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August 22, 2011

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Re: Proposed Amendments to Election Rules and Regulations
76 FR 36812, *et al*.

Dear Executive Secretary Heltzer:

I am a management-side labor relations attorney in the Labor and Employment Department at Fox Rothschild LLP, a firm with over 500 attorneys in 16 offices nationwide. Prior to Fox Rothschild I served the public as a Field Attorney with Region 22 of the National Labor Relations Board ("NLRB" or "Board") and during my tenure at the NLRB I was detailed to the Board's Office of Solicitor.

Recently I had the pleasure of testifying before the Board at its July 18, 2011 public meeting in Washington, D.C.. During the two-day public meeting 63 labor relations professionals, including former Board Members, NLRB General Counsels, practitioners and academicians, provided the Board with varying perspectives relating to the Board's June 22, 2011 proposed amendments to its rules and regulations ("amendments") governing the filing and processing of representation petitions. The Board seeks formal written comments on the amendments and I hereby offer the comments below, which are an expanded version of my testimony before the Board, in opposition to the amendments.[1]

I. Overview

The Board's summary of the proposed amendments cites, among other things, that the amendments would "eliminate unnecessary litigation" and "promote uniformity". 76 FR 36812. Chairman Liebman's statement identified one important result that the Board has attempted to achieve in revising its election rules and regulations over the years; namely, to "reduce the

[1] I would like to thank Yalda Haery, a summer associate at the firm, for her research work on these comments.

typical time between filing of an election petition . . . and the actual election." Statement by Chairman Wilma B. Liebman, http://www.nlrb.gov/node/526. This result is being attempted once again; this time to the detriment of the process. I strongly believe that the amendments will: 1) increase litigation; 2) not achieve uniformity; and, 3) limit the educational process. I therefore respectfully urge the Board to adequately balance the interests of all stakeholders to insure that the process does not suffer any detriment.

II. THE EXTREMELY SHORT AMOUNT OF TIME FROM THE FILING OF THE PETITION TO THE DATE OF THE HEARING, ISSUE PRECLUSION, AND THE POTENTIAL TO BE DENIED A HEARING, WILL INCREASE LITIGATION.

a. *The Board's current practice.*

The Board's current rules and regulations allow ample time for the parties to assess whether or not there are any genuine issues relating to the eligibility or inclusion of employees sought to be represented by a petitioning union. Those who routinely practice before the Board understand that once a petition is filed they must act promptly, and in no more than roughly 18 to 21 days, to determine whether or not there are genuine issues that require the Board's regional director to resolve. This timeframe, between 18 and 21 days, is not dictated by rule or regulation, but has become a standard that the Agency's Division of Operations-Management, through General Counsel, has required Regional Offices to follow. Moreover, this timeframe represents the outermost time from the date of filing that Regional Offices will permit a hearing to open on any genuine issue it must resolve, absent exceptional circumstances, which I have only encountered once in my 10-plus years of Agency practice. Practically speaking, if a hearing must take place, it is going to commence between 14 and 17 days from the date of the filing of the petition.

Experienced practitioners understand this uniform rule and begin their assessment of the petition immediately upon receipt. This assessment begins somewhere between three to five days from the date of the filing of the petition, because there is "lag-time" that occurs as a result of the Regional Office forwarding the petition to the company and the company forwarding it to labor counsel. This timeframe assumes the company: 1) is aware of what a representation petition is; 2) has some knowledge of what the NLRB does; 3) understands the urgency of the process; and, 4) is using labor counsel (either in-house or outside). For companies that do not understand the urgency of the process or are attempting to find adequate labor counsel, the three to five days becomes more along the lines of five to seven days.

Counsel typically has around 12 to 14 full days to review the petition, meet with company officials, assess the workforce and determine whether or not there are genuine issues relating to

the eligibility or inclusion of employees that a Regional Office must determine. During this timeframe the parties, with the assistance of Board agents, are actively engaged in the sharing of information in an attempt to come to terms in a Stipulated Election Agreement that will govern the remainder of the election process before the Board. If an agreement cannot be reached, the parties understand that the Regional Office will conduct a hearing and the regional director will issue a decision that either dismisses the petition or directs an election to take place between 25 and 30 days thereafter. The parties have the right to request review from the Board of any final decision of the regional director. The review of pre-election decision is discretionary and, unless otherwise ordered by the Board, a request for review does not act to stay Regional action and, therefore, a regional director may "proceed immediately to make any necessary arrangements for an election . . .. However, unless a waiver is filed, the [d]irector will normally not schedule an election until a date between the 25th and 30th day after the date of the decision, to permit the Board to rule on any request for review which may be filed." 76 FR 36826.

b. *The Board's proposed amendments.*

The amendments provide that, absent special circumstances, the Board's regional director would set the hearing to begin seven days after service of the petition, notice of hearing, description of procedures in representation cases, and a newly implemented Statement of Position form. They further provide that the regional director would specify in the notice of hearing that the Statement of Position is due no later than the date of the hearing (i.e, seven days). 76 FR 36821.

