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

Re: Public Commentary from Ellen Dannin
29 CFR Parts 101, 102 and 103
Representation -- Case Procedures; Proposed Rule
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Why the Amendments to the NLRB's Proposed Election Regulations Should Be Approved Ellen Dannin¹

It has been so long since the National Labor Relations Board (NLRB) election regulations have been updated that they still include requirements for carbon copies and say nothing about using electronic filing or communications. The proposed amendments would allow the NLRB to use 21st century technology to streamline processes and protect the rights of all parties involved in an NLRB election. More than that, the amendments would bring the NLRB into better compliance with Congress' mandates under the National Labor Relations Act. Finally, the proposed regulations draw on lessons learned from decades of experience handling hundreds of thousands of cases each year under the Federal Rules of Civil Procedure.

The discussion here first provides background on the legal requirements for rulemaking related to the National Labor Relations Act and outlines basic NLRA election procedures. It then discusses whether the proposed rules comply with and promote the NLRA's policies. The discussion includes changes that would allow the Board to make use of modern technology to lower costs and provide information to all parties. The overarching focus here is whether and how key features of the new regulations promote the National Labor Relations Act's policies and purposes.

Introduction

The National Labor Relations Act has two main functions: ensuring that elections allow employees to decide whether to be represented by a union and protecting and enforcing

¹ Fannie Weiss Distinguished Faculty Scholar and Professor of Law, Penn State Dickinson School of Law.

employee rights to freedom of association, self-organization, and collective bargaining. Congress created the National Labor Relations Board to enforce these rights.

I. The Legal Requirements for NLRA Rulemaking

As in all rulemaking, the proposed amendments to NLRA election regulations must be placed in the context of agency rulemaking procedures. Federal agencies can issue or amend regulations only if they conform to the laws that control the rulemaking process. In the case of the proposed NLRB election amendments, the process and regulations must comply with rulemaking standards under Administrative Procedure Act (APA) § 553(c) and National Labor Relations Act (NLRA) § 6.

APA § 553(c) says: “After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”² The National Labor Relations Act gives the NLRB the power to make rules and regulations. NLRA § 6, says that the Board shall have authority to make, amend, and rescind “rules and regulations *as may be necessary to carry out the provisions of this Act.*” In other words, the proposed amendments should be approved if they are necessary to carry out the NLRA’s requirements. It is also possible for the choice of union representation to be made through voluntary processes, for example, through card check recognition. The proposed regulations concern only the NLRB election process and say nothing about card check or voluntary employer recognition.

The NLRA sections that are relevant to the proposed amendments are §§ 1, 7, 8(c), and 9. Section 1 sets out the NLRA’s statement of its policies, and § 7 defines employee rights. These two sections delineate the basic criteria for assessing the legality of the proposed regulations.

Section 1. Findings and Policies

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It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7. Rights of Employees

Employees shall have 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, and shall also have the right to refrain from any or all such activities . . .

In other words, to be in compliance with the NLRA, the regulations must promote full freedom

² <http://www.archives.gov/federal-register/laws/administrative-procedure/553.html>

of worker association and choice of representative and protect the right of employee self-organization.

There is some confusion on this point, but the NLRA gives rights only to employees. It does not give rights to either employers or unions. Some call § 8(c) the employer free speech right. However, the plain language of § 8(c) says nothing about rights nor does it mention employers. The full text of § 8(c) 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 any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

In other words, what § 8(c) does is create an affirmative defense from a finding that an unfair labor practice has been committed. The neutral language means that this affirmative defense could apply to any entity charged with committing an unfair labor practice based on speech. The only such entities are employers and unions.

In 1947, Congress enacted the Labor Management Relations Act (LMRA or Taft-Hartley) to amend the NLRA. The LMRA created additional rights and responsibilities:

Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest. *It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.*³

In short, these policy sections from the NLRA and LMRA, along with provisions concerning elections, set standards for determining whether the proposed regulations are necessary to carry out the provisions of the Act.

