

July 25, 2011

Lester A. Heltzer, Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570

RE: Notice of Proposed Rulemaking, 3142-AA08

Dear Mr. Heltzer:

This letter is to comment regarding the Board's Notice of Proposed Rulemaking to "streamline" the NLRB election process. This proposed rule is unnecessary, at odds with the purposes of the National Labor Relations Act, and likely to have unintended consequences for both unions and the Board. The proposed rule is a direct threat to job creation in the United States. The timing and scope of the proposed rule can only be described as the most transparent kind of political payback to labor unions at the expense of small businesses and entrepreneurs, who are the ones most likely to be harmed by these new regulations.

My name is Phillip Wilson and I am President and General Counsel of Labor Relations Institute, located in Broken Arrow, Oklahoma. Our firm has been involved in literally thousands of NLRB elections as consultants to management. I formerly practiced labor and employment law in Chicago on behalf of employers and also served as a Director of Human Resources at a large employer in St. Louis. I have personally been involved in hundreds of NLRB election campaigns as either an attorney, consultant or company manager and am thoroughly familiar with the NLRB election process.

Our objections to the proposed rule fall into two categories. First, there is no need for the proposed rule. While there is plenty of room for efficiency improvement, the proposed rule will do little if anything to accomplish that goal. In fact, the focus on election procedures calls into question the Board's efficiency motive in the first place. Second, the substance of the rule is counter-productive and ironically will disenfranchise voters and slow down an election process that currently works.

There is one proposed change, related to blocking charges, that would serve the Board's goal of increasing efficiency while at the same time help enfranchise voters and we support this proposed change.

### **The Need for the Proposed Rule**

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

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

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

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

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<sup>1</sup>See GC Memo 11-03, Summary of Operations FY 2010 at p. 5.

<sup>2</sup>Id.

<sup>3</sup>See National Labor Relations Board Performance and Accountability Report Fiscal Year 2010 at p. 19.

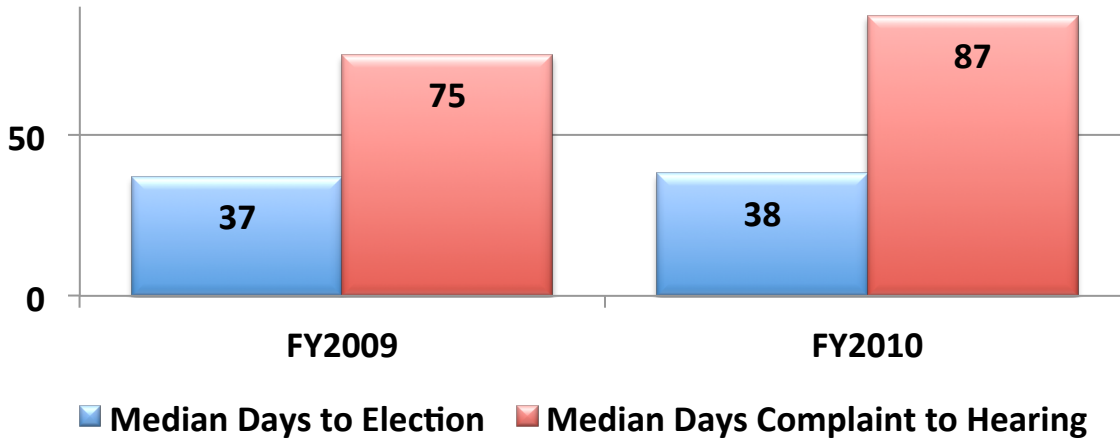
<sup>4</sup>Id. The Board target is to resolve 85% of union representation cases within 100 days of the filing of the petition.

<sup>5</sup>See GC Memo 11-03, Summary of Operations FY 2010 at 4.

out that the Board processes over 7,000 unfair labor practice charges per year, while handling less than 2,000 election cases.<sup>6</sup>

### NLRB Efficiency 2009-2010, Elections vs. ULPs

source: NLRB General Counsel's Memo 11-03



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

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

### The Substance of the Proposed Rule

<sup>6</sup>Id at 5.

<sup>7</sup>See Dissent to NPRM by Member Brian E. Hayes at pp. 5-6.