The Statement of Position would replace the current NLRB Form 5081, the Questionnaire on Commerce Information, and is more comprehensive than Form 5081. That is, Form 5081 requires representations to be made about a company's financial data in order to assist the Board to determine whether the company is subject to the jurisdiction of the National Labor Relations Act ("Act"). The Statement of Position requests "the parties' position on the Board's jurisdiction to process the petition; the appropriateness of the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the existence of any bar to the election; the type, dates, times, and location of the election; and any other issues that a party intends to raise at hearing." *Id*.[2]

Completion of the Statement of Position would be mandatory in the sense that a failure to "state a position would preclude a party from raising certain issues and participating in their litigation."

[2] In cases where a party believes that the proposed unit is not an appropriate unit, it would be required to state its reasons why and identify the most similar unit that it believes is appropriate. In cases where a party plans to contest the eligibility of individuals in certain classifications in the proposed unit, it would be required to "both identify the individuals (by name and classification) and state the basis of the proposed exclusion, for example, because the identified individuals are supervisors." 76 FR 36821.

76 FR 36821. Once the issues are joined in the Statement of Position, the Board's "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." *Id*. at 36823.[3] The amendments further provide that, "if, *at any time* during the hearing, the hearing officer determines that the only genuine issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer will close the hearing" and "the regional director shall direct that those individuals be permitted to vote subject to challenge." *Id*. at 36823 (emphasis added) and 36825.[4]

Thus, the amendments defer the litigation and resolution of eligibility and inclusion affecting no more than 20 percent of eligible voters to the post-election process (*id.* at 36825), which the Board believes "represents a reasonable balance of the public's and parties' interest in prompt resolution of questions concerning representation and employees' interest in knowing precisely who will be in the unit should they choose to be represented." *Id*. at 36824.

c. *The amendments will likely increase litigation.*

The Board believes that the Statement of Position form would ask the parties to do no more than they currently do in preparing for a pre-election hearing and would, therefore, facilitate the entry into stipulated election agreements. The Board's logic is flawed because the amendments change the game by significantly scaling back the amount of time counsel has to assess the issues. Currently counsel has between 12 and 14 days to assess the issues. The amendments would reduce that to seven and, when one strikes the interceding weekend, there is only five days.

The Board's amendments do not adequately consider the time that is needed for counsel to discuss with company officials the nature and makeup of the business enterprise and visit the facility to delve into the inner workings of the operations in order to make an assessment of whether the unit sought by the union in the representation petition is truly a "workable" unit for the purposes of collective bargaining. The current time allotted, between 12 and 14 days, is also used to review documents such as organizational charts, job descriptions, production plans,

[3] The Board stated that an offer of proof may "take the form of an oral or written statement of the party or its counsel identifying the witnesses it would call to testify and summarizing their testimony." *Id*. at 36823.

[4] The amendments state that the final Notice to Employees of Election shall explain that such individuals are being permitted to vote subject to challenge and the procedures through which their eligibility will be resolved.

payroll records, and other personnel information. This is necessary to an overall assessment of whether there are genuine issues relating to the eligibility or inclusion of employees that a Regional Office must determine. Bear in mind, the above assumes that the company involved in the representation petition is skilled in the field of labor relations, and either has in-house or outside counsel readily familiar with labor relations.

As I told Chairman Liebman in a colloquy after my testimony, many employers are generally unskilled in the area of labor relations, as the issue of union representation is often joined upon the filing of the petition. Thus, for those employers that do not have inside or outside counsel available, it may take several days to determine exactly what the NLRB does and then several more days to decide to "go at it alone" or select adequate labor counsel. In these situations, under the amendments, there would be very limited time for one to adequately investigate the factors necessary to determine whether to stipulate to an election in a unit of employees sought by the union or to litigate certain issues raised by the petition.

