have a right not to join the union. I would hope that if Boeing did retaliate against the workers in Seattle, and they chose to move

American jobs to Brazil, that the gentleman would support the effort to make sure that they were not able to do that, for the sake of the fact that they retaliated against the workers for exercising their legal right. [Applause.]

A lot of this discussion, and a lot of the written testimony of the witnesses, is about the issue of time and whether or not employers would have an opportunity to talk to employees and whether employees would have an opportunity to understand what it means to join the union.

Mr. Schaumber, you say, in a couple of cases where the decertification of the election is the issue, that there is no right to time. There is no right to an election.

Mr. SCHAUMBER. I do not think that was myself.

Mr. MILLER. Well, in Shaws Supermarket, the board decision in your opinion in that case, you said the employer should not have to bother with a secret ballot election because, quote—"The time it takes to ultimately resolve the representation case."

Mr. SCHAUMBER. I would have to go back to Shaw Supermarket——

Mr. MILLER. I would hope you would.

Mr. SCHAUMBER [continuing]. To view the context. Because with all due respect, I think that is taking it out of context.

Mr. MILLER. Or we could go to Wurtland. We could go to the Wurtland Nursing Home case where there, again, rather than waiting, you said the unions should be decertified, that there is no need for a secret ballot, to be determined by including the period required for resolution of challenges and objections.

Mr. SCHAUMBER. Congressman, you are reading me out of context. And I think that is unfair. I would like to have those cases——

Mr. MILLER. I am reading you out of context.

Mr. SCHAUMBER [continuing]. Put——

Mr. MILLER. I think you have one view on the rights of people to delay a process when it comes to trying to form a union, and you have another view when it comes to time to decertify the union.

Mr. SCHAUMBER. I would respectfully——

Mr. MILLER. Because all these concerns we have heard about time and the rights of workers on decertification, it is gone.

Mr. SCHAUMBER. I would respectfully request if those cases could be made part of the record.

[The NLRB Decision, cases 1–CA–39764, 1–CA–39971, 1–CA–39972, and 1–CA–40139, "Shaw's Supermarkets, Inc. and United Food and Commercial Workers International Union, Local 1445, AFL-CIO," may be accessed at the following Internet address:]

http://www.nlrb.gov/search/simple/all/350-585

[The NLRB Decision, case no. 9–CA–40471, "Diversicare Leasing Corp. d/b/a Wurtland Nursing & Rehabilitation Center and District 1199, The Health Care and Social Service Union, SEIU," may be accessed at the following Internet address:]

http://www.nlrb.gov/search/advanced/all/351-817

Mr. KLINE. It is done. We will make these part of the record.

Mr. SCHAUMBER. Thank you.

Mr. MILLER. But the point of the view is: what is your view on decertification?

Mr. SCHAUMBER. I think employees should have a right to decertify, as well as employees should have a right to have a union and certify.

Mr. MILLER. But that is not the case you voted on.

Mr. SCHAUMBER. Congressman, I do not recall those cases.

Mr. MILLER [continuing]. Not the case you voted on. And the——

Mr. SCHAUMBER. You are not quoting me fairly.

Mr. MILLER. You constantly hear the same people, the same people in the Congress and outside the Congress, that lament the lack of an opportunity of the employee to be informed and participate on a decertification. You get the card signed, you show up, and it is over for the union right now.

Mr. SCHAUMBER. Congressman, you are quoting me unfairly.

Mr. MILLERr [continuing]. Constitutional rights to speech. How is that not the right to be involved? How is that the right to have some say over your workplace? That is the rule, right?

Mr. SCHAUMBER. Everyone can read those decisions and see for themselves what I said.

Mr. MILLER. What is the outcome of the decision?

Mr. SCHAUMBER. Sir——

Mr. MILLER. The decision was, it was over.

Mr. SCHAUMBER. Those decisions were 4 or 5 years ago. I do not recall them right now, number one. Number two, you are incorrect.

Mr. MILLER. Well, Mr. Dau-Schmidt, let me ask you a question on the question of decertification. You get the cards to decertify the union, you hand them in, and the game is over.