II. The Basics of National Labor Relations Board Election Processes

There are several types of NLRB elections based on its specific purpose and who files the

³ 29 USC § 141(b).

petition. The purpose of the most commonly held category of elections allows employees to choose whether or not to be represented by a labor organization for collective bargaining. These elections are RC (certification of a bargaining representative and usually filed by a labor organization), RD (decertification of a bargaining representative and usually filed by an employee in the bargaining unit), and RM (certification or decertification of a bargaining representative when the petition is filed by an employer).⁴ These terms – RC, RD, and RM – are used throughout the current and proposed regulations and by those practicing in this area. The NLRB held 2969 elections of these types in FY2010.⁵

UC (unit clarification) and AC (amendment to certification) petitions provide an orderly process to accommodate changes or errors in the composition of the bargaining unit.⁶ UD (union deauthorization) petitions allow employees to choose whether to rescind language in their collective bargaining agreement that authorizes a union to require employees to make union dues payments in order to retain their jobs. Only 235 UD, UC, and AC petitions were filed in FY2010.⁷

Although all of these elections are initiated by filing the same NLRB form, each has distinct processes and consequences. The focus of the discussion here is on RC, RD, and RM procedures, for it is these elections that are the main focus of the proposed regulations and changes to them are likely to be the most controversial.

Before discussing the specifics of the proposed changes, here are the basic elements of the election processes Congress created to promote employees' NLRA rights. The relevant NLRA sections are included for easier reference.

1. Elections are to take place in a unit appropriate for collective bargaining. § 9(a)
2. The results of the election to designate or select an exclusive representative for the purposes of collective bargaining are determined by the secret ballot vote of a majority of employees in an appropriate bargaining unit. §§ 9(a) and 2(4)
3. The Board is required to “decide in each case” a unit appropriate for collective bargaining. § 9(b)
4. The bargaining unit should be one that assures to employees the fullest freedom in exercising their NLRA rights. § 9(b)
5. The mechanism that sets this process in motion is the filing of a petition, following the

⁴ National Labor Relations Board, Casehandling Manual, Part Two, Representation Proceedings §§ 11002-11003 (Aug. 2007) <http://www.nlr.gov/sites/default/files/documents/44/chm2.pdf>

⁵ Office of the NLRB General Counsel, Summary of Operations (Fiscal Year 2010) Memorandum No.GC 11-03 2 (Jan. 10, 2011).

⁶ Office of the NLRB General Counsel, Summary of Operations (Fiscal Year 2010) Memorandum GC 11-03 2 (Jan. 10, 2011).

⁷ Office of the NLRB General Counsel, Summary of Operations (Fiscal Year 2010) Memorandum GC 11-03 2 (Jan. 10, 2011).

procedures created by NLRB regulations. § 9(c)

6. Election petitions may be filed by “an employee or group of employees or any individual or labor organization acting in their behalf” or by an employer. § 9(c)(1)(A), (B)

7. An RC petition filed by or on behalf of employees must allege “that a substantial number of employees wish to be represented for collective bargaining and that their employer declines to recognize their representative.” § 9(c)(1)(A)(i).

8. An RD petition may be filed to determine whether employees want the certified or recognized bargaining representative to continue as their representative. § 9(c)(1)(A)(i).

9. An RM petition may be filed by an employer who alleges that one or more individuals or labor organizations have presented a claim to be recognized as the employees’ exclusive representative. § 9(c)(1)(B)

10. When a petition has been filed, the Board shall investigate whether “it has reasonable cause to believe that a question of representation affecting commerce exists.” §§ 9(c) and 2(7).

11. That investigation shall take place through an appropriate hearing upon due notice. § 9(c)

12. If the hearing record shows that a question concerning representation exists, the Board shall direct an election by secret ballot and shall certify its results. § 9(c)(1)

13. Hearings may be waived “by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.” § 9(c)(4)

14. A UD petition can be filed by an employee or employees in a bargaining unit covered by a collective bargaining agreement to rescind the contract’s dues authorization language. § 9(e)(1)

15. A UC petition can be filed to clarify whether certain classifications of employees should be placed in a bargaining unit. § 9(b)

16. An AC petition may be filed to amend the unit certification to reflect changes in the name or affiliation of the employer or of the certified labor organization. § 9(b)

For each of these basic components, there are additional issues, such as who can file each type of petition, what must be filed to support the petition, and what outcome is possible for each type of petition filed.