The fact that the Statement of Position is being made a mandatory submission within seven days makes it extremely difficult for counsel to be eager to enter into a stipulated election agreement because of the inherent uncertainty that surrounds a rushed investigation. Moreover, the amendment's imposition of issue preclusion, wherein a party would forever be barred from raising an issue not identified in the Statement of Position, only exacerbates the uncertainty. Thus, in my view, there would be no incentive to stipulate to an election knowing that a rushed investigation was had and I would be forever barred from raising an issue if I did not identify it in the Statement of Position. The only one sure way that I see for counsel to adequately protect a client's interest is to, at the very least, raise all potential issues in the Statement of Position and vigorously argue to the hearing officer that the issue affects at least 20 percent of the employees sought to be represented by the union.

While I recognize that the hearing officer is the hearing's "gatekeeper", and will ultimately decide whether there are genuine issues involving at least 20 percent of the employees, the simple truth is that hearing officers are often <u>not</u> long-term Agency employees[5] and experienced counsel will undoubtedly be able to get past the offer of proof stage to open the record. This will move the parties into the eighth day from the date of the filing of the petition. Assuming the record opens and by midday the hearing officer determines that evidence presented does not involve the requisite 20 percent, the hearing will close and a direction of election would issue the following day. This will put the parties into the ninth day from the date of the filing of the petition—saving a mere three to five days from the current rules and regulations. However, this

[5] Regional Offices typically assign newer Field Examiners to one supervisor, designate that "team" as the "R-case team", and charge the team with the responsibility of expeditiously processing representation cases.

is a "perfect world" scenario wherein all the necessary and relevant testimonial and documentary evidence are available on the day of the hearing. To the extent that a necessary and relevant witness is unavailable, I find it hard to believe that a Regional Office would choose to close the record as opposed to grant a one or two-day extension in order to allow that witness to appear and testify. Then the parties, under the amendments, would be right back to where the current rules and regulations have them, between 12 and 14 days from the date of the filing of the petition.[6]

The proposed amendments "seemingly discourage parties from entering into any form of election agreement, thereby threatening the current high percentage of voluntary election agreements." *See*, Member Hayes, dissenting at 79. Practical experience and statistics reveal that companies do not choose litigation over agreement. Indeed, a hearing is a costly undertaking. There is lost productivity time due to the preparation that must be done by company officials and possibly employees. There are also legal fees associated with attorney preparation, appearance and brief writing. Companies, and unions alike, must conduct a cost-benefit analysis to determine whether a hearing is necessary or agreement can be had. Moreover, statistics during the Agency's 2010 fiscal year reveal that the practice under the current rules and regulations secures "[v]oluntary election agreements were obtained in 92 percent of merit petitions." *Id*. at 77.

In light of the above, I respectfully urge the Board to seriously reconsider: 1) the date of the hearing; 2) the due date for Statement of Position; and, 3) issue preclusion.

III. ELIMINATING THE ONLY MANDATORY REVIEW BY THE BOARD TO ALLOW FOR CAREER REGIONAL DIRECTORS TO HAVE A FINAL SAY WILL NOT ACHIEVE UNIFORMITY.

If an election is directed, the amendments eliminate the parties' right to request Board review of regional director's pre-election decisions, and the accompanying 25 to 30 day waiting period from the issuance of the decision to the date of the election. 76 FR 36826. The amendments further provide that the regional director has the discretion to bifurcate the decision and direction of election into two, first directing an election and then issuing a decision to follow no later than the time of the tally of ballots. *Id*. at 36825. The Board views this as not prejudicing any party because the amendments defer the parties' right to request Board review of pre-election rulings until after the election. *Id*. However, the amendments would make Board review of a regional director's resolution of post-election disputes discretionary in cases involving directed elections

[6] The difference here, as opposed to the practice under the current rules and regulations where agreement would have been reached, is that the Regional Office will be wasting Agency resources on court reporting services.

as well as those involving stipulated elections.[7] *Id*. at 36827. The Board anticipates that this proposed change would leave a higher percentage of final decisions concerning disputes arising out of representation proceedings with the Board's regional directors who are members of the career civil service. *Id*.

One of the Board's stated goals of the amendments is to achieve uniformity. While the Board may attempt to bring about uniformity procedurally, through a standard timeframe, it fails to achieve substantive uniformity. That is, the amendments eliminate the current election rules and regulations only mandatory review by the Board—the post-election review. Instead, the amendments make Board review of a regional director's resolution of post-election disputes discretionary, just as the pre-election review under the current rules and regulation. The effect of the amendments would be to shift the final decision-making from the Board to the Board's regional directors. This does not achieve substantive uniformity, because the Board is a single entity that issues decisions with precedential value, and the regional directors, of which there are 33 separate individuals, issue decisions with no precedential value. Moreover, a regional director is not required to adhere to what his or her counterpart may decide in another region. Thus, discretionary review that leaves decisions in the hands of 33 regional directors will only serve to increase uncertainty and not achieve uniformity.