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

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

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

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

Several years ago Russ Brown, who is now a consultant for our company, was the head of a small transportation company not unlike many of the companies affected

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<sup>8</sup>See General Counsel Memo GC 11-03 at p. 5.

by these proposed rules. His business was spread across 16 western states, and he did not have a true HR department or a labor lawyer. At one point he had an extended trip away from the office planned. After spending an entire day in transit, he found out that the TWU had filed a petition to represent the workers at one of his remote locations.

Brown's travel plans were well known and it probably is no coincidence that the petition was filed on the day he left. He had no idea what this petition meant and had no choice but to cut his trip short. It took him four business days to just get home and hire a lawyer.

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

Member Becker asked Mr. Brown about this story during the Board's open meeting on July 19, 2011. He wondered whether the Board's exception for "special circumstances" would cover this situation. As Brown noted then, it certainly depends on how the various regions interpret the exception. But if travel schedules like this are considered "special circumstances" then the exception will swallow the rule and virtually all cases will likely be delayed. The efficiency gains sought are unlikely to occur. More likely, you will have regions make inconsistent application of the exception, often to the detriment of small businesses. Instead the Board should give companies ample time to hire counsel and thoroughly assess their situation, especially given the severe penalty for failing to do so under the proposed rule.

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

Whether talking about a small organization or even a big company, it can often take more than a day just to get a list to review. Getting this list right is too

important to rush. If it's wrong it can overturn the election. The current seven days is a good balance between getting the list quick and getting it right.

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

The core change in the proposed rulemaking is shifting many of the appropriate unit decisions until after the election. The biggest change is punting any unit issues affecting less than 20% of the unit until after the election. The basic justification for this change is that disputes of unit issues delay elections. As we've already seen, this is a cure in search of a disease. The vast majority of elections today occur around a month after the petition is filed, even while deciding all unit issues in advance.

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

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

Some employees may decide not to vote because they don't want to be included with others who may or may not be in the final unit. Workers have the right to know who will be in their bargaining unit on the day they vote. If you are

interested in enfranchising workers then make sure they know exactly who will be in their bargaining unit when they vote.

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

### **Why Elections Should Not Be Shortened**

The Board majority insists that the purpose of the proposed “streamlining” is not to reduce the amount of time an employer has to respond to a union election. Cleverly the proposed rule does not reduce the current election targets, but instead simply lays the groundwork for that decision in the future. Undoubtedly this will happen as Regional Directors decide they no longer need the current 42 days to conduct an election now that the unit issues have been so “efficiently” punted into the post-election period. There will likely be no rulemaking or other formal opportunity for the employer community to complain. It is a disgraceful way to make policy, but the effective death of Section 8(c) will happen with a whimper, not a bang.

Since there is unlikely to be another formal opportunity to defend the importance of employer free speech, we must do so here. The employer right to free speech, protected by the First Amendment and codified in Section 8(c) of the Act, gives companies the right to state their opinions about unions to their employees. The purpose of shrinking the period from petition to election is to so severely limit the amount of time and employer has to communicate to employees about unions that it effectively destroys the right completely.

Unions today often campaign for months before an employer is even aware that employees are being approached to sign union authorization cards. Often the first notice an employer has of union organizing is the notification from the NLRB that a petition has been filed. Member Becker and others have expressed skepticism about this claim.<sup>9</sup>

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<sup>9</sup> See e.g. <http://blogs.wsj.com/washwire/2011/07/20/nlr-tries-to-dial-down-the-volume/> (last accessed July 24, 2011).

This tactic is taught to union organizers across the labor movement. Take this example from an organizing training guide published by the AFL-CIO and based on a strategy developed by former AFL-CIO Organizing Director Richard Bensiger. The manual, called *The Blitz: A Manual for Organizers on How to Run Fast-Paced Pre-Petition Campaigns*, tells organizers:

The critical information an organizer must obtain first is a list of the names and addresses of the employees. This often is a **slow, meticulous process, sometimes taking weeks or even months**. In order to gather this information, the organizer may have to work with one or more contacts within the workforce – but **these contacts should be instructed not to talk about the union with anyone while the preparation phase is underway**.<sup>10</sup>

Another well-known union organizer is Harry Kelber, long time editor of *The Labor Educator*. In Kelber's *A Training Manual for Union Organizers* he calls this early phase of the campaign "underground organizing." Kelber writes:

**"Underground" Organizing:** At the start of a campaign, some organizers try to get as much advance information as they can about the plant, its management and its workers. This can be helpful, but fairly soon the employer will get wind of the fact that the union is in town and prepare a counter-attack. **It is important for the organizer to have an initial announcement of the union's presence when he is ready to go public**.<sup>11</sup>

These tactics aren't just limited to training manuals. Union websites also educate employees interested in organizing their company to make sure to keep the organizing activity "underground" as long as possible. For example, this Communications Workers website warns in-house organizers:

When talking among yourself [sic] about a union, be sure to talk only while you are on breaks, away from work areas, or off company property. Organizing a union is legal and a protected right under the law, but **you need to avoid tipping off management as long as possible**. If your employer finds out, especially when you are in the beginning stages of identifying key workplace issues and building union support, your road to success will be much more difficult.<sup>12</sup>

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<sup>10</sup> AFL-CIO, *The Blitz: A Manual for Organizers on How to Run Fast-Paced Pre-Petition Campaigns*, p. 6.

<sup>11</sup> H. Kelber, *A Training Manual for Union Organizers: A New Organizing Strategy for the 21st Century* (The Labor Educator, New York 1997) p. 54.

<sup>12</sup> See [http://www.cwa-union.org/pages/how\\_to\\_organize\\_a\\_union](http://www.cwa-union.org/pages/how_to_organize_a_union) (last accessed July 24, 2011).

Both Kelber and CWA warn explicitly that the reason to keep things quiet is to avoid warning management of the activity, presumably because the company is likely to exercise its free speech rights under Section 8(c). The Massachusetts AFL-CIO is very explicit about the underlying purpose of keeping the campaign underground as long as possible:

Once you have decided that you would like union representation, the first step is to talk to your co-workers and gauge their interest in forming a union. If they have specific complaints, educate them on how a union can make a difference. **There is no need to approach your employer about your decision to pursue representation. The more support you can gather before your employer is aware, the better.** This gives them less time to prepare their anti-union campaign.<sup>13</sup>

Another common union organizing tactic is “salting” an employer, or sending a skilled union organizer to apply for a job at a company where he or she can secretly begin organizing a union from inside the company – again without notice to the employer. Here is a description of “salting” from the Electrical Workers, who regularly use the tactic:

“Salting” is the deliberate act of getting a job at a specific workplace with the intent to organize a union. Most union campaigns start with a lone individual or small group of individuals with no union experience deciding to organize a union from scratch. Sometimes, a union campaign can be strengthened if you know of a friend with union organizing experience. **By applying for open positions at your workplace, your friend can secretly help you organize your workplace.** ... This doesn’t mean that the salt gets a job and immediately starts talking union. **An in your face blunt approach such as that not only tips off the boss, it usually alienates potential union contacts among the rank and file workers.**<sup>14</sup>

This example shows that unions not only want to hide their intentions from employers, but even from potential union members. The IBEW teaches organizers to mislead company employees about their true intentions while avoiding detection by the employer. Remember, this can happen for months before a petition is ever filed.

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<sup>13</sup> See <http://www.massafcio.org/how-organize-union> (last accessed July 24, 2011).

<sup>14</sup> See <http://www.ibewlu363.org/salting.php> (last accessed July 24, 2011).

Finally, the Service Employees International Union also trains its organizers to engage in “underground” campaigns against employers. In 2007 – when Member Becker was Associate General Counsel for the SEIU – the SEIU was training organizers in its WAVE program on the different stages of an effective organizing campaign. New organizers are taught to “stay underground” and conduct employee surveys without “tipping off the boss”.<sup>15</sup> In that same section organizers are taught that one of the “Best Practices” for the list-building phase of the campaign is to, “steal, steal, steal.”<sup>16</sup> While Mr. Becker was apparently unaware of the training materials in use to train organizers while he was at the SEIU, it is clear that the tactic of “underground” campaigns is pervasive and specifically intended to prevent employers from exercising their free speech rights under the Act.

There is little evidence that the exercise of the employer free speech right harms unions at all. For example, unions win nearly 70% of all union elections under the current rules. Unions sometimes counter this by arguing that they withdrawing more petitions than they used to. This claim, repeated by Member Becker during the open meeting, is supposed to reinforce the narrative by unions that anti-union company campaigns are getting worse and to blame for the significant decrease in private sector unionization. The problem with the claim is that it is patently untrue.