Consider the requirement that each type of petition be supported by a “showing of interest.” A showing of interest means that petitioners must present evidence of support for the requested relief before proceeding with the petition. Depending on the situation, showings of interest can be based on signed union authorization cards (RC), signed employee petitions (RD), or employer statements (RM), among others. After this preliminary stage, there are many points during the pre-election process at which disputes can arise. In addition, there can also be post-election

disputes challenging whether an employee was eligible to vote, objecting to the way an election was conducted, and even questioning whether the election should have taken place. Details about the election process may be found in the NLRB's *Casehandling Manual for Representation Proceedings*.⁸

III. Do the Proposed Rules Comply with and Promote the NLRA's Policies?

Section 6 of the NLRA empowers the Board to promote the Act's policies by making, amending, and rescinding rules and regulations *as may be necessary to carry out the provisions of this Act.*" In other words, to be a legitimate exercise of the NLRB's power, the proposed amendments must advance the § 9 election processes and promote the NLRA's policies.

The Board has acknowledged its obligation to comply with these requirements in its summary of the proposed amendments:

As part of its ongoing efforts to more effectively administer the National Labor Relations Act (the Act or the NLRA) and to further the purposes of the Act, the National Labor Relations Board (the Board) proposes to amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. The Board believes that the proposed amendments would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation. The proposed amendments would simplify representation-case procedures and render them more transparent and uniform across regions, eliminate unnecessary litigation, and consolidate requests for Board review of regional directors' pre- and post-election determinations into a single, post-election request. The proposed amendments would allow the Board to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret ballot election.⁹

In other words, the proposed amendments promote Congress' mandates in both the LMRA and the NLRA. When it enacted the Labor Management Relations Act in 1947, Congress re-affirmed the need to provide orderly and peaceful procedures to prevent interference with one another's legitimate rights.¹⁰ The rights of employees include the rights "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" and to refrain from those activities.¹¹ These rights put into effect the NLRA policies of encouraging the practice and procedure of collective bargaining and protecting workers' exercise of "full freedom of association, self-organization, and designation of representatives of their own choosing" so that employees can negotiate their terms and

⁸ <http://www.nlr.gov/sites/default/files/documents/44/chm2.pdf>

⁹ 76 FR 36812 (June 22, 2011)

<http://www.federalregister.gov/articles/2011/06/22/2011-15307/representation-case-procedures#p-3>

¹⁰ 29 U.S.C. § 141(b)..

¹¹ 29 U.S.C. § 157.

conditions of employment.¹² How these rights are promoted by the proposed amendments is discussed in more detail below.

A. Overview of the Proposed Regulations

The primary goal of the proposed regulations is to ensure that all parties' substantive and procedural labor rights are protected. The amendments will lower costs by streamlining and simplifying NLRB election processes; by employing modern communication technologies regularly used by the public, businesses, and government; by eliminating redundant processes; by holding hearings only when issues are in dispute; and by encouraging parties to narrow issues in dispute. These innovations will lower costs for all parties, especially for small businesses, and ultimately benefit the public as a whole.

Petitions for election trigger a period of uncertainty that can affect how a workplace functions. As a result, delay is the enemy of employer and employee productivity. Electronic communications as a standard part of case handling and the elimination of redundant procedures will promote speedier decision-making and elections. As a result, they promote the legitimate interests of all parties – and the public – by allowing the workplace to return to normal productivity more quickly.

