Testimony of Caren P. Sencer, Esq.

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Hearing on

NLRB's Proposed Rulemaking Concerning Representation Case Procedures

Chairman Kline, ranking member Miller and members of the Committee, thank you for this opportunity to testify on the importance of updating the National Labor Relations Board's procedures to reduce gamesmanship, promote efficiency, ensure uniformity among regions, and effectuate the National Labor Relations Act's goal of employee free choice.

I am a partner in the law firm of Weinberg, Roger and Rosenfeld based in Alameda, California. Our firm, small by management standards, is one of the nation's largest representing unions, working people and their institutions, including trust funds and apprenticeship programs. Our client base includes unions representing public and private sector, construction, agriculture, service and white collar workers. We are proud to represent some of the largest and smallest unions in California and our work extends through most of the western states.

I have been with the Firm full time since my 2004 graduation from the University of California, Berkeley School of Law. While at a Berkeley, I served as the Editor in Chief of the Berkeley Journal of Employment and Labor Law. Prior to law school, I earned my Bachelors of Science at the New York School of Industrial and Labor Relations at Cornell University.

In my current work, I have had broad exposure to the NLRB representation process and have played a role in assisting clients in approximately 200 representation petitions.

When a union files an election petition on behalf of a group of workers seeking union representation, the statute provides that the workers' desire to vote for union recognition should be promptly honored. In the absence of an employer's voluntary recognition, the workers ought to have an opportunity to vote in a Board conducted election in a timely manner. But too often, employers exploit the current rules and procedures to delay the election as long as possible or avoid an election altogether.

Currently, the regional offices of the NLRB attempt to implement a goal of conducting elections within 42 days of the filing of the petition. In many cases, the parties are able to stipulate to the scope of the bargaining unit and to the time and place for the election because of the efforts of the Regions to apply the 42 day time goal.[1] Generally, a Regional Director will approve a stipulated election agreement if the

[1] The processing of representation petitions is described in 29 C. F. R. 102.62. It is this provision and others which would be modified by the proposed rule changes.

election date is within that 42-day period. Most employers insist upon the 39th, 40th, or 41st day for an election. The Union has no choice but to agree to this delayed election because, if the matter goes to a hearing without a stipulated election, the hearing will inevitably result in delay of the election for at least several weeks beyond the 42nd day.

The employer can use many tactical devices under the current rules to force this delay. Normally, most Regions will schedule a hearing for the 7th day after a petition is filed. Employers request and are routinely granted a continuance of up to a week. If the hearing is held, it may last several days, and the parties are given the opportunity to file a closing brief one week (or more) later. The record is thus closed at the earliest approximately 3 weeks after the petition is filed. The Regional Director then issues a Decision and Direction of Election. This generally takes at least two weeks but often significantly longer. The election is directed for around 30 days after the Regional Director's decision, in order to allow either party an opportunity to seek review from the Board. As a result, in cases where there is no stipulation and a hearing is held, the election is not held until a minimum of 65 days and often longer after the petition is filed. Thus the employer has all the leverage to insist on delay until the 42nd day or beyond because otherwise it can force a hearing even when one is not necessary, delaying any election weeks and sometimes months longer. By threatening to delay the election, often the employer will force the union to accept concessions, for example, to remove or add workers to an already appropriate unit, to agree to an election day (such as pay day), or other procedures that favor the employer.

I should add that in virtually all the cases where clients have filed election petitions, the employers have been well aware of the organizing efforts prior to the filing. In many cases, employers have already started their overt anti-union campaign. In some cases, they have made a tactical decision notwithstanding the organizing campaign to take no action until after the petition is filed. Many employers have anti-union inoculation programs in place that seek to influence employees from the date of hire regardless of whether or not the employer has ever been a target of union organizing. In my experience, virtually every employer is aware of any union organizing effort and can begin its campaign, if it chooses to engage in one, long before any petition is ever filed.

I should also add that I have been involved in elections under the California Agricultural Labor Relations Act where, by statute, elections are conducted within 7 days of the filing of the election petition.[2] That process seems to run smoothly. The employers, their representatives and the Agricultural Labor Relation Board have adapted to the statutory mandate of elections within 7 days, a provision which has been in place since the statute was enacted.