Mr. DAU–SCHMIDT. There have certainly been opinions expressed to that, yes.

Mr. MILLER. Yes, there certainly have, by the board that is so worried about all of this time that would be consumed or not consumed. However, you want to——

Mr. SCHAUMBER. I have never heard of a case like——

Mr. MILLER. So you clearly have a double standard that has emerged.

Mr. SCHAUMBER. I have never heard of a case, in my 8 years, where a decertification could take place based on cards.

Mr. MILLER. It is with automatic withdrawal of recognition.

Mr. SCHAUMBER. There is no such thing as an automatic recognition. You have to have——

Mr. MILLER [continuing]. All these guys back——

Mr. SCHAUMBER. You have to have a secret—you have to have a secret ballot election.

Mr. MILLER. Well, we will contend. But the point is that you have advocacy for the immediacy, with reaction of the signing the cards. The same cards that would be signed if you had employer free choice act to certify the union. That somehow is terribly wrong. But in the decertification, the same groups that support——

Mr. SCHAUMBER. Well, Congressman——

Mr. MILLER [continuing]. Immediately withdraw the recognition——

Mr. SCHAUMBER. With all due respect, now I understand why you are confused. The cards that are used for decertification are the same cards that are used for certification. In lieu of having the employee sign the decertification petition or sign the certification petition, they sign cards which are submitted with the petition.

Mr. MILLER. Right. And you can immediately withdraw.

Mr. SCHAUMBER. No, there is no immediate withdrawal. It is a secret ballot election.

Mr. MILLER. The board that you participate in, we will straighten this out. But the fact of the matter is that the board that you participated in, and I believe your quotes, suggest that that should not be necessary. That should not be necessary.

So I guess a lot of this upholding of people's rights depends on what side you are looking at it from. I think there ought to be a ballot on each one. I think employees ought to be heard about whether or not when they get blindsided on the decertification process they ought to have an ability to address the workers and tell them maybe they know, they understand, the circumstances which that has taken place so they do not know. And the same as on the front end.

Mr. SCHAUMBER. With all due respect, Congressman, you are suggesting I am partisan. I came to the board as a neutral. I was a labor arbitrator. I was never a management attorney.

Mr. MILLER. I appreciate it. Thank you very much.

Chairman KLINE. I thank the gentleman. I thank the witnesses very much for being here today, for their testimony, for the spirited discussion on the part of all members of the committee. We have talked many time in this committee, and I am sure we will continue, about some shortcomings with the National Labor Relations Act and the fact that there is a pendulum, as one of my colleagues mentioned, that goes from administration to administration.

I think that what we are seeing right now is a swing in that pendulum that is decidedly in the favor of big labor. And I can identify big labor for Professor Dau-Schmidt if he is still looking for it.

I would point out that one of the members, a recess appointee of the board, Mr. Becker—who has been somewhat controversial and understandably so based on this employment as the associate general counsel of the Service Employees International Union—some interesting quotes from Mr. Becker that I think pertain to the discussion here today.

One of the things that Mr. Becker is quoted as saying is, on these latter issues employers should have no right to be heard in either representation case or in unfair labor practice case, even though board rulings might indirectly affect their duty to bargain.

Another quote—"Similarly, employers should have no right to raise questions concerning voter eligibility or campaign conduct." Similarly, just as U.S. citizens cannot opt against having a congressman, workers should not be able to choose against having a union as their monopoly bargaining agent.

This pendulum is swinging, and it has swung a long way. We are going to continue to look into the actions of the NLRB as part of our oversight responsibilities. I thank all the witnesses. I thank the members. There being no further business, the committee stands adjourned.

[Additional submissions of Mr. Miller follow:]

Follow-up Statement for the Record From Mr. Miller

I write to submit cases for the record as a followup to my exchange with Mr. Peter Schaumber, a witness at the hearing on July 7, 2011. In that exchange, I cited Board decisions issued during Mr. Schaumber's tenure on the Board that indicated, contrary to his criticism of the current Board's proposed rule on eliminating delays in representation elections, a frustration with delays in decertification elections.