Even more important, for the first time, the NLRB will be able to directly inform affected employees about their legal rights and address problems quickly. Indeed, the NLRB's directly informing employees of the status of their case is among the most important changes proposed. It acknowledges that the point of the election process is to promote employees' interests in choosing whether to have union representation. Under the current regulations, employees only receive information about their rights and election processes second hand, through employers, unions, rumor, and scuttlebutt. The new regulations require the NLRB to inform employees about the status of their case, to the extent possible and give employees direct access to the NLRB via email if they have questions or if problems arise.

The second major innovation can be found in amendments that import procedural changes that have been widely used by federal and state courts for many years to encourage information sharing and problem solving, to streamline processes, to eliminate unnecessary delay, and to protect all parties' substantive and procedural rights. The process by which these innovations are progressively examined and improved involves tripartite participation of court personnel and the plaintiff and defendant bars and constant re-assessment. In short, the federal courts' use of these procedures has generated empirical evidence that informs the NLRB's amendments.

Each year, the federal district courts handle 100 times the number of cases processed by the NLRB. According to the Federal Judicial Center's most recent caseload statistics for the U.S. District Courts, nearly 300,000 cases were processed in 2010. In FY2010, 3204 representation cases were filed with the NLRB, a 10% increase from the FY2009 intake of 2,912, but still a tiny number compared to federal civil case filings.

¹² 29 U.S.C. § 151.

The proposed amendments rely on that greater federal court experience by incorporating similar methods into the NLRB's pre- and post-election processes. Among other things, they import methods of proven worth in order to determine what issues are actually in dispute, encourage agreement, and eliminate redundant procedures. For example, the proposed regulations eliminate redundant processes by creating a preference for using a single post-election hearing for resolving challenges to the eligibility of voters along with any objections to the election and the conduct of the election. This proposed change incorporates the NLRB's experience that many issues in dispute before an election is held, such as whether specific employees should be included in the bargaining unit and thus allowed to vote, become moot after the election outcome is known.

B. The Use of Modern Technology to Lower Costs, Provide Information to All Parties, and Expedite Election Cases

The proposed regulations require the email address of all party representatives, and parties are strongly encouraged to use email for all communications connected with processing petitions and to file documents electronically. § 102.61. In addition, § 102.62(d) requires employers to transmit the voter list electronically to the NLRB and all parties to the election. The voter list is to include employees' available email addresses along with their full names, home addresses, available telephone numbers, work locations, shifts, and job classifications.

This requirement is likely to be controversial among employers for a number of reasons.. Employers are accustomed to considering personnel information to be confidential and take seriously their obligations not to violate privacy rights. It is natural that they might, therefore, be reluctant to provide all or some of the employee information required under the new regulations. Employers may also be concerned that other parties might misuse the information or fail to protect it.

However, employee information has long been provided in NLRB elections, with little, if any, evidence of misuse of the list or other problems. That information is relevant to issues such as deciding who should be included in the unit and ensuring that the list is accurate and that elections run smoothly. Furthermore, there are important preconditions to a union's right to have that information. A petition for election must have been filed and that petition must have been supported by a "showing of interest." In the case of RC petitions, the showing of interest that supports the petition is usually in the form of union authorization cards signed by more than 30% of the employees in the bargaining unit. Usually the showing of interest is far higher than a majority, and often is at or near 100%. Misconduct by the union can lead to the filing of objections to the conduct of the election and unfair labor practice charges. As a result, a union can lose an election when a majority of employees cast or would have cast votes for the union.

In addition, providing the information to all parties makes it possible for all parties to the election to police pre-election conduct and remedy problems as early as possible so that elections run smoothly. For example, this requirement makes it possible for the NLRB to email information directly and quickly to employees in the unit. The proposed regulations require the NLRB to email the Final Notice of Election directly to employees if employee emails are available. *See, e.g.*, §§ 102.62(e), 102.63(a)(2), 102.67(a), (b), (i). The requirement to provide

employee email addresses gives employees access to information about their legal rights directly from the government and from all parties to the election. Providing employees with information via email from all parties allow employees to assess information about union representation, the election process, and issues such as dues. It will also make it possible for the NLRB to be made aware of problems earlier and to take rapid action to address them.

