

## NATIONAL LABOR RELATIONS BOARD

### 29 CFR Parts 101 and 102

RIN 3142—AA08

#### Representation—Case Procedures

**AGENCY:** National Labor Relations Board.

**ACTION:** Final rule; separate concurring and dissenting statements.

**SUMMARY:** On June 22, 2011, the National Labor Relations Board (the Board) issued a notice of proposed rulemaking proposing various amendments of 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. Thereafter, on December 22, 2011, the National Labor Relations Board issued a final rule amending its regulations, taking effect on April 30, 2012. The final rule stated that any dissenting or concurring statements would be published separately in the **Federal Register** prior to the effective date of the rule. The purpose of this document is to publish the separate statements of Chairman Mark Gaston Pearce and Member Brian E. Hayes. Pursuant to the Board's order providing for publication of the rule and the separate statements, neither statement constitutes part of the rule or modifies the rule or the Board's approval of the rule in any way.

**DATES:** The effective date of the rule is unchanged. The final rule, published December 22, 2011, at 76 FR 80138, will be effective on April 30, 2012.

#### FOR FURTHER INFORMATION CONTACT:

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**SUPPLEMENTARY INFORMATION:** The Final Rule issued on December 22, 2011, at 76 FR 80138, stated that any dissenting or concurring statements would be published separately in the **Federal Register** prior to the effective date of the rule. The concurring statement of Chairman Mark Gaston Pearce and the dissenting statement of Member Brian E. Hayes, are as follows:

#### Separate Concurring Statement by Chairman Pearce

Chairman Pearce, concurring:  
Today the Board publishes these concurring and dissenting statements regarding the Board's final rule concerning representation-case procedures, 76 FR 80138 (Dec. 22, 2011).

Much of the dissent is a close paraphrase of the Chamber of Commerce's brief attacking this rule in federal court. See *Chamber of Commerce, et al. v. NLRB*, 11-2262, Docket 22 (D.D.C., brief filed Feb. 2, 2012). Counsel for the Board has already refuted those arguments in its responsive brief in that litigation. *Id.* at Docket 29 (filed Feb. 28, 2012). In light of this history, little new is said at this point.

However, for the convenience of readers who may not be familiar with that litigation, in this concurrence I will discuss the most salient flaws in the dissent. Primarily, this means recapitulating—often verbatim—the Board's papers in the litigation.

First, the rule provides an “appropriate hearing” under Section 9(c), and the argument to the contrary ignores the plain language, Supreme Court caselaw, and all the relevant legislative history. Next, the rule is also consistent with Section 3(b) of the Act, in letter and spirit, and preserves the opportunity to request a stay or appeal. The rulemaking process was fully consistent with all applicable legal requirements, and the Board gave the dissenter every opportunity to participate that was reasonably possible under the circumstances. Turning to the justification of the rule itself, the rule is not arbitrary and capricious. The Board considered and analyzed the relevant data, and the dissent's arguments otherwise are premised on a misunderstanding of the purpose of the rule. Finally, I reject the dissent's contentions that the public did not get a meaningful chance to comment on the issues in the rule because the rule is not a “logical outgrowth” of the proposal, and that employer speech rights are “burdened” by the rule.

#### Background

On June 22, 2011, the Board issued a Notice of Proposed Rulemaking (NPRM) by a 3–1 vote, with Member Hayes dissenting. 76 FR 36812. The views of the public were sharply divided, with tens of thousands of comments in favor of the proposals and comparable numbers opposing them. Other comments agreed or disagreed only in part. The Board reviewed all of the comments and testimony, and considered and deliberated on the issues for months. During the comment period, then-Chairman Liebman's term expired; the Board then faced the imminent end of the recess appointment

of Member Becker and with it, the indefinite loss of a quorum.<sup>1</sup>

In light of this situation, on November 30, 2011, the Board held a public meeting to deliberate and vote on how to proceed with the rulemaking. At the meeting, I put forward for consideration Resolution No. 2011–1, which adopted eight of the NPRM proposals—to be published in a final rule before Member Becker's appointment ended—while deliberations continued for the rest of the proposals.

At the meeting, all Board Members discussed the resolution in depth. The resolution passed by a vote of 2–1, with Member Hayes voting against it. Pursuant to the resolution, the final rule was prepared and circulated on December 9, with revisions circulated as they were made. In circulating the draft rule, I invited all Board members to participate in the deliberations. On December 14 and 15, the Board voted, again 2–1, on a final order instructing the Board Solicitor to publish the final rule upon approval by a majority of the Board. The order provided that a dissent or other personal statement could be published separately at a later date.

Also on December 15, as Member Hayes had not yet circulated any dissent, my Chief Counsel sent an email asking what Member Hayes wished to do, and whether he would include any dissenting statement contemporaneously with the Final Rule. Member Hayes indicated that he could say whatever he needed to say in a single statement after the rule was published, and so would not be publishing a contemporaneous dissent.<sup>2</sup>

The rule was finalized shortly thereafter and published on December 22, 2011. In general, the rule grants regional directors greater discretionary authority, while simplifying and consolidating Board review. The primary purpose of these changes is to increase procedural efficiency by eliminating unnecessary litigation. In addition, there may be some resulting improvements in the timeliness of Board proceedings. For example, a stipulated election can typically be held in close to half the time it takes to hold the election in a fully litigated case, and it is reasonably likely that eliminating unnecessary litigation may help close

<sup>1</sup> 76 FR 80140–45. When the Board last lost its quorum (in 2007), it was years—816 days to be precise—until the Board was reconstituted. This time it turned out that only six days passed until three more Board members were appointed, but as discussed in greater detail below, there was no way to anticipate this development.

<sup>2</sup> These internal communications previously have been made public in connection with the pending litigation.

this gap. 76 FR 80155, 80149. But, again, and as discussed in greater detail below, the uselessness of a certain litigation procedure is, by itself, sufficient reason to eliminate it, and the primary purpose of the rule is to remove the most obviously unnecessary steps in the representation-case process.

Specifically, the former rules required litigation of individual eligibility issues that did not need to be decided before the election, and may in a given case not need to be decided at all. *Id.* at 80139–80140, 80164. This requirement was eliminated, and the regional offices can now control their own hearings to prevent litigation of any issue that need not be decided before the election.

The former rules provided for pre-election briefing on a fixed 7-day schedule after the hearing, even in simple cases where it was patently unnecessary. The new rule permits the regional office to choose between accepting briefing or hearing oral argument, and to determine the schedule and subject matter of any such briefing. *Id.* at 80140, 80170–71.

After the direction of election, the former rules required the parties to file an immediate interlocutory request for discretionary Board review in order to preserve their rights. *Id.* at 80140; 80172. The new rule eliminates this needless interlocutory interruption in most cases, permitting these issues to be raised instead at the conclusion of the regional proceeding. However, in “extraordinary circumstances where it appears that the issue will otherwise evade review,” the Board will hear an immediate special appeal. *Id.* at 80162.

The former rules suggested that the regional director should “normally” choose an election date at least 25 days (but no more than 30 days) after the direction of election. The express purpose of this waiting period was to give the Board an opportunity to rule on any interlocutory appeal that may be filed by a party, but even under the former rules, it did not serve this purpose: in many cases no appeal was filed, and, even where filed and granted, the election was usually held as scheduled while a ruling on the merits was pending. If the election is going to be held in any event, there is no reason to routinely wait 25 to 30 days for the election. The new rule gives the region broader discretion to select an appropriate election date. *Id.* at 80140, 80173.

Finally, the former rules generally provided for *mandatory* Board review of a “report and recommendation” by a *hearing officer*, without the benefit of any decision on the merits by the regional director. But the statute

expressly contemplates *discretionary* Board review of decisions by the *regional director*, and the Board’s experience with discretionary review has proven that it is perfectly satisfactory. The new rule provides that as to determinative challenges and objections there will always be a regional director’s decision, with discretionary review by the Board. *Id.* at 80142, 80159–61, 80173–74.

I turn now to the specific points raised in the dissent.

### 1. Contrary to the Dissent, the Rule Provides for an “Appropriate Hearing”

The Board has correctly and repeatedly stated that the rule provides for an “appropriate hearing” consistent with Section 9(c) of the statute. That section clearly states that the purpose of the pre-election hearing is to determine whether there is a question of representation:

[T]he Board shall investigate [representation] petition[s] and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. \* \* \* If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. 159(c). When is a hearing to be held? When there might be a “question of representation.” And what must the Board decide on the record of the hearing? Whether “such a question of representation exists.”

That seems plain enough to me. The focus of the hearing is the existence of a question of representation. Other matters, which do not implicate the essential issue, are within the sound discretion of the Board and regional director to decide whether to hear.

The dissent is absolutely correct to state that “the reference [in Section 9(c)] to an ‘appropriate’ hearing connotes a relative, flexible standard.” As discussed below, the word “appropriate” was carefully chosen by Congress to grant the Board very broad discretion.

In the very next breath, however, the dissent concludes precisely the opposite, stating that “appropriate” means that the Board is required to hear—in each and every litigated case—evidence on a host of contested issues that do not need to be decided before the election.

That is not flexibility. To require litigation of such issues would tie the Board’s hands, so that it could not adjust or control the issues litigated to fit the circumstances. By contrast, the Board’s rule is explicitly discretionary,

and frees the Board to take evidence on the appropriate issues and at the appropriate time for the particular case. It is the dissent, not the Board, that is trying to transform the word “appropriate” into an inflexible statutory limit on the form and contents of the hearing.

The statute’s plain language should settle the matter. But, in case any doubt remained, the Supreme Court has already reviewed all the relevant legislative history and has expressly held that the whole point of the term “an appropriate hearing” in the 1935 Act is to “confer[] broad discretion upon the Board as to the hearing [required].” *Inland Empire Council v. Millis*, 325 U.S. 697, 706–710 (1945).

[U]nder Public Resolution 44, which preceded § 9(c), the right of judicial hearing was provided. The legislative reports cited above show that this resulted in preventing a single certification after nearly a year of the resolution’s operation and that one purpose of adopting the different provisions of the Wagner Act was *to avoid these consequences*. In doing so Congress accomplished its purpose *not only* by denying the right of judicial review at that stage *but also by conferring broad discretion upon the Board as to the hearing* which § 9(c) required before certification.

325 U.S. at 708 (emphases added).<sup>3</sup> Thus, the Board’s investigation is “informal” and the language “appropriate hearing” is broad and general, designed to give “great latitude” to the Board. *Id.* at 706–708. As the Supreme Court stated, the purpose of this “latitude” is to help the Board keep its process timely, efficient, and free of the unnecessary litigation that bogged down the former process. That is precisely what the new rule is designed to do.

The dissent tries to twist *Inland Empire* to create an inflexible scheme for pre-election litigation of every issue, even if it will not be decided before the election.<sup>4</sup> But the Supreme Court’s

<sup>3</sup> Public Resolution 44 (approved June 19, 1934, c. 677, 48 Stat. 1183), comprised the National Industrial Act’s enforcement machinery.