The NLRB's proposed rules take important steps toward reducing the opportunity for unnecessary delay. The Regions would be permitted to grant an extension from the original hearing date only under special circumstances. Written closing briefs would not be a matter of course but rather would require special permission, for example, in complex cases. Most cases only involve one or two issues and they are typically the same issues regarding supervisory status and community of interest. As a result, oral closing arguments would become the norm, thus eliminating up to 2 weeks of delay caused by waiting

[2] California Labor Code 1140 *et seq*.

for transcripts and briefs to be filed. Hearing officers of the NLRB are trained to develop complete records for the Regional Director and closing arguments are more than sufficient to explain a position at the close of the hearing. Moreover, this would reduce the expense for all parties to the process.

The NLRB's proposed rules also eliminate the pre-election request for review to the Board and require instead for appeals to be consolidated during the post-election process. With these reforms, under the proposed rules, elections could be set promptly after an election is directed by the Regional Director, in contrast to the current practice, under which elections are delayed for at least 25 days after a decision. This would bring the Board's rules in line with most other administrative agencies and courts where interlocutory appeals are not permitted or are severely limited.

We anticipate that the proposed rules will substantially reduce the number of hearings, since a hearing will no longer carry with it the same opportunities for delay and thus, the threat of forcing an issue to hearing would carry less weight. In addition, under the Board's proposed rules, absent true dispute between the parties, the Regional Director would have the discretion to refuse to open the record to hold a hearing. We anticipate the new rules will encourage more stipulated elections and thereby shorten the time that workers have to wait to be able to exercise their right to vote and eliminate litigation carried out solely for tactical advantage in the campaign and election.

Eliminating delay serves the purposes of the National Labor Relations Act in promoting employee free choice. Employers will benefit because it will reduce the time period during which employees are distracted by the campaign and upcoming election. The new streamlined process will be less expensive for the employer and the union and will be easier and less cumbersome for the Agency to administer. It is difficult to see how anyone is disadvantaged by eliminating unnecessary litigation and unnecessary delays before employees can make a free choice through the election process.

The proposed rules are not ground breaking, nor, to be perfectly frank, do they go far enough. The proposed rules reflect practices that have been applied in some Regions already and are not particularly controversial. Most of my practice is in the seven Regions on the west coast. From my experience, representation hearings are regularly scheduled to be held 7 days after the petition is filed. Petitions are accepted by fax with copies of the showing of interest with the original signatures to be received by the Regional office within 48 hours. When there is a dispute over scope of the bargaining unit, but the number of employees in the disputed classifications represents less than 20% of the entirety of the unit, the Regional Directors regularly approve stipulations for election indicating employees in the disputed classifications will vote subject to challenged ballots. The proposed rules would simply codify some of these already existing best practices. Many employers have accepted these practices although they use the threat of litigation to delay the election until the 42nd day and to extract concession on the composition of the unit, the election date, and election mechanics from the union which wants to avoid a lengthy hearing process.

Other changes will reduce parties' ability to exploit the process for tactical advantage by forcing parties to clarify their position on relevant issues. The "statement of position form" in the proposed regulations is a good example of this. Under the proposed regulations, no later than the start of a pre-election

hearing, an employer would be required to commit to its position regarding the composition of the bargaining unit in writing. In one case recently handled in my office, the employer, represented by a skilled management firm, first requested an extension of time before the start of the representational hearing. The last day before the rescheduled hearing, the parties entered into a stipulation that referenced six team leaders and explicitly did not determine their voting eligibility. The election was set for 30 days later -- the 42nd day after the petition was filed.

These 6 team leaders represented less than 10% of the total unit. The day of the election, the Board Agent asked the employer its position on the six individuals. The Employer asserted that the six individuals were supervisors and the Board Agent challenged each of the individuals so when they voted, their ballots were segregated and impounded. After the voting was concluded, the employer again stated its position that the six were supervisors. The Union accepted the employer's position. After the vote count, the employer reversed its position to claim the employees were not supervisors and should be eligible to vote. This statement was made after it was clear the six votes would be determinative if they were counted in what was a very close vote count. There was no rationale provided by the employer for its change of position.

This led to post-election litigation of the supervisory status of the individuals with the burden on the Union to prove supervisory status after the employer had been asserting it from the beginning! The Hearing Officer issued his Report and Recommendation regarding the challenged ballots roughly 5 months after the petition was filed, and found that all six team leads were supervisors. The matter was transferred to the Board for post-election review and has remained there for over 7 months because the employer filed exceptions asserting, contrary to its long held position, that the six were not supervisors!