In 2007, Mr. Schaumber was part of a Board majority that issued dozens of controversial decisions overturning long-standing precedent. One of those decisions, co-authored by Mr. Schaumber, was Shaw's Supermarket.[1] In that case, the Board held that, based on a majority of employees signing cards asking for removal of their union, an employer could withdraw recognition without waiting for a secret-ballot election because delays may force employees "to endure representation that they have unquestionably rejected."[2] Mr. Schaumber cited concerns that a decertification election could be delayed if the union files blocking charges or challenges or objects to the decertification election. In light of the time "it takes to ultimately resolve the representation case."[3] Mr. Schaumber and the Board's majority held that an employer may rely on signed cards as evidence of actual loss of majority support and unilaterally withdraw recognition from a union.

In a separate case that year, Wurtland Nursing & Rehabilitation Center,[4] the Board again raised concerns that delays can occur with a secret ballot election and accordingly rejected the need for a secret ballot election. In that case, a majority of workers signed cards requesting an election to remove the union as their bargaining representative. The Board held that the employer could simply withdraw recognition without waiting for an election, explaining that an election would prolong the time during which the union would remain the workers' representative, i.e., "until the election results were certified, including any period required for the resolution of challenges and objections."[5]

In another case from this prior Board, Dana Corporation,[6] the Board's majority completely disregarded any concern over possible delays where workers sought recognition for their union. In Dana, Mr. Schaumber and the prior Board majority held that a minority of the workforce can override the expressed desire of the majority of the workers. The Board held that collecting employees' signatures in support of a union is "admittedly an inferior process to the election process" and "there is good reason to question whether [signatures] accurately reflect employees' true choice." While requiring a representational election "may result in substantial delay in a small minority of Board elections," this is preferable "for resolving questions concerning representation."small minority of Board elections," this is preferable "for resolving questions concerning representation."small minority of Board elections," this is preferable "for resolving questions concerning representation."[7]

These cases are submitted to highlight the inconsistency among opponents of the Board's recent proposed rule, between being highly tolerant of delays when workers seek recognition of their bargaining representative and being impatient with delays when workers seek removal of such recognition. The prior Board believed workers seeking to decertify the union should not even have to wait for an election because of possible delays in the election process. At the same time, numerous cases[8] before the prior Board indicate a great deal of patience for delays relating to certification elections, i.e., when workers are trying to form a union.

The National Labor Relations Act was intended to provide more stable, less conflict-ridden labor relations for both employees and employers, including a free and fair way for workers to decide upon union representation. However, current rules

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[1] 350 NLRB 55
[2] Id. At 588
[3] Id. at 589
[4] 351 NLRB No. 50 (2007)
[5] Wurtland Nursing & Rehabilitation Center, 351 NLRB No. 50 (2007)
[6] 351 NLRB No. 28 (2007).
[7] Id.
[8] Oak Park Nursing Care Center (351 NLRB 9)—The Regional Director ordered an election be held in March 2004. The employer filed a request for review with the Board. The Board didn't issue a decision until September 2007—over three years later. Ryder Memorial Hospital (351 NLRB 26)-Elections were held in April 2004. Objections were filed. A decision wasn't issued by the Board until more than three years later. BP Amoco Chemical-Chocolate Bayou (351 NLRB 39)—Elections were held in 2000, but they were tainted by employer unfair labor practices. An ALJ decision was issued ordering a new election. The employer appealed. It took the Board six years to issue a decision upholding the ALJ and ordering a new election.

provide multiple opportunities for bad actors to purposefully delay and derail an election. These delays intensify workplace conflict. The Board's recent proposal does nothing more than limit the opportunity for intentional delay, creating a fairer election process. It modernizes current Board procedures, increases transparency, and reduces wasteful litigation.

The Shaw's Supermarkets and Wurtland Nursing cases are attached. Thank you for your attention.

Prepared Statement of Melinda Burns, Newspaper Reporter

My name is Melinda Burns and I was a senior reporter for the Santa Barbara News-Press newspaper for 21 years. I was fired in October 2006, one month after my co-workers and I voted in a secret ballot election to join the Teamsters. Since that time, I have been pursuing legal action to get my job back and receive the back wages I am due. While there have been rulings in my favor, the News-Press continues to file appeals and I have no idea when the process will come to a conclusion. I have had to move out of my house and for several years, I could not find permanent work.