<sup>4</sup> The language from *Inland Empire* quoted by the dissent does not answer the question in this matter. It is certainly true that the parties should have a “full and adequate opportunity to present their objections before the \* \* \* certification.” *Inland Empire*, 325 U.S. at 708. But this does not answer the question here, because the overwhelming majority of such objections literally cannot be litigated until after the election: “Objections relate to the working of the election mechanism and to the process of counting the ballots accurately and fairly.” Cf. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 334 & fn.7 (1946).

Under the basic structure of Section 9(c), some issues must be litigated after the election (such as the fairness of the election campaign), and some issues must be litigated before the election (such as

opinion is squarely aimed at achieving the opposite result: increased Board flexibility in controlling the litigation.

In the quest to find some support for this inflexible view of “appropriate,” the dissent cites inapposite authority, including a statement by Senator Taft in 1947 and an irrelevant Third Circuit case. Then, the dissent cites a trio of terse Board decisions that have already been extensively discussed in the Board’s final rule. These points are addressed in turn.

First, the dissent relies upon a passing comment in a 1947 statement by Senator Taft about a failed amendment to the NLRA. 93 Cong. Rec. 6858, 6860 (June 12, 1947). At the outset, it should be noted that such post-enactment history sheds no reliable light on the meaning of the word “appropriate” as used by Congress 12 years earlier. See *Huffman v. OPM*, 263 F.3d 1341, 1354 (Fed. Cir. 2001) and cases discussed therein.<sup>5</sup>

But even assuming this statement was relevant, it has been badly misinterpreted by the dissent. The dissent views Senator Taft as endorsing the litigation of eligibility questions, regardless of whether they would need to be decided. However, in the crucial words relied upon by the dissent, what Senator Taft actually said was that the Board would “decide” voter eligibility. Senator Taft made no mention of litigation:

[T]he function of hearings \* \* \* [is] to determine whether an election may properly be held at the time; and if so, to decide questions of unit and eligibility to vote.

Did Senator Taft mean that the Board must decide all questions of eligibility to vote before the election? Of course not. This would have been in conflict with the well-established challenge procedure for deciding voter eligibility

the existence of a question of representation). The question here is what to do with the rest of the many and varied issues that can arise, which can be litigated either before or after the election. *Inland Empire* makes clear that the term “appropriate” is not designed to limit Board discretion on this issue. The dissent’s efforts to read it to mean the opposite are unavailing.

Ever since *Inland Empire*, the courts have continued to take a very broad and accommodating view of what will satisfy the requirement of an “appropriate” pre-election hearing. In *Utica Mutual Ins. Co. v. Vincent*, 375 F.2d 129, 133–34 (2d Cir. 1967), for example, Judge Friendly followed the Supreme Court’s statement that the “appropriate” hearing was within Board discretion. As the court noted, due process concerns were overblown: “A representation hearing is simply a preliminary to an election which may or may not result in a certification; if it does, and the employer refuses to bargain, he is entitled to present in an unfair labor practice proceeding any material evidence he was prevented from introducing at a hearing under § 9(c).”

<sup>5</sup> For the same reason, none of the still later history cited by the dissent is relevant either.

post-election. The Supreme Court had expressly held—in 1946, the year before this statement was made—that the Board was allowed to wait to decide eligibility to vote via the challenge procedure. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330–35.

So what did Senator Taft mean? He was generally describing the “function,” not the requirements, of hearings, and did not mean to suggest that the Board must resolve all such issues pre-election in every case.<sup>6</sup> And his mention of “unit and eligibility to vote” accurately reflected the reality that “[b]ecause the representation election is held only within the approved unit” (*Local 1325, Retail Clerks Intern. Ass’n v. NLRB*, 414 F.2d 1194, 1199 (D.C. Cir. 1969)), the designation of an appropriate unit largely determines who will vote in the election. Indeed, the definition of the unit, together with other voting eligibility formulae (such as the payroll period for eligibility), necessarily identifies the core group of eligible voters. See, e.g., *NLRB v. Hondo Drilling Company*, 428 F.2d 943 (5th Cir. 1970). Accordingly, Senator Taft’s remarks are fully consistent with the new Rule. See 76 FR 80165 n.116.

Simply put, the dissent misinterprets Senator Taft. And, in any event, his statement—twelve years after the fact—sheds no reliable light on the intent of Congress in the Wagner Act.

Regarding *NLRB v. SW. Evans & Son*, 181 F.2d 427 (3d Cir. 1950), the dissent claims that the “inescapable inference” is that the “appropriate hearing \* \* \* must permit litigation of all contested issues of substance.” But, in fact, the Third Circuit expressly disclaimed any suggestion that it might be interpreting the “appropriate hearing” requirement of the statute, and relied explicitly and exclusively upon the language in the Board’s regulations themselves. The court stated:

Moreover, we need not determine whether we are presented with a situation in which the statute may be said to control on the issue of a pre-election hearing. For, in our view, the solution to the problem presented is to be found in the Rules and Regulations of the Board.

*Id.* at 429–30. Those rules required hearings on “substantial issues.” They did not and could not turn this standard

into a statutory requirement of the 1935 Act.

The Board’s vacated decision *Pacific Greyhound Lines*, 22 NLRB 111, 123–24 fn. 37 (1940), is also inapposite. Although the Board stated that the hearing “may” include many issues, this was not mandatory, and nothing in the decision suggests that the 1940 Board viewed Section 9 as mandating litigation of every voter eligibility issue prior to the election. Indeed, the focus of the litigation was actually the appropriate unit, and the Board decided to defer decision on these unit questions in part until after the ballots were opened and counted. *Id.* at 121–23.<sup>7</sup>

In any event, the Board is allowed to change its mind—particularly about something as irrational as a reading of the statute that would imply a requirement to litigate issues that will not be decided. Which leads to the final point in this discussion: the 1990’s trio of Board cases, including *Barre-National*, regarding the pre-election hearing. Even assuming these cases rested upon the statute, rather than the regulations, the statutory analysis in these cases is non-existent. There is no meaningful discussion of the statutory language, no analysis of the legislative history or the plain language of Section 9(c), and no explanation for why it would make sense to require litigation of issues that will not be decided—in short, nothing whatsoever to substantively support the supposed interpretation of the statute. The persuasiveness of the “analysis” in these cases has already been fully addressed by the final rule.

The D.C. Circuit recently reiterated that “the APA allows an agency to adopt an interpretation of its governing statute that differs from a previous interpretation and that such a change is subject to no heightened scrutiny.” *Air Trans. Ass’n of Am. v. NMB*, 663 F.3d 476, 484 (D.C. Cir. 2011) (citing *FCC v. Fox Television Studios, Inc.*, 129 S.Ct. 1800, 1810 (2009)). The court proceeded to find that “for purposes of APA review, the fact that the new rule reflects a change in policy matters not at all. [T]he [National Mediation] Board ‘articulated a rational connection between the facts found and the choice

<sup>7</sup> *Pacific Greyhound Lines* also illustrates the dangers of lengthy litigation. Petitions were filed in June 1938. About 144 days later, in October 1938, a decision and direction of election was issued, which was later amended, and the election was not completed until 204 days after the petition, in late December 1938. *Id.* at 120–22. That the Board in one case from the 1930s chose to permit such lengthy proceedings does not tie the hands of all future Boards; rather, as *Inland Empire* established, the “appropriate hearing” is within Board discretion.

<sup>6</sup> The same is true of the law review articles quoted by the dissent, none of which suggest that Section 9(c) requires litigation of issues that will not be decided. See Steven E. Abraham, *How the Taft-Hartley Act Hindered Unions*, 12 Hofstra Labor Law Journal 1, 12 (1994); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495, 516 fn. 91, 519 fn. 102 (1993).

made.’’ *Id.* (quoting *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007). So, too, here, *Barre-National* is entirely irrelevant to whether the current statutory interpretation of the Board is reasonable.<sup>8</sup>

Aside from *Inland Empire* (which undermines the dissent), there is no meaningful analysis of the statutory text in any of the cases cited by the dissent. Thus, there is no support for the dissent’s interpretation of the statute.

## 2. Contrary to the Dissent, the Rule Is Consistent With Section 3(B) of the Act

The rule generally delays Board review until the conclusion of the regional proceeding. But, if a party wants immediate review or a stay, it can seek it, and it will be granted in extraordinary circumstances where the issue would otherwise evade review.

This result is not all that different from current procedures, under which pre-election review is rarely sought and very rarely granted. When the Board does grant review, it usually does not issue a decision on the merits until after the election has been held; meanwhile, pre-election stays are so rare as to be almost mythical creatures.

The rule’s approach is very similar to procedures in the subpoena context, which the Supreme Court has already approved. See *NLRB v. Duval Jewelry Co. of Miami, Inc.*, 357 U.S. 1, 6–7 (1958). The Court held: “One who is aggrieved by the ruling of the regional director or hearing officer can get the Board’s ruling. The fact that special permission of the Board is required for the appeal is not important.” The Court also noted that, even in meritorious special appeals, “where an immediate ruling by the Board on a motion to revoke is not required, the Board defers its ruling until the entire case is transferred to it in normal course.” *Id.* Here, too, special permission offers an avenue for requesting immediate review, but where immediate review is not required, the Board can simply

address the issue upon completion of the regional office’s processing of the case.

The dissent argues that the rule unlawfully eliminates a “right to request” a stay or Board review before the election. First, there is no such right in the statute. But even if there were, the rule plainly does not eliminate any such right.

The dissent argues that Section 3(b) implicitly suggests a right to request review before the election because it mentions the possibility of stays. But, by its plain terms, the statute does not speak to *when* a request for review must be decided by the Board, and the “stay” language reflects a grant of discretion to the Board, not a limit. Section 3(b) states in relevant part:

The Board is [] authorized to delegate to its regional directors its powers [] to determine [issues arising in representation proceedings], except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him [], but such review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

29 U.S.C. 153(b). That the Board “may review” any action of a regional director does not mean that the Board must rule on requests for review at any particular point in time. Indeed, the Board sometimes decides such requests after the election. 76 FR 80168, 80172 (and cases cited therein). Nothing requires the Board to rule within a certain number of days of the regional director’s action, or imposes any other time limit on review.

The “stay” language is not phrased as a limit on Board power. To the contrary, the language only clarifies that, whenever review is granted, either before or after the election, it will not automatically operate as a stay. The stay language of the statute expressly contemplates that the Board’s failure to rule on a request for review would have no impact on the progress of ongoing regional election proceeding.<sup>9</sup> Nothing in the text of Section 3(b) prevents the regional director from continuing to process the election proceeding to completion while a request for review is pending.

But, even assuming that the statute somehow required an immediate

opportunity to request a stay or Board review, both the former rules and the current rules provide that opportunity, through the special-appeal procedure. In a sense, the request-for-review procedure was always beside the point here, because it applied to the direction of election, whereas the request for a special appeal was available for any of the multitude of other regional office decisions made before the election.