While unions do withdraw petitions each year, this withdrawal rate has remained relatively consistent over the last decade (if anything it is dropping), even while the union win rate has improved substantially.<sup>17</sup> In fact, in 2010 unions won 67% of elections while withdrawing only 26% of petitions, the lowest number on record.

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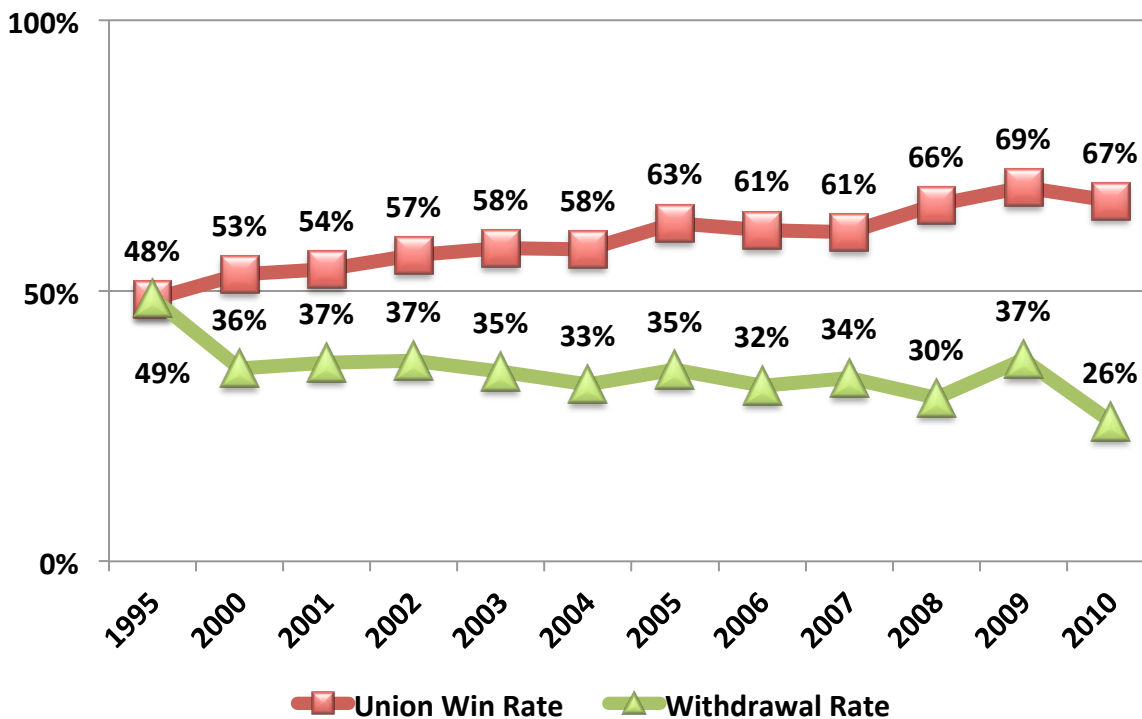
<sup>15</sup> See *SEIU Texas New Organizer Training Curriculum*, 2007, [http://www.memberconnect.com.au/Images/Dynamic/attachments/6500/oc\\_rb\\_oc\\_seiutexastrain ing.doc](http://www.memberconnect.com.au/Images/Dynamic/attachments/6500/oc_rb_oc_seiutexastrain ing.doc) (last accessed July 25, 2011) at p. 458.

<sup>16</sup> *Id.*

<sup>17</sup> Even a withdrawal rate of 26% is misleadingly high, because many withdrawals are strategic moves by union organizers to either buy additional time and to gain support. For example, union organizers will sometimes “light file” (file with just over the minimum 30% threshold required to sustain a petition) with no intention of getting to an election, planning instead to withdraw the petition after they get the Excelsior list and then re-file after getting more support.