My co-workers and I chose to come together for a voice on the job after five editors resigned in protest in mid-2006, alleging that the multimillionaire owner of the News-Press was meddling in the news coverage, in part by threatening and disciplining reporters. Instead of choosing to leave, we decided to form a union to protect their professional integrity and job security from the owner's arbitrary attacks.

Even though more than 80 percent of the newsroom signed cards to join the Teamsters, the owner would not accept them. We then held a secret ballot election, in which we voted overwhelmingly to form a union. In the time leading up to the election, the management sent out memos with misinformation about the union, wrote anti-union editorials and in some cases threatened to suspend those workers who supported the union.

After we won the election, the News-Press fired eight reporters, all of them union supporters. The newspaper filed frivolous objections and delayed union certification for a year. While an administrative law judge considered their employer's objections, we had to be part of an intrusive and burdensome process that required us to turn over personal files and emails. Finally, the judge ruled in our favor, finding "widespread, general disregard for the fundamental rights of the employees."

The News-Press owner was ordered to reinstate most of the employees with back pay, but she appealed, and my coworkers and I are still waiting for a resolution to a scandal that has dragged on for nearly five years. To date, the News-Press has been found guilty of more than 25 violations of federal labor law, including nine illegal firings (an additional employee who served on the union's negotiating team was fired in 2008) and threatening and spying on union supporters. The company also has been found guilty of bad-faith bargaining.

More than four years after the union vote, we still do not have a contract.

Prepared Statement of Brandii Grace

In March of 2010, I was fired from my position as Course Director in the Game Production department at the Los Angeles Film School. In April of 2011, an Administrative Law Judge for the National Labor Relations Board ruled I was illegally terminated due to my union activities. I was the leader of a faculty-driven effort to join the "California Federation of Teachers" (CFT) union. Prior to this, I had no ties to or interest in unions.

In the final days of January 2010, the faculty were informed via a memo and department meetings that the school was about to make drastic changes to our employment. We were told that our employee contracts were being scrapped and replaced with new contracts making us hourly employees. At the time, I had a contract that said I was a fulltime employee, responsible for two classes: "Game Design 1" and "Game Design 2;" in exchange I was earning an annual salary of $70,000 plus full benefits.

Faculty were also informed that we would need to take on more classes and that the hours we were to be paid would be mostly limited to the hours we were physically teaching in class.

For those who have never taught at the college level, the time you spend in class is a mere fraction of the amount of time you work. There is a general rule-of-thumb that for every hour of class you teach, you can expect to spend 3 hours working outside of class. Out of class work includes critical activities such as lecture preparation, homework & test creation, grading, and—of course—helping students. After

all, a teacher's job is not simply to lecture at someone, teachers must act as a guide to help students learn and grow.

Given the above formula, if you were to teach 20 hours of class a week, you could expect to have approximately 60 hours of out of class work a week. That's an 80 hour work week. Yet, under the school's proposed system, you would only be paid for 20 hours a week—or half your salary. To top it all off, we were told that if we did not accrue 40 paid hours a week, we would lose our benefits.

The faculty gathered together to discuss the situation. Many faculty wanted to know if the school's changes were an illegal violation of our employee rights. I volunteered to research this. I contacted several local and state government agencies which informed me that California is an "At Will" state. As such, I was informed that we had limited power to prevent the employer from making these changes—unless we joined a union.

I brought my findings back to the faculty who immediately decided to unionize. We met with the California Federation of Teachers, I was put in charge of the union steering committee, and we began the unionization process. Many faculty wanted to see this happen immediately, but even as motivated as we were, it still took about a month to move through the process, collect Union Authorization card signatures (over two-thirds of the faculty signed), and submit the petition to join the CFT.