So, if we assume that Section 3(b) required an immediate opportunity for review of “any action” of the region, it was always and only the special appeal that met that requirement. The dissent admits that special appeals are very rarely granted in current practice, and even admits that the special appeal will still exist under the rule. But, the dissent avers that this right to seek a stay and appeal is “entirely illusory” simply because it is granted under a “severely narrow standard” in the rule. This argument lacks merit.

Nothing in Section 3(b) even arguably speaks to the standard the Board is to apply in granting or denying review—whether pre-election or post-election. It says, again, that the Board “may” grant review, without imposing any limit on this discretion. As the Supreme Court has explained, “Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination.” *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971). As the Board pointed out, “extraordinary circumstances” is not the same as “no circumstances.” 76 FR 80163. As a matter of common sense, pre-election review serves no purpose in the ordinary case, where final review is more than adequate.

## 3. Contrary to the Dissent, the Board Followed an Appropriate Rulemaking Procedure, and the Dissenter Had Adequate Opportunities To Participate

The dissent argues that the Board should not make rules without three affirmative votes, and that it should have waited 90 days for the dissent before publishing the rule. The dissent admits that these are discretionary choices, but contends that these choices were inadequately explained. However, under *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978), the procedure that the Board follows in rulemaking is subject to only the most narrow review, and little if any explanation of these procedural choices is necessary. In any event, the Board’s choices were fully explained: it makes no sense to require three affirmative votes for rulemaking,

<sup>8</sup> Because the dissent straightforwardly borrows the Chamber’s arguments about *North Manchester* and the minority views in *Barre-National*, I would be remiss if I did not mention the shortcomings of these arguments already identified in the litigation. *North Manchester* is, at most, imprecise in its description of *Barre-National*, and there is absolutely no indication that *North Manchester* was intended to make any change to the rationale of *Barre-National*. See 328 NLRB 372, 372–73 (1999). Meanwhile, the view articulated in the concurrence and dissent of *Barre-National* demonstrates quite the opposite of Member Hayes’ claims that the majority holding rests on the statute. That the concurrence was forced to make this point separately supports, rather than undermines, the Board’s reading of *Barre-National* as resting on the regulations. The views of a minority of the Board about what the majority meant are not authoritative.

<sup>9</sup> Contrary to the dissent’s reading, the stay language would not be “render[ed] meaningless” even if the rule completely prohibited stays (which it does not), because the statutory language is designed only to grant authority to the Board to routinely refuse to grant stays, and does not require the Board ever to exercise its power to issue specifically ordered stays.

and the Board gave the dissenter every reasonable opportunity to participate under the circumstances.

*A. Rulemaking Procedure Is Within Board Discretion, and the Board Acted in Good Faith*

The dissent appears to acknowledge that the legal standard for overturning the rule on a ground like this is supplied by *Vermont Yankee*, but, by also arguing that the rulemaking procedure was “arbitrary and capricious,” the dissent misunderstands the nature of *Vermont Yankee* review.

The “formulation of procedures [i]s basically to be left within the discretion of the agencies.” *Vermont Yankee*, 435 U.S. at 524. Otherwise, “all the inherent advantages of informal rulemaking would be totally lost.” *Id.* at 546–47 (rejecting “Monday morning quarterbacking”); *Nat’l Classification Committee v. United States*, 765 F.2d 1146, 1149–52 (D.C. Cir. 1985).

Review under the arbitrary and capricious standard is not a loophole in this policy of extraordinary deference. To be sure, in some sense, arbitrary and capricious review “imposes a general ‘procedural’ requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency’s rationale at the time of decision.” *Pension Ben. Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 653–55 (1990).

But, so long as the rule itself is adequately explained, the courts cannot prescribe “specific procedural requirements that have no basis in the APA.” *Id.*; see *Natural Res. Def. Council v. NRC*, 216 F.3d 1180, 1189–91 (D.C. Cir. 2000); *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326–28 (D.C. Cir. 1994) (notice-and-comment rulemaking not required in agency’s promulgation of “hard-look” rules intended to streamline license review process). Thus, it is irrelevant whether the agency explained its wholly discretionary choices about the procedure of rulemaking—that is not required by the APA. So long as the substance of this rule is adequately explained, it cannot be arbitrary and capricious.

The Supreme Court has hinted that there might be a narrow exception for “a totally unjustified departure from well settled agency procedures of long standing,” but such an exception—if it exists—has been applied rarely if at all. *Vermont Yankee*, 435 U.S. at 542. And, as in this case, where there are reasons to distinguish prior traditions—such as the imminent loss of an agency quorum—there is no “totally unjustified” departure. See *Consol.*

*Alum. Corp. v. TVA*, 462 F.Supp. 464, 476 (M.D. Tenn. 1978). In the absence of extraordinary evidence of bad faith, the courts simply do not inquire into discretionary choices made regarding the rulemaking procedure. See *Air Trans. Assoc. of Am., Inc. v. NMB*, 663 F.3d 476, 487–88 (D.C. Cir. 2011).

Consider the contrast between the Board’s procedure here and a very recent example considered by the D.C. Circuit involving National Mediation Board rulemaking. 75 FR 26062. The NMB majority, according to a letter written by the dissenter to members of Congress, at first refused to allow her to publish a dissent, and then gave the dissenter precisely 24 hours in which to consider the proposed rule and prepare her dissent—which she did. See *Air Trans. Assoc. of Am., Inc. v. NMB*, 663 F.3d at 487–88. If she had not met this timeline, the majority would have published without any opportunity for her to publicly express her views. *Id.*

Little if any explanation was given by the majority for this choice. But the court refused even to open discovery on the issue because, although the letter “reflects serious intra-agency discord” and the majority’s “treatment of their colleague fell well short of ideal,” it did not meet the standard of a “strong showing of bad faith or improper behavior” and therefore was not enough to permit further inquiry. *Id.* Here, the Board’s procedure was far more accommodating. If, as the D.C. Circuit held, the 24 hours provided by the NMB was enough, then the Board’s procedure in this rulemaking was more than adequate. *Id.*

I have no desire to reexamine, in public, the internal details of the process leading up to the Board’s issuance of the final rule. It is enough to say that a fair-minded student of the existing public record can only conclude that Member Hayes was given ample opportunity to participate in the rulemaking process and that, by his own choosing and for his own reasons, he chose to opt out for as long as possible.

There is clearly no legal requirement for three affirmative votes. The Supreme Court has held that a majority of the quorum is all the law requires. *FTC v. Flotill Prods., Inc.* 389 U.S. 179, 185 fn.9 (1967). So, too, as the dissent appears to concede, no law requires the Board to wait for a dissent. 76 FR 80146 & fn.26; see Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411, 431 fn.102 (2010) (observing that “APA does not address the possibility of dissents in agency rulemakings”).

Agencies can issue decisions without awaiting dissenting or other separate statements. See, e.g., *S. Cal. Edison Co.*,

124 FERC ¶ 61308, 2008 WL 4416776 at \*\*8 (2008); Marshall J. Breger & Gary J. Edles, “Established by Practice: the Theory and Operation of Independent Federal Agencies,” 52 Admin. L. Rev. 1111, 1248–49, 1256–57, 1262–63, 1288 (2000) (noting that the Farm Credit Administration, the Federal Energy Regulatory Commission, the Federal Maritime Commission, and the Surface Transportation Board all allow this practice).

*B. The Board had Good Reason To Issue the Final Rule Without Waiting for a Dissent*

The dissent’s suggestion that the Board should nonetheless be bound by past agency practice is also bad policy. Internal agency procedure is subject to extraordinary deference for good reason. Administrative efficiency demands that agencies be permitted to adapt internal procedures based on the particular circumstances in which they find themselves. See *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). To transform very limited past agency experience into rigid internal procedural requirements would deprive the agency of the essential ability to adapt its procedures to the differing needs imposed by differing circumstances.

The error of the dissent’s suggestion becomes even more obvious when the agency experience and procedure at issue here are examined. In arguing that the final rule should not have issued without a contemporaneous dissent, the dissent relies on an “unbroken 76-year practice.” That cited “practice” consists of just two final rules that included a dissent, issued in 1989 and 2011, respectively, and only one in which Member Hayes was not the dissenter.<sup>10</sup> Board policy ES 01–01, upon which the dissent relies, is expressly limited to case adjudications, as evident in the terms “full Board or Panel cases” in the policy. See NLRB Executive Secretary’s Memorandum No. 01–1, Timely Circulation of Dissenting/Concurring Opinions (January 19, 2001). Thus, even if a well-established internal practice could bind an agency in some instances, this would not be such an occasion.

It is also significant that the Board was facing unusual circumstances at the time that it ordered issuance of the rule with any dissent or concurrence to issue on a later date. The Supreme Court had recently ruled that the Board could not issue decisions without a quorum of at

<sup>10</sup> The dissent also cites two notices of proposed rulemaking that included a dissent, both published within the last year and a half, and both with Member Hayes as the lone dissenter.

least three members in place, *New Process Steel L.P. v. NLRB*, U.S., 130 S.Ct. 2635, 2639–42 (2010), and the appointment of one of the Board's three members was set to expire at the end of the congressional session, no later than January 3, 2012, and possibly weeks earlier. The last time that the Board's membership had fallen to two, it had taken over 27 months for additional members to be installed. The Board had expended significant resources in the rulemaking effort, resources that might very well have been wasted if the Board lost a quorum before the process reached fruition. Under these circumstances, it was perfectly reasonable for the Board to defer the publication of members' personal statements, rather than delay issuance of the rule beyond the date when the Board would lose its quorum in order to permit those personal statements to be published simultaneously with the rule.

We now know that the Board did lose its quorum, but only for a few days. Around noon on January 3, 2012, Member Becker's appointment ended. On January 9, 2012, three new members were sworn in pursuant to recess appointments by the President, bringing the Board to full strength.

The dissenter argues—in hindsight—that these circumstances did not warrant any departure from procedures that would ordinarily have been followed. At the time, however, that was not how the Board, including Member Hayes, assessed the situation. In November and December 2011, the Board issued a series of orders and rules delegating some of the Board's functions in the absence of a quorum and creating a new Subpart X of the Board's Rules and Regulations contingently modifying some of the Board's procedures.<sup>11</sup> The orders recited that the Board “anticipate[d] that in the near future it may, for a temporary period, have fewer than three Members of its full complement of five Members,” specifically citing the approaching end of Member Becker's service.<sup>12</sup> Each of these measures was deemed to be necessary in order to “assure that the Agency [would] be able to meet its obligations to the public to the greatest extent possible.”<sup>13</sup> And each of these measures was approved by all of the

members of the Board, including Member Hayes.<sup>14</sup>

The dissenter also asserts that the December 14 announcement of the President's intention to nominate Sharon Block and Richard Griffin for seats on the Board was an indication that new member appointments were imminent. However, it ignores the facts that Terence Flynn's nomination had been pending for almost a year at the time of his appointment, and that the only other recess appointments to the Board by President Obama, those of Craig Becker and myself, had been made more than eleven months after the announcement of intent to nominate. In short, there was every reason to believe that the Board would be without a quorum for a substantial period of time.