In other words, this is a situation far different from those that give employers concern about breaches of privacy, and there is a strong public interest in making the information available to employees. Employees cannot have true freedom of choice if they lack information on which they can base that choice. However, it must be remembered that the party with the most access to employees continues to be the employer.

The new regulations require that employers and the NLRB send information and specific documents directly to employees who have email addresses. For example, if the employer customarily communicates with its employees electronically, the employer is required to send the NLRB's Initial Notices of Election directly to employees, as well as posting them in the workplace. § 102.63 (a)(2). These notices provide information about NLRB elections and employee protections and rights. The notices allow employees to carefully read and digest the information away from work where they will have more time and privacy. It would also address common problems experienced with NLRB notices to employees, such as employers not posting the notices, allowing notices to be defaced, and posting notices where supervisors visibly observe employees and, as a result make employees reluctant to read them.

Traditionally employees' only contacts with the NLRB have been notices posted on workplace bulletin boards and board agents at elections. And even though the law forbids defacing the notices, the NLRB has had only the slightest control over whether the notices are posted or defaced. Directly giving employees information that the government is involved and how employees can contact NLRB agents should assure employees that they can seek out accurate information and help if they have questions or problems. In short, this new requirement will help ensure that employees have access to information that can stem problems in the election process and protect employees' rights to a free choice in the election.

The new regulations reflect the greater speed and accuracy available with electronic record keeping and transmission. The ability to use electronic documents and electronic transmission makes it possible to expedite elections by eliminating delay involved in constructing, copying, filing, and mailing documents.

We are long past the days when lists of employees had to be typed and retyped, but the NLRB's current election regulations remain stuck in the IBM Selectric era. The proposed regulations acknowledge that today employers small and large use electronic records as a matter of course for core functions, such as maintaining personnel information, and employees regularly use electronic communications at work and home. Because virtually all employers today maintain employee information in electronic form, they can quickly extract that information from data bases to construct government reports that can then be transmitted electronically. As a result, incorporating modern technology into NLRB functions will cost less than current practices.

For all these reasons, the NLRB has correctly concluded that standard use of electronic communication technologies supports the proposed regulations concerning voter lists and employee information.

C. Amendments that Incorporate Experience Under the Federal Rules of Civil Procedure

The proposed regulations borrow and build on the experience with litigation in federal and state courts in a number of ways and at various stages of the election process, as discussed in more detail below.

First, the proposed regulations incorporate experience under Rule 1 of the Federal Rules of Civil Procedure (FRCP). Rule 1 says that the rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” That is also the goal of the proposed NLRB regulations.

Rule 26(a)(1) of the FRCP imposes an immediate obligation on parties to disclose a wide range of specific information shortly after a case is filed, including names and contact information of people with discoverable information about claims and defenses, copies of documents that can be used to support claims or defenses, and evidence that can be used to calculate damages. As the case progresses, discovery rules provide access to information relevant to issues in a case, and Rules 11 and 37 impose meaningful sanctions on those who fail to meet their obligations set out in the rules. Parties to litigation are not particularly enthusiastic about providing any of this information, but doing so is the price for a functioning system of justice.

FRCP Rule 56 provides a summary judgment process to resolve issues that do not need to be tried. The proposed NLRB election procedures include provisions that encourage parties to resolve election issues amicably and avoid the cost of unnecessary litigation. Indeed, most NLRB elections are held based on agreements by the parties. The processes in the proposed regulations seek to amicably resolve as many disputes as possible while also addressing those that cannot be settled in the most efficient way possible. In particular, this means not relitigating issues and not litigating when other alternatives exist.