During the month before the petition was submitted, the school took actions that the Administrative Law Judge has ruled were illegal violations of the National Labor Relations Act. For example—I, and the other 4 fulltime members of my department, were all promoted to the position of "Department Chair" which we were told would promote us to a position of management. (Had we actually qualified as management, we would have been ineligible to join a union.) Following my promotion, and starting the very day I began to collect Union Authorization card signatures, I was put on probation and given a suspension that was to last for exactly the number of days we were collecting signatures.

After the petition was submitted, the school took further actions that the Administrative Law Judge has also ruled were illegal violations of the National Labor Relations Act. For example—I was quickly terminated. The school changed its security policies and forced an invited union representative off the campus.

On top of that, I had calls from faculty who told me they were being interrogated by their bosses and yelled at over signing cards—whether the faculty member signed a card or not. I had other faculty telling me they were assigned their boss's paperwork—paperwork which would then be used to declare the employee as "management" and be excluded from the union. Much of this began after we had received word that the school had hired a professional anti-union consultant to find the most effective ways stop our unionizing efforts.

On my end, I acted as a source of support and listened to my former coworkers pour out all their fears—fears of losing their jobs, fears of being blacklisted from the industry, and fears of how this would impact their families. I also listened to their stories—stories of pregnant wives, sick children, and aging parents.

The school filed appeal after appeal. And the election process was delayed month after month. Eventually, the faculty gave in. I don't blame them. No one should have to suffer through what they experienced for months on end.

It is important that we recognize that this rule isn't about changing how long it takes for an election to be scheduled. It takes a while to schedule an election, and that's not likely to ever change. All this rule does is act as a shield to protect the election process from unnecessary and unfair delays. It closes a critical loophole that unscrupulous employers take advantage of to continually deny their employees the chance to hold a fair election. All we wanted was a chance to have our voices heard—we were denied that chance.

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July 6, 2011

The Honorable John Kline, Chairman
The Honorable George Miller, Ranking Member
U.S. House Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, D.C. 20515

Via email to: Jody Calemine, General Counsel (Jody.Calemine@mail.house.gov)

Re: July 7, 2011 Hearing: **"Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice"**

Dear Representatives Kline and Miller:

It has come to my attention that the House Committee on Education and the Workforce is conducting a hearing on the National Labor Relations Board's proposed rule for representation proceedings. I write to advise the Committee that the rule contains moderate and necessary reforms to the NLRB's procedures and I request that this letter be made part of the record of the Committee hearing.

The National Labor Relations Board's proposed rule for representation proceedings contains modest, sensible, and long-overdue reforms. Labor law experts have long criticized the procedural complexity, extensive litigation, inadequate information, and long delays in the existing processes for handling representation proceedings. *See, e.g.*, Paul C. Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harvard L. Rev. 1769 (1983). The proposed rule addresses some of the most glaring failures. It reflects a balanced effort to streamline the regulatory process in a way that will enhance the effectiveness of American business and protect the rights of all workers to express their views on whether to bargain collectively.

Reducing Delay and Litigation Costs. The rule will reduce the opportunities for lawyers to exploit the pre-election hearing process to delay proceedings. By consolidating challenges to voter eligibility and unit determinations, the proposed rule will improve efficiency without sacrificing the ability of any party to raise objections. The proposed rule simply eliminates the ability of parties to duplicate appeals within the agency and requires the parties to state their positions at the beginning of a hearing. Reducing duplicative proceedings and requiring parties to identify the issues at the beginning of a hearing are the sorts of procedural reforms that courts and other agencies have long since adopted. Reducing litigation –

such as reducing the opportunity to re-litigate issues at multiple levels of the NLRB both before and after an election -- will save money for employers, unions, and taxpayers. Reducing delay will also reduce opportunities for both union organizers and management labor consultants to coerce employees to vote one way or another on representation, thus ensuring free and fair elections.