Similar concerns were persuasive in *Consolidated Aluminum*, to give one example, where the TVA sped up its decision-making process because the resignation of one of its members threatened to deprive the agency of a quorum. 462 F.Supp. at 472. The court held that, even assuming that the TVA had deviated from a “well settled” tradition, the change was lawful for many reasons, including because the impending loss of a quorum was good reason to move quickly. *Id.* at 476. Thus, here, even if ES–01–1 were somehow binding and applicable to rulemaking (neither of which is true), departure is permitted on a “case-by-case basis” for “good cause.” NLRB Executive Secretary's Memorandum No. 01–1 at 2. The imminent loss of a quorum was good cause to give the dissenter 90 days to draft a dissent after publication of the rule, but before the effective date.

Justice Ginsburg's article cited by the dissenter points out the value of dissenting opinions as a vehicle for the exchange of ideas among members of a collegial decision-making body. Dissents are not, however, the only such vehicle. Significantly, my colleague does not assert that he was in any way deprived of an opportunity to engage in a collegial decision-making process.

The procedure followed here accommodated the concerns addressed in Justice Ginsburg's article to the greatest extent possible while addressing the exigencies of the possibility of a loss of quorum. Indeed, the Supreme Court itself has issued a decision with dissent to follow when

time constraints so required. *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947) (releasing the majority opinion before the dissent, and stating that dissent would follow because there was “not now opportunity for a response adequate to the issues raised \* \* \* Accordingly, the detailed grounds for dissent will be filed in due course.”).

The dissenter has had ample opportunity to participate. My email to Member Hayes on December 9 was an open invitation to him to engage with his colleagues, and, if he so chose, draft a contemporaneous dissent. He had sufficient time to do so, and indeed could have drafted one dissent to accompany the rule, followed by the longer statement published today. He chose otherwise. On December 15th my Chief Counsel sent an email asking whether the dissenter wished to include any dissenting statement in the Final Rule. The dissenter indicated that he did not, because he could add a dissent at a later date, and could say whatever he needed to say in a single statement. It seems unfair to blame the Board for the loss of an opportunity that the dissenter deliberately chose not to take.<sup>15</sup>

Finally, the issues that are raised in Member Hayes' statement today show that the Board was fully aware of his policy concerns about the rule when it issued the final rule, and so would likely have gained little from a written dissent. That a draft dissent could, in some cases, have some influence on the majority is therefore of little consequence here.

The Board had good cause to move forward with the rule without waiting any longer.

### *C. The Board Explained Why There Is No Reason To Require Three “Yes” Votes for Rulemaking*

The Board acted by a majority vote of the quorum, as authorized by statute. Requiring an additional, third “yes” vote makes no sense for rulemaking. 76 FR 80145–46. The Board has a tradition of requiring a third vote to overturn precedent in adjudication, but the whole point of the tradition is to provide stability to an inherently unstable adjudicatory process for making rules of law. *Id.* This purpose flows directly from the fact that “[u]nlike other federal agencies, the NLRB promulgates nearly all of its legal rules through adjudication rather than rulemaking.” *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 872

<sup>11</sup> Order Contingently Delegating Authority to the General Counsel, 76 FR 69768 (Nov. 9, 2011); Order Contingently Delegating Authority to the Chairman, the General Counsel, and the Chief Administrative Law Judge, 76 FR 73719 (Nov. 29, 2011); Special Procedural Rules Governing Periods When the National Labor Relations Board Lacks a Quorum of Members, 76 FR 77699 (Dec. 14, 2011).

<sup>12</sup> 76 FR 69768; 76 FR 73719.

<sup>13</sup> *Id.*

<sup>14</sup> A fourth measure, adding a fifth section to Subpart X concerning representation cases, was not approved by Member Hayes. 76 FR 82131, 82132 (Dec. 30, 2011). As recounted above in the “Background” section, Member Hayes also voted against the order providing for publication of the final rule with separate dissenting and concurring statements to be published at a later date.

<sup>15</sup> As previously explained, these internal Board communications were previously made public in connection with the litigation challenging the Rule.

(9th Cir. 2011); see also Samuel Estreicher, "Policy Oscillation at the National Labor Relations Board: A Plea for Rulemaking," 37 Admin. L. Rev 163 (1985) (explaining in detail how "overruling" past cases through the rulemaking process would lead to greater certainty and consistency in the law). Thus, where the Board does utilize rulemaking, the basic purpose of the tradition is inapplicable.

The dissent apparently maintains that notice-and-comment rulemaking does not give the rule any added stability over adjudication. In this view, the Board could mechanically and rapidly issue "another proposed rule revision, another notice-and-comment period, and a rationally justified rule." This is a curious supposition, particularly when countless commentators on Board practice, Congressional encouragement of rulemaking generally, the collective administrative experience of the federal government, past Board experience with rulemaking, hints from the Supreme Court, and basic common sense uniformly suggest that rulemaking is more stable than adjudication. The Board's decision here was reasonably explained.<sup>16</sup>

#### 4. The Rule Was Adequately Explained

The dissent denounces a caricature of the rule as arbitrary and capricious, while ignoring the reasoned explanation that the Board actually provided for the rule. The structure of the dissent's argument appears to be as follows: (1) The sole purpose of the rule is to have faster representation proceedings; but (2) those proceedings are (generally) fast enough already; and, in any event, (3) the Board did not consider statistically whether each change in the rule will necessarily lead to faster proceedings. I will address the first two points in turn, then analyze the particular changes in the rule.

From the outset, the dissent fails to come to terms with the actual rule's principles of good administrative practice, focusing instead almost exclusively on how the rule will lessen delay. The dissent's focus on delay and time leads it further and further from adequately grappling with the Board's primary and clearly-articulated reason for propounding the rule: to "reduce unnecessary litigation."<sup>17</sup> Unnecessary litigation, even when not accompanied by delay, can and should be eliminated.

The dissent entirely misses this point. And so, the dissent wonders why the Board focuses on litigation, when there are other sources of delay. The answer is that this rule is primarily about reducing unnecessary litigation, with reducing delay as an important but collateral purpose. According to the dissent, the Board assumes that litigation always leads to undesirable delay. The Board does no such thing: It simply posits that litigation that is unnecessary is also undesirable.

In focusing on time, the dissent pretends that the rule's changes are designed solely to ensure a union's rapid certification, thus implicitly suggesting that the rule's purpose is improper. But the rule's improved procedures apply equally to decertification elections, thus helping employees to get the election they desire, whether to certify or decertify a bargaining representative, without wading through litigation that is unnecessary and costly to the parties and the Board. That other changes to the procedure might provide additional benefits is good reason to pursue further rulemaking, but it is not good reason to invalidate this rule.

The dissent then criticizes the Board for not adequately discussing the Board's time target statistics. Yet what the dissent primarily offers in response is the simplistic assertion that because the agency is meeting its current time targets for representation case processing, there can be no reason to make any changes. This is a disconcerting stance, to say the least. As explained in both the NPRM (76 FR 36813–14) and the final rule (76 FR 80155), for decades the Board has continually strived to process representation cases more quickly and efficiently, and the targets have accordingly been adjusted downward over time. Under the dissent's reasoning, in any given year when the agency was meeting its then-applicable time targets, the agency should have left well enough alone and should not have engaged in any analysis about how the process might be improved.

In my view, there is nothing magical about the time targets now or those that existed decades ago. As stressed in the rule, the existing time targets reflect the limits imposed by the Board's current rules. That the Board seeks to, and does, meet its current targets in most instances is commendable but irrelevant to whether additional improvements may be made by amending the rules. 76 FR 80148.

Nevertheless, even taking the dissent's misguided focus on current time targets at face value, it is easy to

see a justification for the rule's efforts to make the process more timely. As the Board stressed, the changes in the rule focus on the subset of cases in which the parties do not enter into an election agreement and instead proceed to a pre-election hearing. And, as further discussed in the rule, the median time to process those cases has ranged from 64 to 70 days over the past five years. 76 FR 80155. Yet, as the dissent points out, the agency currently strives to move representation cases from petition to election in a median of 42 days, far faster than it takes the agency to process litigated cases. The agency also attempts to process 90% of cases from petition to election within 56 days. But the garden-variety litigated case misses even this generous goal. In short, under the current system of case processing, we have shown an inability to regularly move cases (whether in the context of initial certification or decertification) through the pre-election process within even the existing 56 day time target for the tail of our cases, unless we can somehow convince the parties not to exercise their right to litigate. This is not acceptable. The Board should be able to process litigated cases in a more timely fashion. As described below and in the final rule, some of the changes will in fact result in more timely processing of litigated cases.

In any event, the rule relies upon statistical evidence where appropriate. For example, in deciding to move the request for review process from before to after the election, the rule relies, in part, on data showing that in recent years review was granted pursuant to less than 12% of requests and that less than 5% of regional directors' decisions were reversed. 76 FR 80172 fn. 140. Notably, the dissent fails to meaningfully engage these statistics and instead offers a handful of cases that demonstrate only the uncontroversial proposition that the issues raised via requests for review are not always meritless. The ironies here are twofold. First, this is exactly what the dissent accuses the Board of: "shooting ducks in a barrel" through anecdotal identification of individual representation cases rather than identifying problematic patterns. Second, as discussed below, the cases picked by the dissent run directly counter to the dissent's assertion that eliminating the pre-election request for review will lead to unnecessary elections. For in each of the cited cases, by the time that the Board judged the regional director's decision to be in error, the election had already been run.

In sum, the dissent's focus on delay blinds it to every other principle of good

<sup>16</sup> Responses concerning the procedural nature of the rule, and whether *Barre-National* was "overruled," are contained elsewhere in this statement.

<sup>17</sup> See, e.g., 76 FR 80138; Explanation of Election Process Changes, available at <http://www.nlrb.gov/node/3608>.



administrative practice. With that in mind, let us consider each of the changes discussed by the dissent, and show how the rule truly does eliminate needless litigation.

#### *A. Evidence About Challenged Voters Is Irrelevant at the Pre-Election Hearing*

The dissent correctly points out that pre-election hearings are often short under current rules. The dissent's conclusion, however, that there is therefore no reason to exclude irrelevant evidence simply does not follow.

Courts routinely refuse irrelevant evidence, see Fed. R. Evid. 401(b) (evidence must be "of consequence in determining the action"); *Wood v. State of Alaska*, 957 F. 2d 1544, 1550 (9th Cir. 1992) (holding that there is no constitutional right to present irrelevant evidence), as do agencies, even in the far more rigorous APA adjudications, 5 U.S.C. 556(d) ("[T]he agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.").