Before reviewing the proposed regulations, it is helpful to keep in mind the purpose of NLRB election hearings. The proposed regulations define the purpose of a hearing to be determining if a question of representation exists. That means that an election petition has been filed and the petition concerns a unit of employees in which collective bargaining can appropriately take place. If there is such a unit and there is no bar to holding an election, then the regional director shall direct an election to resolve the question of representation. § 102.64(a)

1. Procedures Immediately After Filing a Petition

Several amendments to the NLRB regulations create new procedures that require parties to disclose information and to identify and resolve disputes as early in the process as possible. For example, at the time a petition is filed, petitioners must provide specific information and materials to all parties, including a copy of the petition, a description of procedures in representation cases, and a Statement of Position form. § 102.60. The regional offices will

provide assistance in filling out the Statement of Position for those who need it. *See, e.g.*, § 102.63(a)(1)

Statements of Position are new in these proposed regulations, but they essentially formalize longstanding Board practices to promote election agreements and avoid hearings that are unnecessary. Statements of Position become part of the record, § 102.68, and their function is similar to the disclosures required by FRCP Rule 26(a).¹³ They are an important innovation that would operate at critical stages in the election process to identify issues that are or are not in dispute. There is no discovery in NLRB cases, so Statements of Position help clarify and narrow issues and streamline the hearing and decision process.

The philosophy of the proposed regulations is that providing information on parties' positions can help move the parties to agreement and focus attention on matters where there is actual disagreement. For example, the Statement of Position for RC petitions (petitions in which a labor organization seeks certification as the employees' representative) requires that the employer take a position on basic issues and provide basic information.

The employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over the petition and provide the requested information concerning the employer's relation to interstate commerce; state whether the employer agrees that the proposed unit is appropriate, and, if the employer does not so agree, state the basis of the contention that the proposed unit is inappropriate, and describe the most similar unit that the employer concedes is appropriate; identify any individuals occupying classifications in the petitioned-for unit whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state the employer's position concerning the type, dates, times, and location of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing.

§ 102.63(b)(1)(i)

Employers who do not agree that the petitioned-for unit is appropriate must provide "the full names, work locations, shifts, and job classifications of all employees in the most similar unit that the employer concedes is appropriate." § 102.63(b)(1)(iii) There are similar requirements for RM petitions, § 102.63(b)(2), and RD petitions, § 102.63(b)(3). Statements of Position provide information that is relevant to processing all election petitions and prompt parties to assess their evidence and positions as early as possible.

The proposed regulations also impose sanctions, similar to those under FRCP Rule 37(b)(2)(ii)¹⁴, for refusing to provide required information. The sanctions prohibit a "disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence." In addition, under the proposed regulations, "The employer shall be precluded from contesting the appropriateness of the petitioned-for unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting

¹³ <http://www.law.cornell.edu/rules/frcp/Rule26.htm>

¹⁴ <http://www.law.cornell.edu/rules/frcp/Rule37.htm>

evidence or argument, or by cross-examination of witnesses, if the employer fails to timely furnish” basic information concerning employees whom the employer does not agree should be in the unit and that is necessary to make that determination. § 102.63(b)(1)(v). Similar requirements for Statements of Position, disclosure, and sanctions appear in sections that concern petitions other than RC petitions.

These provisions may seem to fall heavily on the employer. However, the statements of position are targeted to the party that has the most accurate information on issues relevant to the type of petition and stage of the proceedings. The employer is the only party with basic information about employee job classifications, tasks, pay, benefits, and other information necessary to decide issues central to election cases. In addition, experience has shown that employers who oppose unions have strong incentives to take actions that impede hearings and deprive employees of their legal rights to make a free choice whether to be represented by a union. The sanctions in the proposed regulations do no more than take away incentives to destroy employee rights under the NLRA.¹⁵ Just as with court litigation, eliminating issues can help parties reach a settlement and avoid the cost of unnecessary litigation.