My testimony revealed a potentially disturbing result of the amendments change that would allow regional directors to bifurcate the decision and direction of election into two, the direction of election and the decision resolving certain employees' eligibility or inclusion. Assuming a hearing takes place, the amendments would allow the regional director to direct the election immediately upon close of the hearing and then issues the decision no later then when the tally of ballots issues—i.e., the date of the election. A rush to judgment scenario is fostered by requiring the decision to issue by a date certain. The amendments would require regional directors to adhere to tight deadlines in issuing their decisions and this rushed atmosphere is likely to lead to faulty decision-making. The amendments could also have the effect of regional directors setting later election dates knowing that the issues to be decided are complex and the only way to "buy" more time in issuing their decision is to issue the tally of ballots at a later date—i.e., set a later election date.

In sum, the amendments would not achieve substantive uniformity and are likely to lead to rushed decision-making and later election dates. To this end, I urge the Board to continue its current practice of providing the parties the opportunity to obtain, upon request, mandatory review of regional directors' post-election decisions and continue to require regional directors to issue decision and directions of election at their own pace.

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[7] The current rules and regulations provide that Board review of regional director's pre-election decisions is discretionary, but that such review of post-election decisions is mandatory.

IV. THE BOARD'S RUSH TO THE VOTING BOOTH REDUCES THE TIME IN WHICH EMPLOYEES BECOME EDUCATED ABOUT THE PROCESS OF UNIONIZATION.

The issue of whether employees wish to be represented by a union is joined with the filing of a petition. Prior to the filing of a petition, union representation is a non-issue for many companies, and not something that is discussed by the company with its employees. Moreover, employees are not likely to be thinking of union representation unless there is some disconnect between the company and its employees wherein union representation is sought to fill the void. And when employees contemplate union representation, they are bombarded for weeks, possibly months, before the filing of the petition by the Union's side of the story only. This one-sided version offers employees an employment utopia, where increased wages and better benefits are automatically granted.

It has been my experience that once a petition is filed, companies feel obligated to tell employees the truth about the unionization process, and employees take it upon themselves to self-educate by determining truth from fiction. Thus, the days between the filing of the petition and the election are crucial to the education process. It is when free spirited debate can take place and employees can learn for themselves what the Union really obtains from an election win—the right to sit down and negotiate with the company, not automatically obtain higher wages, better benefits or complete job security.

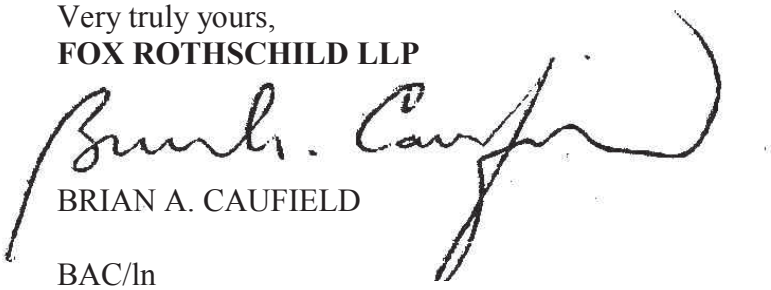
The educational process that takes place today is not limited to the traditional campaign methods of endless meetings, cute cartoon handouts and scare tactics, for the current electorate is much more sophisticated than it ever was in the past. The advent of the Internet and various other research avenues has increased employee awareness of the unionization process. Any false statement, by either side, completely destroys that side's credibility and any hope of a successful campaign. This period of research and fact checking only serves to foster a more informed secret-ballot voter. Isn't that the ultimate hope? Should we all not strive to allow for a maximum amount of time that permits a voter to be fully informed when he or she steps into the voting booth? I suspect so. Otherwise an unintended result may occur that, we as labor professional know, is often extremely difficult to undo.

V. CONCLUSION

Tomorrow the Board will face the daunting task of reviewing the testimony and comments from interested stakeholders. Many people have spent many hours providing the Board with their thoughts and I am certain that I echo the sentiments of all when I say that these amendments will

have a significant impact on labor relations as we know it. To this end, the Board must carefully and diligently balance the interests of all stakeholders to insure that the current process suffers no detriment.

Very truly yours,
FOX ROTHSCHILD LLP



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