In representation cases, the Board and the General Counsel have long maintained that it is important to avoid a cluttered record at the pre-election hearing. Guidance documents are emphatic on this point. For example, consider the NLRB Hearing Officer's Guide;<sup>18</sup>

The hearing officer must ensure that the \* \* \* record is free of cumulative or irrelevant testimony." "The hearing officer has the authority to seek stipulations, *confine the taking of evidence to relevant disputed issues* and exclude irrelevant and cumulative material." (emphasis added) "The hearing officer's role is to guide, direct and control the presentation of evidence at the hearing \* \* \* While the record must be complete, it is also the duty of the hearing officer to keep the record *as short as is commensurate with its being complete*." (emphasis added) "The hearing officer should guide, direct and control the hearing, excluding irrelevant and cumulative material and not allowing the record to be cluttered with evidence submitted 'for what it's worth.'" "Exhibits are not admissible unless relevant and material, even though no party objects to their receipt. Even if no party objects to an exhibit, the hearing officer should inquire about the relevancy of the document and what it is intended to show. *The hearing officer can exercise his or her discretion and determine whether the documents are material and relevant to the issues for hearing*." (emphasis added).

The Board's interest here is in keeping "the record as short as is commensurate with its being complete" on the relevant

questions. *Id.* at 1. That is unquestionably a legitimate rationale, and advanced statistical analysis is simply not necessary to support it.

This legitimate goal of administrative economy includes prohibiting litigation of issues that should instead be resolved through the challenge procedure. For example, the hearing officer routinely excludes evidence about the eligibility to vote of striking employees: "Voting eligibility of strikers and strike replacements are not generally litigated at a pre-election hearing. They are more commonly disposed of through challenged ballot procedures." *Id.* at 20. As the Board noted in *Mariah, Inc.*, 322 NLRB 586, fn.1 (1996) (citations omitted):

It is beyond cavil that the role of the hearing officer is to ensure a record that is both complete and concise. Here, the hearing officer, consistent with this duty, exercised her authority to exclude irrelevant evidence and to permit the Employer to make an offer of proof. Our consideration of that offer establishes the correctness of the hearing officer's decision to exclude the testimony. Thus, with particular respect to the issue of strikers, we note the Board's decision in *Universal Mfg. Co.*, 197 NLRB 618 (1972) [that] the issue of striker eligibility is best left to a postelection proceeding.

See 76 FR 80166 (citing *Mariah*). The amendments call for using precisely the same approach with other voter eligibility questions that will be resolved by challenge.

This is not just delaying litigation. Any post-election settlement, any mooted issue, is a clear and unqualified gain in efficiency—one less issue to litigate. There is no need to engage in speculation about the quantum of such gains. The answer is not clearly knowable: any statistics from current Board practice on this point will be cast into doubt by the fact that litigation costs will play into the post-election settlement calculus. And the dissent concedes that at least "some issues will indeed be mooted." Nothing more is needed to justify the rule. The better question, for which there is no clear answer, is why did the Board ever embrace such useless litigation? It is *Barre-National* that is unjustified, not the Board's rule.

Aside from the timing issue, the bulk of the dissent on this point is aimed at the supposed benefits of identifying or deciding voter eligibility issues before the election. This is simply irrelevant here. There is every reason to believe that the regional offices will continue to try to identify and settle voter eligibility disputes sooner rather than later, if possible. The dissent discusses the "discretionary case-by-case practice" of

figuring out what issues will be decided pre-election, and that practice is entirely unchanged by this rule.

The only issue here is whether those unresolved issues will nevertheless be litigated. There is no reason that they should be. For these reasons, the Board's evidentiary rule is adequately explained.

#### *B. Written Briefing Is Not Required for Simple, Straightforward Cases*

The Supreme Court has permitted administrative agencies a great deal of flexibility to choose between oral argument and written briefing. Compare *Mathews v. Eldridge*, 424 U.S. 319, 345 (1976) (written submission without oral hearing); with *Goss v. Lopez*, 419 U.S. 565, 581–82 (1974) (oral hearing without written submission). Although adjudication under the APA requires briefing, 5 U.S.C. 557(c), Congress specifically exempted Board representation cases from these provisions because of the "simplicity of the issues, the great number of cases, and the exceptional need for expedition." Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945) (discussing 5 U.S.C. 554(a)(6)).

These very concerns motivate this amendment. 76 FR 80170–71. Although some cases are sufficiently complex that briefing is helpful, in others the issues are quite simple and oral argument is sufficient. Here, the Board authorized the hearing officer to choose whether to have full briefing, partial briefing, or oral argument, so that the hearing officer can ask for briefing only when it would be helpful in a given case. In addition, the parties retain the right to file briefs requesting Board review of the regional director's decision, so the parties will still have an adequate opportunity to present their arguments to the Board in writing.

Again, in focusing only on time, the dissent does not account for good administrative practice. It is indisputable that briefing is of little help, at least in some cases. The dissent's own reference to the drafting guide demonstrates that briefs are often of so little help that the drafting begins before the briefs arrive. And so there is no reason to prohibit hearing officers from taking oral argument or limited briefing in such cases.<sup>19</sup> There is no

<sup>19</sup> The dissent apparently interprets "special permission" as crafting a narrow substantive limit on Board review. This issue was not specifically addressed in the rule, and will be subject to interpretation. That said, it is unclear why the dissenter feels that special permission would be interpreted so narrowly. The term implies no

<sup>18</sup> See Office of the General Counsel, NLRB, *Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings*, at General Counsel's Statement, Forward, 1, 6, 34 (Sept. 2003).



reason to put the Board and the parties to the expense and trouble of briefs when oral argument would suffice. That is a sufficient rationale for the rule.

In addition, there quite clearly is a delay caused by accepting briefs. Because the briefs are due in seven days, briefing, by itself, essentially guarantees that the decision will take at least a week from the hearing to be issued. No statistics are necessary on that point; it is a clear feature of the former rules: By simply insisting on briefs, the parties effectively have the power to prevent the decision and direction of election from issuing in the week or so after the hearing. In sufficiently straightforward cases, therefore, under the revised rules decisions may now issue more promptly.

The dissent says that the Board is “totally dismissive of the potential value of post-hearing briefs.” Not so. The Board simply feels that the potential value of post-hearing briefs depends on the particular litigation, and therefore regional personnel are in the best position to weigh, in each particular case, the relative benefits and costs of oral argument, briefing, partial briefing, etc. under the particular circumstances. The rule puts the power to make that decision in their capable hands. The rule eliminates the one-size-fits-all approach in favor of flexibility to tailor the briefing to the case.

*C. It Is Reasonable for the Board To Hear All the Issues in a Single Post-Election Review Proceeding, Interlocutory Review Is Disfavored, and It Is Appropriate To Limit It to Issues That Would Otherwise Evade Review*

The dissent is incorrect to claim that the request for review was eliminated in order to eliminate the “companion” time constraints on the election. Again, by focusing solely on timing the dissent fails to appreciate the administrative process improvement that drives the change.

The final judgment rule is omnipresent in administrative and judicial procedure for good reason: as Justice Story stated, “causes should not come up here in fragments, upon

particular standard, and in fact means different things in different contexts in the Board’s regulations. For example, special permission to appeal to the regional director from decisions of the hearing officer is not subject to the same standard as special permission to appeal to the Board. Rather than speculating on the standard to be applied, I will simply focus on the fact that the purpose and text of the rule are designed to give hearing officers, in consultation with regional management, the authority to make, as the dissent terms it, a “real case-by-case evaluation” of the helpfulness of briefs.

successive appeals. It would occasion very great delays, and oppressive expenses.” *Canter v. Am. Ins. Co.*, 28 U.S. 307, 318 (1830); 76 FR 80163, 80172. The old rules were inconsistent with this practice, requiring interlocutory review to avoid waiver. It is perfectly reasonable, therefore, to limit interlocutory Board action to issues that “would otherwise evade review.” See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546–47 (1949); cf. *Duval Jewelry*, 357 U.S. at 6 (“[W]here an immediate ruling by the Board on a motion to revoke is not required, the Board defers its ruling until the entire case is transferred to it in normal course.”). The amendments merely apply a commonsense final judgment rule to election proceedings, consolidating review after the regional proceedings have been completed.

In fact, the parties generally gain nothing from pre-election review. If the election was improper, the Board can simply invalidate the results, and, where appropriate, order the election to be rerun properly. This is the only remedy for post-election objections, and it is fully adequate in this context, as well. The Board reasonably concluded that, in most cases, post-election review is the more efficient method for addressing the matter, rather than to preemptively disrupt the process on the off-chance that the regional director might have erred. 76 FR 80172 fn.140 (discussing the low reversal rate).

It is important to point out that the new procedure for Board review is as generous as the old. Indeed, the former procedure was more burdensome to the parties in that unless a request for review was filed within two weeks of the direction of election, the issues would be forever waived. See former § 102.67(b) (requiring the request within 14 days). So the parties were burdened with the obligation to engage in protective interlocutory litigation to preserve issues that could ultimately be mooted out. Under the new rules, failure to seek pre-election special permission to appeal will not result in waiver. 76 FR 80162.<sup>20</sup>

<sup>20</sup> The dissent argues that some issues are not mooted, but that does not account for the inefficiency of protective interlocutory litigation. Before the election, the parties simply do not know what the electoral margin will be, and an issue involving just one voter must be appealed to the Board just to avoid the possibility that that vote will make the difference. This is an entirely unnecessary burden.

The dissent also argues that some cases will not involve post-election objections, thus “giv[ing] the lie to my colleagues’ characterization of the pre-election request for review as interlocutory.” But simply because some parties do not choose to exercise their right to file objections, that does not

The dissent contends that denial of an interlocutory request for review at least provides “finality” to the regional director’s direction of election. The same could be said for every single interlocutory ruling. And yet no one maintains that the Board should hear an immediate appeal from every single act of the regional office. The Board should have discretion to say, “this issue does not require our immediate attention, we will deal with it later,” rather than being forced to issue a truly final decision on the matter immediately or risk sabotaging the smooth functioning of the regional process. In any event, court review always remains available, and so even the Board’s decision cannot be said to be truly final.

The Board addressed the matter of the supposed “unnecessary elections” in its rule, and none of the examples cited by the dissent prove its point. In each, the regional office had already held the election when the Board decision was made. Truly, the risk of unnecessary elections is about the same under the former rules as the new rules, because it is—understandably—exceedingly rare for the Board to (1) fully consider the papers, (2) grant review, and (3) publish a final decision reversing the regional director, all in the slim window typical between the filing of briefs and the election.<sup>21</sup>

Thus, the request for review breaks up the regional proceeding, and for no purpose. This is sufficient justification for the rule.

*D. The Regional Director Is in the Best Position To Decide an Appropriate Election Date*

The regional director determines the election date—this is not new. But the former rules had included—as a general, non-binding guideline—a recommendation that “normally” regional directors should hold the vote within a five-day window 25 to 30 days after the pre-election decision, thereby creating at least a 25-day wait between the direction of the election and the election itself. 76 FR 80172. The former rules expressly stated that the purpose of this guideline was “to permit the

convert an appeal in the middle of a proceeding into an appeal of a final judgment.