2. Pre-Election Hearings

If the parties are unable to agree to an election, a pre-election hearing may be needed. Efforts to narrow disputes and facilitate agreement to the extent possible continue even though a hearing has been scheduled. In order to eliminate unnecessary delay and wasteful litigation in both pre- and post-election initiatives, the proposed regulations create procedures that are similar to those commonly used in court litigation to resolve cases without the need for a hearing. Indeed, the proposed regulations explicitly borrow from summary judgment practice, Fed. R. Civ. Proc. Rule 56, when they say that it “shall be the duty of the hearing officer to inquire fully into all *genuine disputes as to material facts* in order to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the Act.” § 102.64(b)

In the pre-election stage, at the beginning of the hearing, the petitioner must respond to each issue raised in the responding party’s completed Statement of Position. This allows the hearing officer to determine whether there are issues on which the parties agree. The regulations state that no evidence can be received on any issue if the parties have not taken adverse positions on it. The only exception is that, if the respondent has not taken a position on the appropriateness of the petitioned-for unit, the petitioner must still make the case for the appropriateness of that unit. The petitioner may present evidence on the unit through sworn statements, declarations, or

¹⁵ In a two day pre-election hearing in which I was involved, the union petitioned for representation for a single store. The employer took the position that only a multi-location unit that included all of the employer’s stores in the area was an appropriate unit and presented evidence in support of that unit. The second day, the union amended its petition to include employees at all the employer’s stores in the area and provided additional cards in support of its amended petition. The employer’s attorney then took the position that only single store units were an appropriate unit.

Unfortunately, the temptations to engage in this sort of nonproductive litigation have effectively been rewarded and imposed real costs on employees and employee rights. In addition, they have also cost the public by wasting NLRB time, resources, and money.

witnesses and other evidence. § 102.66(a)(1)-(3).

Pre-election hearings may also use offers of proof on matters in dispute. The hearing officer is directed to solicit offers of proof from all parties, either in writing or on the record. Offers of proof can include the identity and testimony of each witness the party plans to call. The hearing officer is directed to hear testimony and accept relevant evidence “only if the offers of proof raise a genuine dispute as to any material fact.” § 102.66(b) In addition, sanctions are imposed on parties that fail to meet these obligations. They are “precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party’s Statement.”

In addition, a party whose Statement of Position contends that the petitioned-for unit is not appropriate, but fails to identify the most similar unit that it concedes is appropriate, will be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. § 102.66(c)

Even though the rules push parties to be straightforward about their positions and to work toward settling disputes, there are some exceptions. For example, the proposed regulations state that parties are not “precluded from contesting or presenting evidence relevant to the Board’s statutory jurisdiction to process the petition,” nor is a party precluded from challenging a voter because the party did not contest a voters’ eligibility to vote or inclusion in the bargaining unit during the pre-election hearing or from challenging the eligibility of any voter during the election. § 102.66(c) In other words, parties who want to raise these issues need not fear they will be barred if they do not raise them in a pre-election hearing. This means that parties can proceed to an election more quickly, and the results of the election may make the issues moot so no post-election hearing is required.

Finally, the proposed regulations limit pre-election litigation of issues to those that must be litigated before an election can be held. For example, the proposed regulations require the hearing officer to close the hearing if the only issues remaining in dispute concern the eligibility or inclusion of individuals to be included in the bargaining unit and if the number of potential voters affected would be less than 20% of the unit if they were found eligible to vote. § 102.66(d) In similar proceedings before the regional director, the regional director “shall direct that those individuals be permitted to vote subject to challenge.” § 102.67(a).

The value of such a procedure can only be assessed by understanding the ways in which NLRB hearings have been used to deprive employees of their rights under the NLRA. Holding hearings to determine whether a handful of employees in a particular job classification should be placed in the bargaining unit can be a tactic to force agreement that the employees be excluded or included, even though the result may be a unit that is not cohesive and is difficult to represent. The proposed regulations remove improper incentives that could cause an employer to insist on inclusions or exclusions in order to deprive employees of their NLRA rights to representation and collective bargaining.

These rules may cause concern among employees in a bargaining unit and at the workplace in general. The proposed regulations address this problem by including information about the situation in the Final Notice to Employees of Election. The notice must inform employees that specific employees have not been included in, nor excluded from, the bargaining unit, and that they will be allowed to vote subject to challenge. In addition, the election notice in such a case is to tell employees that eligibility or inclusion in the unit will be resolved, if necessary, after the election. § 102.67 (a) This amendment provides a solution to a persistent problem that addresses a common situation that leads to delay and disquiet among employees.