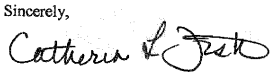
Providing Better Information to Employees. A fair and fully-informed election requires that the worker electorate receive information from all points of view. Under current U.S. Supreme Court law, employers and supervisors can explain the anti-union position at any time to any employee on working time, but employees and union organizers cannot present the alternative point of view in the workplace during working time. Compare *NLRB v. United Steelworkers (Nutone & Avondale)*, 357 U.S. 357 (1958) (employer may require employees to attend meetings on working time to listen to anti-union presentations while denying employees or unions representatives the opportunity to respond); *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992) (union organizers may not enter a shopping mall to provide information to employees even though the mall is otherwise open to the public). Because the union can only communicate with employees off the worksite, it is extremely important that employers be required promptly to provide full and accurate information about how to reach employees away from the worksite. The proposed rule does not go anywhere near remedying the gross inequalities of access and information that currently plague the representation election system, but it is a modest step in the right direction.

Modernizing Communications. The rule allows use of electronic technology to communicate with the NLRB and with the parties. Most courts have now adopted electronic filings, and every modern business uses electronic communication with its employees. It is high time that the NLRB adopt electronic communications as well.

It is unfortunate that the NLRB's efforts to increase the efficiency and fairness of its operating procedures have become the subject of political controversy. Many of the reforms proposed by this rule -- such as the permission to use electronic communications and the requirement that employers provide complete and accurate information to employee organizers after the filing of a representation petition -- could be accomplished without rulemaking. In this time of budget stringency, Congress and the taxpayers should applaud the efforts of an agency to reduce waste and inefficiency in the regulatory process.

Thank you for the opportunity to present this analysis.

Sincerely,



Catherine L. Fisk
Chancellor's Professor of Law

Prepared Statement of Trisha Miechur, Certified Nurse's Aide, HCR ManorCare

My name is Trisha Miechur and I started working at HCR Manor Care—Easton, a nursing home in Easton, Pennsylvania, in 2005 as a Certified Nursing Assistant. I was excited by the chance to be doing something that I love—spending quality time with seniors and providing them with the care they need to live their final years with dignity.

The nursing home is part of the HCR ManorCare system. Based in Toledo, Ohio, the company boasts of having more than 500 locations in 32 states with 60,000 employees. In 2009, HRC ManorCare made a net profit of $201.4 million.

Unfortunately for my coworkers and the patients serve, ManorCare's success and profitability did not translate into the proper staffing levels and management that you would want your loved ones to have.

When you have 14 to 20 residents to take care of during your shift, you cannot take care of them. I'm constantly running between rooms trying to keep up with my residents' needs, and there are some days when I just can't give them the care that I know they deserve.

In 2007, my coworkers and I got fed up with the short staffing, high turnover and low pay so we decided we needed to form a union to finally have a voice in the decisions that affected our residents and their families.

Even though we came to the decision ourselves, and before we had even contacted a union, once management heard there was talk of a union they started an anti-union campaign within two days. And in less than two weeks, with the help of a professional union-busting consultant, employees were thrown into a vicious intimidation and harassment campaign that continues to this day—four years later.

While we were trying to form our union, we were repeatedly taken away from our residents to go to mandatory meetings with these consultants and our bosses who told us a union will not make it better. They said a third party would stop us from working together to try and solve the problems. When we told them what are problems were and how we had tried to talk to them before about solving them, they said it was a new day and changes would be coming. Well, four years later I'm still waiting for those changes. How can you fix a company when they are not willing to fix it?

As we continued to organize, we started speaking out publicly. At one point I was given a final written warning because management accused me of asking residents and their family members to sign letters to State Representative Mundy (D-Luzerne) about quality of care and short staffing at our nursing home. The warning said I was being disloyal to the company and that if my 'behavior' continued I would be 'subject to termination.'

After I was written up I was scared whenever I walked into work. I thought I had legal rights, but it seemed the system was blind to what was happening to us, that it existed to work against us and for our bosses to treat us wrong.

But I'm not ashamed of what I did. I'm proud of speaking out and trying to make Manor Care a better place for seniors to receive care. What I am ashamed of is how this country continues to let employers bully workers who are trying to improve their lives.

Due to the broken NLRB process, ManorCare had every incentive to drag the process out, appeal and delay at every point so they could continue to identify and try and get rid of pro-union employees.

Unless the process changes, stories like mine will never change. Management has all the power to make you afraid the next day at work will be your last just because you want to have a voice in improving the company. It will be the same story, different day, different year, different month and a different never-ending process.