<sup>21</sup> Former § 102.67(b) and (d) provided that parties could file a request for review within 14 days following a decision and direction of election, and that a statement in opposition to any such request could be filed as late as 21 days following a decision and direction of election. Thus, given the instruction in former § 101.21(d) that regional directors should normally schedule an election between the 25th and 30th day following the decision and direction of election, the Board could be left with as little as 4 days between full briefing concerning the request for the review and the election itself.

Board to rule on any [interlocutory] request for review which may be filed,” after the regional director’s direction of election. Former 29 CFR 101.21(d).

But, even under the former rules, the window did not serve its stated purpose. It applied regardless of whether a request was filed. Furthermore, because a request for review does not operate as a stay unless specifically ordered by the Board, elections were usually conducted as scheduled after 25 days even if the Board had not ruled on a request to review. For these reasons, the amendments independently eliminate this recommended window (without respect to the availability of a pre-election request for review).

This basic analysis was seldom criticized in the comments. In fact, there was “near consensus that this [25-day] period serves little purpose.” 76 FR 80173. Moreover, enlarging the regional director’s discretion to set the election date makes sense because the regional director is most familiar with the case, the area, the industry, and the parties, and is in the best position to know what election date to choose. Cf. *Vermont Yankee*, 435 U.S. at 525. Should an inappropriate election date be chosen in a particular case, the Board will be able to revisit that decision and re-run that election.

The dissent ignores all this. Without confronting the Board’s stated justification for the rule, it views the issue as wholly subsumed within the change to the Board review procedure. However, the dissent does tentatively offer two alternative reasons to keep the recommended window: (1) “there could well be both an agency administrative justification for at least some post-decisional time to arrange the details of election,” and (2) “in at least some instances it will be critically important to provide some post-decisional time for employers to exercise their free speech rights. \* \* \*”

But these claims miss the mark. The regional director has discretion to choose an appropriate election date. Will 25 to 30 days define the only appropriate choice in each case? Certainly not. The dissent acknowledges that these interests will vary, and may only apply in “at least some” cases. Again, the better solution is to move away from the one-size-fits-all approach of the former rules, so that flexibility is available to deal sensibly with the “at least some” cases that merit it.

*E. It Makes Sense for Regional Directors To Decide Objections and Challenges, and Certiorari-Like Review by the Board Is a Reasonable and Efficient Way To Oversee the Regions*

In *Magnesium Casting*, the Supreme Court held that under the Act, the Board may engage in discretionary review of regional directors’ decisions. The dissent considers it “pretentious” and an “abdication” of responsibility for the Board to do precisely what Congress contemplated, and exercise discretionary review. I disagree.

Congress entrusted the Board with the ultimate authority over labor policy, subject only to very limited review in the courts. We should not try to do more than we reasonably can, or thinly spread too much of our limited attention to cases that raise no substantial issues. Certainly, we should not be micro-managing regional directors.

The Board has recognized this in the context of unit determinations in directions of election, which have been only discretionarily reviewed for decades. And there have been no problems of the sort predicted by the dissent. No dearth of opportunities for clarification or dissent, no breakdown in uniformity of law and policy, no citing regional precedent, no swell in test-certification cases.

The rule merely applies precisely the same standard to post-election review.<sup>22</sup> The dissent does not explain why these fears should have any special salience in the post-election context that they have never had pre-election.

Consider the stipulation rate, for example. Under the current rules, except in the rare cases of regional

director decisions, both stipulated and litigated cases are most often subject to mandatory review. Stipulations are not being signed by parties in order to secure Board review.<sup>23</sup> Under the new rules, again, the Board will apply the same standard for review regardless of whether a stipulation is entered into. And so, again, the choice between stipulation and litigation remains entirely unrelated to the availability of post-election review.

In sum, the amendments are adequately explained and reasonably address the problems presented. They are within the sound discretion of the Board to regulate its own procedures.

## 5. Other Points

### A. The Opportunity To Comment

The dissent complains that the final rule is not a “logical outgrowth” of the June proposed rule. The “logical outgrowth” test is a creature of the notice-and-comment requirement. It is satisfied if the public had a meaningful opportunity to comment on the issues raised by the final rule.

The crux of the dissent’s argument is that, without the proposed “20% rule,” the regional director will defer decision on more voter eligibility issues, a consequence that the comments were not able to meaningfully address. This is plainly not true, both because it mischaracterizes the rule, and because there was an opportunity to comment on this point. In any event, the question is irrelevant because notice and comment is not required for these procedural rules.

First, as the dissent posits elsewhere, under current practice, “[u]sually, the number of such challenges does not exceed about 10–12% of the unit.”<sup>24</sup> And, because the proposed 20% rule has not been adopted at this time, the new rule does not change the current practice with respect to regional director discretion to defer deciding individual eligibility questions. Rather the rule contemplates that litigation will be permitted only of issues that will be decided prior to the election. The dissent’s fear that the rule will result in massive and disproportionate numbers of challenges is, quite simply, not

<sup>22</sup> Nor is there any merit to the dissent’s accusation that the majority has failed to rationalize the rule’s standard of review for post-election litigation. The rule does not change the Board’s standards for considering post-election requests for review of regional director decisions. It appears that the dissent fails to appreciate that under the rule, the Board will be applying a discretionary standard of review to regional directors’ disposition of exceptions to hearing officers’ factual findings following post-election hearings, not to the hearing officers’ factual findings themselves. See 76 FR 80173–74. Although perhaps not the normal course under the former rules, this procedural option existed prior to the final rule, and when utilized, the Board applied exactly the same standard of review. See former § 102.69(c)(4) (providing that if a regional director chose to issue a decision disposing of election objections or determinative challenges, parties would subsequently have the same rights to request review by the Board as exist under the pre-election request for review standards in former § 102.67); see also 76 FR 80174, quoting Casehandling Manual section 11366.2; Casehandling Manual section 11396.2. It is unquestionably rational for the Board to continue to utilize the same standard of review that it currently applies to pre-election requests for review and post-election requests for review, when they arise.

<sup>23</sup> They were preferred to consent agreements for that reason, but that preference has nothing to do with the choice between stipulation and full litigation, where there is no meaningful difference in post-election Board review.

<sup>24</sup> See also Casehandling Manual 11084.3 (“As a general rule, the Regional Director should decline to approve an election agreement where it is known that more than 10 percent of the voters will be challenged, but this guideline may be exceeded if the Regional Director deems it advisable to do so.”).

grounded in the rule, and is rank speculation.

Second, it is perfectly appropriate to adopt only some of the proposals. As the Supreme Court recently explained in *Coke*, a proposed rule is “simply a proposal,” meaning that the agency is “considering the matter,” and thus its decision not to adopt part of the proposal is “reasonably foreseeable” and a logical outgrowth. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007) (emphasis in original). Indeed, here, many commenters obviously foresaw that only parts of the rule might be adopted, and some urged the Board to use a different percentage or to eliminate the 20% rule altogether.<sup>25</sup> Clearly, the issue was reasonably presented by the proposal.

Finally, this is a procedural rule, and no opportunity to comment was required. The courts cannot impose the logical outgrowth test on the Board simply because it voluntarily undertook to provide an opportunity to comment on a proposal. The fact that the agency chose to engage in notice and comment “does not carry the necessary implication that the agency felt it was required to do so.” *United States v. Fla. E. Coast R.R. Co.*, 410 U.S. 224, 236 fn.6 (1973). None of the Board’s prior election rules were substantive—even when they made dramatic changes—so what is different here? In fact, this is in many ways a textbook procedural rule: Rules of evidence, the manner of arguing (oral vs. written), the timing of Board review, etc. “[A] judgment about procedural efficiency \* \* \* cannot convert a procedural rule into a substantive one.” *Public Citizen v. Dep’t of State*, 276 F.3d 634, 641 (D.C. Cir. 2002).

For these reasons, the Board was not required to hold a new round of public comment to consider the November 30th resolution adopting parts of the proposed rule.

### B. Employer Speech

At the end of the dissent, a First Amendment argument is thrown in. The central thrust of this argument appears to be that the secret purpose of timely elections is to unfairly tilt the campaign in favor of unions by quashing the opportunity for meaningful employer

speech. This argument is puzzling for two reasons.<sup>26</sup>

First, it is not the purpose of the amendments to limit speech, but to limit unnecessary litigation. To the extent litigation results in delay that incidentally provides extra opportunities for speech, the Board fully considered the effect of the amendments and validly found the rules consistent with the policies of the Act and Constitution. All parties remain free to engage in as much or as little campaign speech as they desire. The content of such speech, of course, is entirely unregulated by these amendments.

To the extent the amendments eliminate delay, they do not do so unfairly. Time is a resource that is inherently equal for everyone: A day, a week, a month, is the same amount of time whether you are a union or employer. However long the time from petition to election, it is the same for both parties.

The Board’s analysis does not play favorites between the parties. As the rule explains, if 10 days has always been enough for the union to campaign with the *Excelsior* list, then even 10 days from the petition would be enough for the employer (who needs no such list of employees) to campaign, too.<sup>27</sup> 76 FR 80156 fn.79. And employers remain free to say whatever they want whenever they want (within established legal limits), regardless of whether an election petition is pending.

The dissent mischaracterizes the discussion of employer speech in the

rule. The rule does not discuss these employer speech opportunities in order to prove that faster elections would have some “antidistortion” effect—indeed, the Board expressly disclaimed that purpose—but to prove that even a very fast election would not deprive employers of a meaningful opportunity to speak. 76 FR 80148–50 (“The Board, having carefully considered these pointedly contrasting comments, adopts neither position.”).

Second, the dissent’s argument is predicated on a basic misunderstanding of representation proceedings. Indeed, under the dissent’s analysis, the entirety of Section 9 would have to be invalidated as unconstitutional in violation of the First Amendment.

After all, the very purpose the dissent criticizes here was expressly embraced by Congress in the NLRA. “[U]nless an election can promptly be held to determine the choice of representation, [the union] runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review.” H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 6–7.

If it would be unconstitutional for the Board to have considered the impairment of union strength caused by delay, then the Supreme Court in *Inland Empire* would not have cited this legislative history with such unqualified approval, nor would it have upheld the appropriate hearing of the Board in that case. Congress had foremost in its mind the intention to make representation proceedings more efficient so that elections could be held in a timely manner, with the ultimate goal of promoting collective bargaining and furthering the flow of commerce.

This should be reiterated: To avoid strikes and economic damage, Congress wanted to give unions an opportunity to prove their strength by peaceful means while it was at its height and without delay. Why? So that unions would not be forced into using their moment of strength destructively out of fear that delay would erode their power.

Again, to address this by crafting fair and timely representation procedures is a purpose that has been—repeatedly and expressly—approved by the Supreme Court in *A.J. Tower*, *Inland Empire*, *Magnesium Casting*, and countless other cases. Elsewhere, the dissent itself appears to agree with this purpose as well, stating that “the efficient and expeditious exercise of our statutory

<sup>26</sup> Initially, it should be noted that this argument is in tension with the dissent’s vehemently expressed doubts that the rule will result in a more timely process. If the stipulation rate drops dramatically and elections are dragged out, as the dissent contends, how can the rule be said to limit speech? In any event, whether faster or not, elections conducted under the new rule will not violate the First Amendment.