If the employer had been required to commit to a position on the six leads at the outset or, at least, at the challenge stage, much of this posturing would have been avoided. Even if, based on the stipulated election agreement, the proposed position form had not been required; many of the proposed rules would have reduced the delay involved in this case. Under the proposed rules, as the parties did not have a dispute affecting more than 20% of the unit, the Region could have unilaterally set the election before the 42nd day. The Union would not have been pressured into the last acceptable day by the threat of a hearing when no issues requiring pre-election resolution were pending. Under the proposed rules, the employer would have produced a complete *Excelsior* List[3] with detailed information no later than the 2nd day after the stipulation, rather than 7 days and the Union, if it so desired, could have waived the right to have the *Excelsior* list for a full 10 days before the election. As a result, under the procedures in the NLRB's proposed rules, the election could have been set for a few weeks after the petition was filed. Even if the election was held on the 42nd day after the petition was filed and the employer was entitled to change its position on the supervisory status of the team leads between the end of the election and the end of the vote count, the question of representation would still have been resolved at least 7 months faster under the proposed rules because the Board could have simply denied review of the Hearing Officer's Recommendation on this routine issue of supervisory status, allowing the Regional Director to issue a final decision.

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[3] *Excelsior Underwear*, *Inc.*, 156 NLRB 1236 (1966).

In a different region earlier this year, I filed a petition on behalf of a client seeking to represent only a small unit of employees – all the employees inside a particular job classification – working for a subcontractor of the federal government. This particular subcontractor has approximately six collective bargaining agreements with this international union, and each CBA is specific to a particular federal worksite. The employer asked for an extension of time to hold the representation hearing – "the parties are sure to stip," said the representative. The day before the rescheduled hearing, it was clear that there would be no stipulation because the employer sought to add an additional job classification, which would double the size of the proposed bargaining unit. The employer also informed the Region that it would not be appearing at the hearing scheduled for the following day. The Union still had to appear and provide testimony about its labor organization status, the Board's jurisdiction over the employer, and the propriety of the proposed unit which, under Board law, was a presumptively appropriate unit. That was February 12. A direction of election has still not issued and, when it does, it is expected to include the mandatory 25 day waiting period to allow the parties to seek review notwithstanding the employer's refusal to participate in the process. The employees filed their petition on January 31. They will be lucky if they are able to cast their vote in early April.

If the proposed rules were in place, it is questionable whether the continuation of the representation hearing date would have been granted. The morning of the hearing, upon the employer's failure to appear, the Regional Director could have issued a direction of election without holding a hearing as there was no dispute regarding the scope of the bargaining unit. The employer would have 2 days to produce the *Excelsior* List. Given the size of the unit, the Union would likely have waived the right to a full 10 days with the *Excelsior* List. If the proposed rules were in place, the Election would have already been held. Instead, the employees are still waiting for a direction of election and are prevented from exercising their right to vote. This case, with the employer's gamesmanship of delaying the initial hearing and then boycotting the hearing process, highlights the importance of the NLRB's proposed election rules in improving the election process.

As a final example, a client filed a petition for a unit of approximately 45 automobile mechanics. Despite well established Board law that automobile mechanics constitute a traditional craft unit that is presumptively appropriate, the employer insisted on a hearing where it took the position that service writers must also be included. The service writers would have constituted more than 20% of the unit. A hearing was held two weeks after the petition was filed. The employer requested and was provided with an extension to file a post-hearing brief. In its brief, the employer abandoned its position that the only appropriate unit needed to include the service writers. As a result, there were only 6 positions (representing less than 15% of unit) in dispute. The Regional Director issued a Decision and Direction of Election two weeks later. The election was directed in the unit the Union had originally petitioned for. The election was set for 26 days later. On the fourteenth day after the Decision and Direction of Election issued, the Employer filed a Request for Review of the Decision of the Regional Director.

The election was held 78 days after the petition was filed. The morning of the election, the Board issued an Order amending the Regional Director's Decision in part and sustaining it in part. It allowed for four additional individuals to vote under the challenged ballot procedure. During the election, two additional individuals whom the employer believed should have been in the unit were denied ballots by the Board

Agent because the Board had already ruled that they were ineligible to vote. This alleged "disenfranchisement" to use the employer's phrase, served as the basis for the employer's objections to the election which were served 4 days after the election. The hearing on the objections was set for a month later and was held over 2 non-consecutive days. The second day was set for the employer to produce witnesses who had not been available the first day of hearing. Those witnesses were not produced on the second day and the employer disingenuously bought additional delay. The Employer filed a closing brief a week later. The Administrative Law Judge issued his recommended decision 40 days after the second day of hearing. The recommended decision overruled each of the employer's objections and directed the four challenged ballots to be counted. The number of ballots to be opened and counted was insufficient to affect the outcome of the election and the Union won. The employer took exception to the report of the Administrative Law Judge. The Decision from the NLRB issued 9 months later. Four hundred and twenty seven (427) days after the petition was filed, the union was certified.