## Union Win Rates vs. Withdrawal Rates, 1995-2010

source: LRlonline.com, NLRB data



The vast majority of the so-called “studies” cited by unions to support restrictions on management speech are derivative of the research of Kate Bronfenbrenner, who has published prolifically on the issue of management campaign tactics and their impact on union election outcomes. These studies are old and routinely conducted using very small samples and questionable data. For example, one common data set used in multiple studies of union organizing campaign tactics by unions and companies examines only 130 elections plus 30 withdrawn petitions in 1994.<sup>18</sup>

According to our LRlonline.com database which tracks NLRB records since 1990, there were 3,350 NLRB elections certified and 5,451 NLRB petitions filed in 1994. The data set used by Rundle and Bronfenbrenner’s “study” looked at less than 4%

<sup>18</sup> See e.g. James Rundle, *Winning Hearts and Minds in the Era of Employee Involvement Programs*, in *Organizing to Win: New Research on Union Strategies* (Kate Bronfenbrenner, et al. eds., Cornell University Press 1998) at 216 (*Organizing to Win* hereafter) and Kate Bronfenbrenner and Tom Juravich, *It Takes More than Housecalls: Organizing to Win with a Comprehensive Union-Building Strategy*, *Organizing to Win* at 20-21 (hereafter *Housecalls*).

of elections and only 3% of petitions filed in that year.<sup>19</sup> They collected data by sending questionnaires to lead organizers in this small sample of campaigns.<sup>20</sup> These lead organizers are hardly an objective source of information about why they lost the campaigns they did. Both Rundle and Bronfenbrenner looked at elections involving 50 or more employees<sup>21</sup>, which can hardly be seen as a “random” sample of all elections - in fact, it seems more like a sample intentionally chosen to spotlight the more sophisticated employers. Finally, the bulk of this research was conducted nearly 20 years ago.<sup>22</sup>

Even after stacking the deck to reach the preferred conclusion the research doesn’t even show that so-called “union-busting” speech prevents unions from winning. Even Bronfenbrenner and Juravich themselves conclude:

“Perhaps the most striking finding of Bronfenbrenner’s study was that **union tactics as a group play a greater role in explaining election outcome than any other group of variables, including employer characteristics and tactics...**”<sup>23</sup>

In other words, the research relied on by unions to justify limitations on employer free speech concludes that unions win by working hard at organizing, even when the employer exercises its right to free speech. In the nearly 2 decades after these studies were conducted, the experience for unions has proven exactly that. Unions today win nearly 70% of all elections held, in spite of the use of management consultants and attorneys.<sup>24</sup>

It is also important to note that many of the most egregious “union-busting” activities are, in addition to being illegal, also exceedingly rare. For example, union-sponsored researchers regularly claim that companies fire internal union organizers in around one-quarter of union campaigns.<sup>25</sup> Looking carefully at actual NLRB data (versus interviewing union organizers) shows that internal organizers are terminated in less than 3% of organizing campaign.<sup>26</sup> While even that small number of terminations is way too many, the good news is that in these cases the

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<sup>19</sup> See *Organizing to Win* at 20-21, 216.

<sup>20</sup> *Id.*

<sup>21</sup> See *Id.* at 26, 216.

<sup>22</sup> Even the more recent papers refer liberally to Bronfenbrenner’s research cited here.

<sup>23</sup> See Bronfenbrenner and Juravich, *Housecalls* at 21.

<sup>24</sup> According to LROnline.com data, unions won 48% of all certification elections held in 1994. They won 67% of certification elections in 2010 and so far in 2011 have won 68% of certification elections.

<sup>25</sup> See J. Justin Wilson, *Union Math, Union Myths: An Analysis of Government Data on Employees Fired During Union Organizing Campaigns*, (Center for Union Facts 2008) at 2.

<sup>26</sup> See *Id.* at p. 7.

NLRB remedies include reinstatement, back pay and often a re-run election or a bargaining order (where the union is put in place without winning an election).<sup>27</sup> In other words, the current system effectively remedies even the small number of abuses that occur.

Ironically, the proposed rulemaking is likely to *increase* unlawful employer conduct. This is because employers, particularly small employers who will be hurt most by the proposed rule, are intentionally thrust into a complex legal situation under extreme time pressure. Unfortunately smaller and unsophisticated employers, without the benefit of expert legal counsel or consultants well-versed in the rules (not to mention a calming influence in these tense cases), are likely to engage in knee-jerk, emotional behavior that is likely to further complicate and slow down the process. There is very little to be gained, and much lost, in rushing certification cases through. The current system balances quick resolution of questions concerning representation with thoughtful resolution of them.

## **Conclusion**

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

Respectfully submitted,



Phillip B. Wilson  
President  
Labor Relations Institute

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<sup>27</sup> The General Counsel reports that results in each of these areas is improved in FY2010 versus FY 2009. See GC 11-03 at 4-5.