3. Other Amendments to Address the Problems of Delay

The effects of delay fall disproportionately on the parties to an election. In general, studies shows that delay and the uncertainty and even fears accompanying it fall most heavily on employees. Some employers contend that they have a right to a long campaign in order to ensure that employees are well informed before casting a ballot. However, only employees are expressly given rights protected by the NLRA. Those rights are set out in clear and positive language, and when those rights are violated, the NLRB will prosecute those whose speech violates their rights.

Some claim an employer speech right exists under the NLRA; however, the language that is supposed to underpin that right says nothing about rights nor is it limited to employers. Rather, § 8(c) provides nothing more than a narrow affirmative defense for an entity charged with an unfair labor practice based on speech, and the only entities that can be charged with an unfair labor practice – including unfair labor practices based on speech – are employers and unions. When employers claim a speech right, they must recognize that unions could also claim a speech right based on the same language in § 8(c). Unions have long wanted access to the workplace during an organizing campaign, and parity of rights under § 8(c) might be grounds for giving them that right.

However, the plain language of § 8(c) provides no support for a free speech right for either employers or unions. That means that employers have no grounds on which to claim a right to delay. In the absence of any express employer speech right, the fallback argument an employer can make for delay is that its employees need information. However, employees do not lack information about their working conditions. While doing their jobs, employees will have had the opportunity to collect empirical evidence on their working conditions.

If anything, employees need information on what life with union representation would be. Anti-union campaigns often make claims about unions and union representatives' conduct; however, that information is often not accurate. More accurate information could be provided by allowing unions regular access to employees in the workplace during the pre-election period. However, it is unlikely that employers would agree to such access.

IV. Assessing the Appropriateness of the Proposed Regulations

It is obvious that the proposed regulations include a number of innovations that would better protect parties' substantive and procedural rights and make incremental improvements in the

election rules. The issue, though, when promulgating new regulations, is whether the proposed regulations are necessary to carry out the provisions of the Act. That decision must be guided by the express purposes and policies set by Congress. The NLRA's sole focus is on employee rights to freedom of association, and collective bargaining as fundamental to the welfare of the economy of the United States. What the LMRA adds is that there must be mutual respect of the rights of employees, unions, and employers.

In enacting the NLRA, Congress made employee freedom of association and collective bargaining the foundation for the proper functioning of a democratic society. In other words, the value of employees who have the bargaining power to be paid well and have good benefits and working conditions must be placed in its larger social context. In the NLRA, Congress observed that employers have the benefit of incorporation or partnership law that allow them to be far more successful than if they could only operate sole proprietorships. In return for the valuable right to incorporate and act as a collective entity, it is reasonable for society to make demands of employers. This includes fair treatment of employees and unionization as a counterbalance to the power created by incorporation.

When it enacted the Labor Management Relations Act in 1947, Congress made clear that employees, employers, and unions must respect each other's "legitimate rights" under law. To this end, Congress re-affirmed the need to provide orderly and peaceful procedures to prevent interference with one another's legitimate rights.¹⁶ The rights of employees include the rights "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" and to refrain from those activities.¹⁷ These rights put into effect the NLRA policies of encouraging the practice and procedure of collective bargaining and protecting workers' exercise of "full freedom of association, self-organization, and designation of representatives of their own choosing" so employees could negotiate their terms and conditions of employment.¹⁸ Section 6 of the NLRA empowers the Board to promote the Act's policies by making, amending, and rescinding rules and regulations *as may be necessary to carry out the provisions of this Act.*"

As discussed above, the proposed amendments are a legitimate exercise of the NLRB's power. They advance § 9 election processes and support the right of employees to make a free choice as to bargaining representation. In sum, they would improve the operation of the NLRB's election procedures over those regulations now in place. Therefore, the proposed regulations should be adopted as necessary to carry out the provisions of the Act.

¹⁶ 29 U.S.C. § 141(b).

¹⁷ 29 U.S.C. § 157.

¹⁸ 29 U.S.C. § 151.