To be fair, some of the delay – after the recommended decision issued – was due to vacancies at the Board. However, the Decision of the Administrative Law Judge was issued 162 days (more than 5 months) after the petition was filed. While not as dramatic as 427 days, it is still completely unacceptable if employees are entitled to timely free choice.

The proposed rules, in addition to requiring the employer to commit to a position in writing, regarding the service writers, would have reduced the time it took from the filing of the petition until the election. If the employer had retreated from its position regarding the service writers prior to the opening of the hearing, the remaining disputed positions would have voted subject to challenge and the challenges would have been resolved through the post-election hearing. The post-election hearing would have been scheduled for fourteen days after the tally of ballots, on consecutive days – not 34 and 44 days later. The Board would have had the discretion to deny review of the decision regarding the challenged ballots.

The proposed rules will unquestionably reduce the number of days between the filing of a petition and an election, and provide more fairness and certainty to the process.

For a short window in 2012, aspects of the proposed rules and the Acting General Counsel's Guidance Memorandum regarding election procedures were in place, because they had been adopted earlier that year by the Board (before being stayed due to a court challenge to the rules).[4] During that time, I filed a petition for a client. The only dispute between the parties was the time and date of the election. The Regional Director refused to open a hearing. Instead, the morning when the hearing would have been held, the Region informed the parties that in the absence of an agreement between the parties, it would set the date and time of the election without input from the parties. The parties reached an agreement. The Union waived the right to have the *Excelsior* List for a full ten days. The election was held 24 days after the petition was filed. The Employer was not denied its full opportunity to run an anti-union campaign -- in fact, the employer's campaign started before the petition was even filed. This experience

[4] Memorandum GC 12-04 (April 26, 2012) [Subject: Guidance Memorandum on Representation Case Procedure Changes].

gives us an indication of how the system will work under the Board's proposed new rules – less unnecessary delay, less gamesmanship, and more timely elections.

Some of the proposed rules are basic modernization of an old statute. Since the 1960s, employers have been required to provide the names and home addresses of employees in proposed bargaining units to the Region under the *Excelsior* List rule. The Region then provides a copy to the Union. In nearly all cases, the list is produced on an electronic spread sheet. Presumably the same electronic record would include other accessible data such as phone numbers and email addresses. Frequently, the list contains PO Boxes in lieu of home addresses. Some employers provide street addresses and omit apartment numbers or other information necessary to locate the worker even though the employer has the information available in electronic format.

Since the 1960s, communication has changed. Almost all employees have a cell phone, email address or both. Almost all employers maintain computer systems for processing payroll. Under the Fair Labor Standards Act, the paystubs provided to employees are required to include the employee's home address. This confirms that employers already have employee contact information in an electronic format. There is no practical reason why the employer should not produce the electronic document directly to the Region and the Union. Modern business depends on electronic delivery of information and this basic tenet should apply to eligibility lists as well.

Some opponents of the Board's proposed rules have expressed concern that providing email addresses and phone numbers is more intrusive on employee privacy than the current standard of producing home addresses. This does not make sense. We all choose when to read our emails, when to respond, and most importantly, when to delete. The same is true of phone calls and voicemail. I would anticipate that in many cases, the union will use less intrusive means to communicate with employees in the bargaining unit if the *Excelsior* List requirement is expanded to require employers to provide email addresses and phone numbers.

In my experience, incomplete addresses or PO Boxes are routinely provided, thwarting the intent of the *Excelsior* list requirement. The list does not provide the Union with information allowing for contact outside of the employer's premises. For some groups of employees, including employees who work in multiple locations throughout the year, they use only a PO Box for mail. Even if seasonal, their employer contacts them in the off season to recall them to work using the cell phone numbers that are already gathered by the employer. Providing this information is no more intrusive than providing a home address.

In conclusion, these rules are not revolutionary or radically different than the status quo. They reflect an attempt to standardize some of the best practices and create consistency between Regions. Many of the proposed changes attempt to align the Board procedures to procedures used by other agencies, bring the process into the 21st century and provide clear notice. The proposed rules reduce unnecessary delay, simplify the procedure and permit the parties to seek Board review after the election at which time the parties know which, if any, differences of opinion that existed prior to the election are relevant

or determinative. This saves time and money for employers, unions and the government, and promotes the ability of employees to exercise their right to vote.

I would be happy to answer questions and I hope that my experience with the Board's procedures is helpful to this Committee.

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