My coworkers and I have never filed for union recognition with the NLRB because we are afraid we will lose our jobs.

So the argument that the new proposed NLRB rule prevents employers from talking to their workers about unions is just plain false. My company had a head start in talking to us about its anti-union views.

We never got a chance to hear from the other side.

We never got the chance to vote whether we wanted to join together on the job for the sake of our patients and form a union.

And to this day, we still do not have union representation even thought we wanted it.

[Additional submission of Ms. Hirono follows:]

Prepared Statement of R. Brian Bixby

My name is R. Brian Bixby. I am a member of the Transport Workers Union of America (TWU), Local 721, at Caesars Palace Table Games. I joined with my co-workers in 2007 to form a union where I worked. I was the lead worker organizer and then served as Shop Steward and was a member of the contract negotiation team. I became the Inaugural Local President of TWU Local 721.

My co-workers and I wanted to form a union at Caesars Palace to represent dealers. First we had to determine if there was support among the dealers and there was overwhelming support. In order to let workers know about the union, we left flyers and business cards in the workplace. In October, we identified to the employer the workers who were the lead supporters for the efforts to form a union. This is standard practice with TWU, i.e., to identify the in-house supporters, and is done to protect these workers from employer retaliation.

We filed our petition for an election with the National Labor Relations Board in early November of 2007. But even before that time, supervisors at work started wearing "No TWU" buttons. These buttons looked the same as our longevity buttons, but instead of the number of years of seniority, it said "No TWU." The buttons were also available in our pit area, where we work, for employees to take and wear.

After the petition was filed, the union agreed to every issue the employer brought up in connection with the election. It did this in order to avoid the delay that a hearing would cause. An election date in mid-December was agreed to. However, shortly before that date, the election was delayed until late December. It was never clear to me why this additional delay was allowed, but even after agreeing to every point the employer wanted, the election was delayed.

While we were waiting for our election, the employer conducted mandatory captive audience meetings, sent letters to workers' homes criticizing the union in ways that I believe were very inaccurate, handed out many flyers, and instituted a new benefit that would really help dealers financially.

Many of my co-workers are from other countries and working legally in this country. I watched them walk through my work area, one-by-one, to a supervisor's office. They told me that they were being threatened that they could lose their citizenship and be deported if they supported the efforts to form a union. There was a lot of fear and none of them would go to the National Labor Relations Board to complain or file an unfair labor practice charge.

The approximately 550 workers voted for the union by an 84% margin. The union was certified, but we are still trying to bargain a first contract.

[Additional submission of Mr. Holt follows:]

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June 23, 2011

JUN 27 2011

The Honorable Rush Holt
50 Washington Road
West Windsor, NJ 08550

Dear Representative Holt:

I write to ask that you please make a public statement backing a modest, much needed step towards achieving workplace democracy: the National Labor Relation Board's proposed rule to streamline and modernize union election procedures.

Under the current NLRB election system, unscrupulous employers have many opportunities to delay the election. These irresponsible employers use the delay to intimidate and coerce workers. One third of employers fire workers during organizing drives, and threats are commonplace.

The proposed rule eliminates some of the antiquated parts of the process that provide opportunities for delay. Additionally, the proposed rule addresses the tragic, anti-democratic spectacle of employees voting for a union and then waiting years before they can actually bargain with the employer – delays which employers all too often use to discourage the workers and weaken their bargaining power.

The rule is a very modest step and simply modernizes the system. Employers, who have unfettered access to the workers during the entire work day, will retain plenty of opportunity to share their views about unionization with their employees.

Workers today face devastating attacks on their health care, retirement security and real wages, while corporate profits and CEO salaries are skyrocketing. Streamlining NLRB elections is a long overdue, small step toward giving workers an opportunity to have a voice about their working conditions. Many workers will use this opportunity to unionize, and so improve their wages and working conditions and rebuild the American middle class.

Please support the proposed rule and make your support public.

Thank you.

Michael P. Fishman
President

[Whereupon, at 12:57 p.m., the committee was adjourned.]

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