<sup>27</sup> Both *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), and *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), involved regulation of campaign spending, not campaign time. The dissent’s application of those cases to the resource of time would also have some very strange consequences. For example, many comments argued that it was unfair to hold elections too quickly because unions enjoy an intrinsic advantage in that they can organize in secret before the petition is filed. If the dissent’s analysis of *Citizens United* were accepted, then it would be unconstitutional for the Board to deliberately prolong the campaign in order to give the employer a leg up in the campaign. After all, the ability to organize in secret is an “advantage” that the unions lawfully have in the “open marketplace of ideas protected by the First Amendment.” To compensatorily grant employers additional time in order to equalize the playing field would be granting special privileges to employer speech through an unlawful “anti-distortion theory.”

Suffice to say, I am doubtful that any such analysis is meaningful in this context. Time is not, in fact, literally money. Some concrete election date must be chosen in every case.

<sup>25</sup> See, e.g., Testimony of Peter Leff, General Counsel for the Graphic Communications Conference of the International Brotherhood of Teamsters; United Food & Commercial Workers International Union; U.S. Chamber of Commerce; National Association of Manufacturers; Coalition for a Democratic Workplace.

mandate is an appropriate and important goal that is central to our mission.” The about-face here, to argue that any effort at efficient and expeditious representation procedure is unconstitutional, remains unexplained.

As the D.C. Circuit recognized in a related context, “the force of the First Amendment \* \* \* var[ies] with context,” particularly in the sphere of labor relations. *US Airways, Inc. v. NMB*, 177 F.3d 985, 991 (D.C. Cir. 1999) (emphasis in original); see also *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003) (noting that free speech rights are “sharply constrained in the labor context”). The dissent runs roughshod over this principle and instead would twist the First Amendment into a strict limit on any constraint—implicit, explicit, or incidental—on the time given for employer speech before the employees make their choice. This impermissibly elevates employer speech interests above both industrial peace and “the equal rights of the employees to associate freely.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). To the extent that the rule removes unnecessary obstacles to the “efficient, fair, uniform, and timely resolution of representation cases,” 76 FR 80138, a modest reduction in the time between a petition and an election may result in some cases. To argue that this violates the Constitution is to ignore *Gissel*’s teaching that “the rights of employers to express their anti-union views must be balanced with the rights of employees to collectively bargain.” *US Airways*, 177 F.3d at 991 (applying *Gissel*). Indeed, the D.C. Circuit has instructed that “[n]ot only is a ‘balancing’ required, the NLRB calibrates the scales.” *Id.* The Board’s judgment here was reasonable.

For all of these reasons, I continue to agree with the Board’s final rule.

#### Separate Dissenting Statement by Member Hayes

Member Hayes, dissenting.

Acting with imperious disdain for process, two members of what should be a five-member Board summarily concluded their own rulemaking deliberations on December 16, 2011, by adopting and issuing a rule overruling precedent and substantially revising longstanding Board election procedures.<sup>28</sup> The Rule contains some elements of the proposal made public in a June 22, 2011, Notice of Proposed Rulemaking (NPRM),<sup>29</sup> and reserves all others for further consideration. It

eliminates the right to seek pre-election review of a regional director’s decision and direction of election. It alters the role of the hearing officer in deciding what evidence may be introduced in a pre-election hearing. It generally prohibits the filing of briefs after a pre-election hearing. It eliminates the automatic right to seek Board review in post-election disputes, a right previously included in stipulated election agreements overwhelmingly favored by most parties to an election. Finally, the adopted Rule, founded on an impermissible interpretation of the Act, essentially eliminates the pre-election right to litigate *all* issues not deemed relevant to the question of representation. In this respect, the Rule significantly departs from the NPRM, which would at least have permitted pre-election litigation of genuine and material issues about the eligibility or unit placement of individuals who would constitute 20 percent or more of a bargaining unit.

Like a game show contestant with a parting gift, I was granted the opportunity to issue a post-deliberative “personal statement” of my views concerning the Rule, even as its validity is being contested in a Federal district court.<sup>30</sup> I do so now.

It is my personal view, shared by many of the thousands of commenters to the NPRM, that my colleagues’ Rule contravenes the Act and the Constitution. In whole and in several parts, in substance and in the process used to adopt it, it also reflects arbitrary and capricious decisionmaking that requires invalidation on judicial review. Finally, as with recent adjudicatory actions,<sup>31</sup> this rulemaking action represents an abdication of the Board’s representation case duties and reflects a compulsive effort by my colleagues to favor union organization over all opposition, no matter its legitimacy or statutory protection. Accordingly, I dissent.

#### I. Background

As described by my colleagues, publication of the NPRM was followed by a public hearing and a notice-and-comment period concluding on September 4, 2011. Before that, Chairman Liebman’s term expired, leaving the Board with three sitting Members: newly-appointed Chairman Pearce, Member Becker, and myself.

In November, acknowledging that time was dwindling in which to issue a

Rule before the potential loss of a Board quorum upon the expiration of Member Becker’s recess appointment, Chairman Pearce announced his intention to put forth a resolution to proceed on a proposed “scaled-back” rule.”<sup>32</sup> Accordingly, on November 30, Chairman Pearce, Member Becker, and I attended a public Board meeting to discuss and vote on the Chairman’s proposed “Board Resolution No. 2011–1,” which provided for the drafting, circulation and publication of a final rule containing eight elements from the original NPRM. The Resolution also provided that no final rule “shall be published until it has been circulated among the members of the Board and approved by a majority of the Board.” I voted against the Resolution, and my colleagues voted to approve it.

In the late afternoon of Friday, December 9, a draft of the Rule, consisting of 180 pages, was circulated by email to me and others by the Chairman.<sup>33</sup> A revised draft was circulated early in the next week, followed on December 14 by a draft order from the Chairman directing that the Solicitor publish a Final Rule immediately upon its approval by a Board majority. The Order also provided for subsequent publication in the **Federal Register** of the statement of any dissenting Board Member then serving—obviously meaning me—if a draft of the dissent was circulated no less than 30 days prior to the April 30, 2012, effective date of the Rule. Provision was also made for publication of a concurring statement, with the qualification that any separate dissent or concurrence “shall represent the personal statement of the Member and shall in no way alter the Board’s approval of the final rule or the final rule itself.”

Chairman Pearce and Member Becker approved a revised version of the Order on December 14. I voted against it in an email on December 15, noting in addition to my other reasons for opposition that the President had just announced two Board member nominations and that a third nomination was also pending. My email stated “With the prospect of a full Board to address these proposed rule changes, I believe there is even less justification for proceeding on a divided 2–1 basis.”

<sup>32</sup> Fact Sheet, National Labor Relations Board, “Explanation of [R]esolution” at <http://www.nlr.gov/publications/rules-regulations/notice-proposed-rulemaking/proposed-amendments-nlr-election-rules-an>.

<sup>33</sup> I discuss internal Board deliberations only to the extent that they have already been disclosed by the Acting General Counsel to parties in the current district court litigation challenging the Rule.

<sup>28</sup> The Rule was published in the **Federal Register** on December 22, 2011. 76 FR 80138.

<sup>29</sup> 76 FR 36812.

<sup>30</sup> *Chamber of Commerce v. NLRB*, No. 11–2262 (D.D.C. filed Dec. 20, 2011).

<sup>31</sup> E.g., *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).

The draft Rule was further revised on December 15 and 16, then approved by the Chairman and Member Becker and issued on the later date without further action by me.<sup>34</sup>

## II. The Rule Is Invalid Under Chevron Step One

My colleagues assert that the Rule is authorized by Section 6 of the Act, that it is a reasoned interpretation of Sections 9 and 3 of the Act, and that as such it is entitled to substantial deference under *Chevron USA Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837 (1984). I have no quarrel with the general proposition that the Board has express authority under Section 6 of the Act to make rules governing the conduct of representation elections. However, the rulemaking authority granted to the Board is not unlimited. It must be exercised in a manner consistent with the Act. *American Hospital Ass'n v. NLRB*, 499 U.S. 606 (1991) (rules enacted through the Board's rulemaking authority must not conflict with the Act).

Under step one of the *Chevron* analysis, a reviewing court first asks whether Congress has directly addressed the issue covered by agency action. *Chevron*, 467 U.S. at 842–43. If so, the court, and of course the Board, must give effect to Congress' intent. *Id.* In determining whether Congress has addressed the issue, the court employs traditional tools of statutory construction, including a review of legislative history. *Id.* at 843 n.9. Here, this inquiry leads inevitably to the conclusion that the Rule directly and substantially contravenes Congress' intent.

### A. An Appropriate Pre-Election Evidentiary Hearing Under Section 9 Must Generally Include Litigation of Genuine and Material Unit Placement, Exclusion, and Eligibility Issues

Since its inception, the Act has provided for an “appropriate hearing” as part of the investigatory process attendant to Board elections. While the original and revised versions of the Act do not explicitly define what constitutes an “appropriate hearing,” the text of the Act, its legislative history, and prior

Board and court interpretations demonstrate that an “appropriate hearing” should encompass all relevant election issues—including individual eligibility and unit placement issues—not just whether a “question of representation” exists. At least since the Taft-Hartley amendments in 1947, it is clear as well that Congress intended that the appropriate evidentiary hearing must be held before the election. Accordingly, the Rule's interpretation of the statute is impermissible under step one of the *Chevron* analysis and the Rule is invalid.

\* \* \* \* \*

Section 9(c) of the Wagner Act provided:

Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

Although “appropriate hearing” was not explicitly defined, the natural reading is that it was intended to be part of the investigation of the electoral controversy and was not limited to the issue of whether an election should be held. Instead, the reference to an “appropriate” hearing connotes a relative, flexible standard, not rigid or limited as to the number and kind of issues to be litigated. Considered in the converse, the statutory language can certainly not be interpreted as dictating that litigation of unit eligibility and inclusion/exclusion issue is inappropriate.

Further, Congress generally saw the development of a complete evidentiary record in hearings pertaining to election issues as necessary due process protection for the parties. *See, e.g.*, S. Rep. 74–573, at 14 (May 1, 1935), reprinted in *2 Legislative History of the NLRA, 1935*, at 2314 (the “entire election procedure becomes part of the record” which provides a “guarantee against arbitrary action by the Board”); H.R. Rep. 74–1147, at 23 (June 10, 1935), reprinted in *2 Legislative History of the NLRA, 1935*, at 3073 (“The [appropriate] hearing required to be held in any investigation provides an appropriate safeguard and opportunity to be heard.”). Consistent with this intent, the conduct of election hearings under the Wagner Act established a practice of developing a complete record in a nonadversarial proceeding

on all pertinent issues which the Board must decide relevant to the conduct of the election. *See e.g., Pacific Greyhound Lines*, 22 NLRB 111, 123–124 fn. 37 (1940) (“The wide latitude such a hearing possibly may take is illustrated by the nature and number of issues with which the parties herein themselves were concerned and which were considered and decided by the Board in the Representation Proceedings.”).<sup>35</sup>

Indeed, prior to the Taft-Hartley Act, questions about an “appropriate hearing” dealt with whether it needed to be held before an election, not whether, if held pre-election, litigation of unit inclusion and eligibility should generally be foreclosed. In *Inland Empire Dist. Council v. Millis*, 325 U.S. 697 (1945), the Court concluded that, although the Wagner Act did not require the Board to hold a hearing before conducting an election (or that it even hold any election), if an election were to be conducted, the Board was required to hold an “appropriate hearing” as part of any investigation under Section 9(c). *Id.* at 706–707.

The Court explained that the statutory purpose of Section 9(c) is “to provide for a hearing in which interested parties shall have full and adequate opportunity to present their objections before the Board concludes its investigation and makes its effective determination by the order of certification.” *Id.* at 708. The Court concluded that the “appropriate hearing” requirement was met because, in a post-election hearing, the Board permitted evidence to be introduced on all issues—including the effects of a union's contractual relationships with the employer, voting eligibility of employees in the armed forces, exclusion of certain groups of employees, and the appropriate payroll date for voting eligibility.

Following *Inland Empire*, the Board amended its Rules and Regulations in 1945, and initiated a process of conducting some elections prior to any hearing “in cases which present no substantial issues.” Article III, Section 3 of the Board's Rules and Regulations (as amended, effective November 27, 1945). These pre-hearing elections were a specific target of the 1947 Taft-Hartley amendments, which eliminated the Board's option of holding them and

<sup>34</sup> Not surprisingly, having had months to participate in the preparation and revision of the draft rule before I ever saw it, the Chairman has nevertheless taken the self-created opportunity to issue a concurring opinion responding to this dissent. By the Chairman's own declaration, joined by Member Becker, this post hoc opinion cannot vary from or supplement the Rule and its justification, as issued on December 16. I therefore find little need to respond directly to his numerous mischaracterizations of my arguments and actions in this proceeding.

<sup>35</sup> As a result of a subsequent settlement agreement, the Board vacated the Decision and Order. *See Pacific Greyhound Lines*, 30 NLRB 439 (1941). The case nevertheless retains its precedential value and illustrates the Board's comprehensive approach to a hearing on election issues. *See Caterpillar Inc.*, 332 NLRB 1116, 1116–1117 (2000) (Board decision vacated pursuant to a settlement may be cited as controlling precedent with respect to the legal analysis therein).

made the “appropriate hearing” mandatory before the election. To this end, Section 9(c)(1) provides that:

*Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board \* \* \* the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereto. (emphasis added).*

Section 9(c)(4), also added in 1947, further provides that

Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

Even those critical of the Taft-Hartley Act changes acknowledge that an “appropriate hearing” before the election is now mandatory. “Section 9(c)(1) and Section 9(c)(4) of the Taft-Hartley Act, read in conjunction, require that an election hearing be held before the election takes place.” Steven E. Abraham, *How the Taft-Hartley Act Hindered Unions*, 12 Hofstra Labor Law Journal 1, 12 (1994) (arguing for amending certain Taft-Hartley Act provisions considered to have contributed to the declining unionization rate). “[T]he Board cannot run an election without first holding a hearing unless the parties consent \* \* \*.” Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495, 519 fn. 102 (1993) (“Prior to the Taft-Hartley Act, the Board could postpone the hearing until after the election \* \* \*. The Taft-Hartley Act stripped the Board of its discretion to conduct such ‘pre-hearing elections.’”) (internal citations omitted).

While the amendments mandated that “the hearing must invariably precede the election, neither the language of the statute nor the committee reports indicated that any change in its nature was intended.” *Utica Mutual Ins. Co. v. Vincent*, 375 F.2d 129, 133–34 (2d Cir. 1967). See also Becker, *supra*, at 516 fn. 91 (describing Board procedures after the Taft-Hartley amendments: “If the Board finds that the petition creates a ‘question of representation,’ it must hold a hearing \* \* \* [where] the Board determines whether the unit \* \* \* is appropriate \* \* \*. [and] \* \* \* also

resolves individual eligibility questions.”) (internal citations omitted)

The ordinary and natural meaning of Sections 9(c)(1) and (4) is that once a regional director determines that there is reasonable cause to believe a question concerning representation exists, a hearing must be held on all issues relevant to the conduct of an election unless waived. Of course, confirmation of the regional director’s preliminary determination that a question concerning representation existed is a necessary predicate to a post-hearing direction of election, but if Congress had intended that the mandatory “appropriate hearing” be limited to litigation of that question, it failed to say so.

The failure of Congress to impose that express limitation must be considered in light of the prior consistent interpretation by the Board and courts that an “appropriate hearing” under the Wagner Act required the Board to provide the parties an opportunity to raise and present evidence on all issues relevant to the election. As a matter of statutory interpretation, Congress is presumed to be aware of administrative or judicial interpretation of a statute’s language, and if it amends the statute without changing that language, then Congress presumably intended to adopt that administrative interpretation. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). See also *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365–366 (1951) (by adopting Taft-Hartley amendments “without pertinent modification” of provision at issue “Congress accepted the construction [of that provision] by the Board and approved by the courts.”). Nothing in the Taft-Hartley amendments to Section 9 changed the meaning of “appropriate hearing,” thus indicating Congress’ intent to adopt that settled meaning of “appropriate hearing” but now requiring that it must be held before the election.

The legislative history of the Taft-Hartley Act confirms that Congress intended that the “appropriate hearing” be held before the election and that it continue to address all pertinent election issues. Some versions of the Taft-Hartley legislation included proposals permitting the Board’s continuation of its prehearing elections procedures; Congress plainly rejected those proposals. After the House and Senate initially passed different versions of the legislation, the conference committee was appointed to resolve the differences, including in Section 9(c)(4). At the “insistence” of the House conferees, the resulting conference report recommended deleting the authority to conduct

prehearing elections included in the Senate version of the legislation. 93 Cong. Rec. 6601 (June 5, 1947) (conference report) reprinted in 2 *Legislative History of the LMRA, 1947*, at 1542. Both the House and the Senate adopted the conference report recommendation to delete the prehearing election option, thereby making “appropriate hearings” mandatory before an election in all cases. 93 Cong. Rec. 6549 (June 4, 1947) (House agreed to conference report) reprinted in 1 *Legislative History of the LMRA, 1947*, at 899–900; 93 Cong. Rec. 6695 (June 6, 1947) (Senate agreed to conference report) reprinted in 2 *Legislative History of the LMRA, 1947*, at 1620–1621.

In his analysis of the Act’s provisions in the Congressional Record, Senator Taft explained the reason for changing Section 9(c)(4) and confirmed that Congress intended to preserve the Board’s interpretation of an “appropriate hearing”:

The conferees dropped from [Section 9(c)(4)] a provision authorizing prehearing elections. That omission has brought forth the charge that we have thereby greatly impeded the Board in its disposition of representation matters. We have not changed the words of existing law providing a hearing in every case unless waived by stipulation of the parties. *It is the function of hearings in representation cases to determine whether an election may properly be held at the time; and if so, to decide questions of unit and eligibility to vote.* During the last year the Board has tried out a device of holding the election first and then providing the hearing to which the parties were entitled by law. Since its use has been confined to an inconsequential percentage of cases, and more often than not a subsequent hearing was still necessary and because the House conferees strenuously objected to its continuance it was omitted from the bill. 93 Cong. Rec. 7002 (June 12, 1947), reprinted in 2 *Legislative History of the LMRA, 1947*, at 1625. (emphasis added)

My colleagues attempt to minimize the significance of Senator Taft’s statements as those of a single Senator made after the “dispositive vote” on the Taft-Hartley legislation. 76 FR 80165 fn.116. Although they were made after the initial Senate vote and passage of the legislation, Senator Taft’s statements preceded further Senate debate and the crucial votes in the Senate and House to override President Truman’s veto. 93 Cong. Rec. 7504 (June 20, 1947) reprinted in 1 *Legislative History of the LMRA, 1947* at 922; 93 Cong. Rec. S–7692 (June 23, 1947), reprinted in 2 *Legislative History of the LMRA, 1947* at 1656–1657. Moreover, Senator Taft’s statements were not merely those of a single Senator. As the legislation’s

principal Senate sponsor and Chairman of the Senate's Labor and Public Welfare Committee, Senator Taft had been instrumental in securing passage of the Act. His statements were to "make clear the legislative intent," 93 Cong. Rec. 7000, reprinted in *2 Legislative History of the LMRA, 1947*, at 1622, that a pre-election hearing that includes all election issues was mandatory. 93 Cong. Reg. 7002, reprinted in *2 Legislative History of the LMRA, 1947*, at 1625. Senator Taft's analysis of the legislation is authoritative and compelling evidence of Congress's intent.<sup>36</sup>

The import of the Taft-Hartley amendments for determining the scope of an "appropriate hearing," and whether it had to be held before the election, was discussed in *NLRB v. SW. Evans & Son*, 181 F.2d 427 (3d Cir. 1950). Although decided after the amendments had gone into effect, the case concerned the Board's pre-Taft-Hartley rule permitting a pre-hearing election "in cases which present no substantial issues." Id. at 430. Preliminarily, the court observed that "the instant problem [whether a pre-election hearing is required] is hardly apt to recur, since the [Taft-Hartley Act] now makes mandatory a pre-election hearing." Id. at 429. The court then concluded that issues related to "unit, eligibility to vote, and timeliness of the election" raised by the employer were "substantial issues" that the employer was entitled to litigate in a pre-election hearing under the extant rule. Id. at 430-31. The inescapable inference from the court's opinion is that under the amended Section 9(c)(1), an appropriate hearing, which now must take place before the election, must permit litigation of all contested issues of substance, not just those necessary to confirm a preliminary investigatory determination that a question of representation exists.

In 1959, Congress amended Section 3(b) of the Act to provide for Board delegation of its Section 9 representation case duties to regional directors in an effort to address a serious casehandling backlog at the Board level. During this legislative process, there were numerous unsuccessful proposals to revive the pre-hearing election that the Taft-Hartley Act eliminated.<sup>37</sup>

Instead, as further discussed in the following section, Congress resolved upon the delegation language, with an express reservation of the right of parties to file pre-election requests for review of a regional director's post-hearing direction of election. The final language of Section 3(b), as an alternative to the pre-hearing elections proposals, was explained by Representative Barden, Chairman of the House Committee on Education and Labor in the Conference Report:

There is one addition and that is this. The conferees adopted a provision that there should be some consideration given to expediting the handling of some of the representation cases. Therefore, the Board is authorized, but not commanded, to delegate to the regional directors certain powers which it has under section 9 of the act. Upon an appeal to the Board by any interested party the Board would have the authority to review and stay any action of a regional director, delegated to him under section 9. But the hearings have not been dispensed with. *There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out. The right to a formal hearing before an election can be directed is preserved without limitation or qualification.* 105 Cong. Rec. 16629 (September 4, 1959), reprinted in *2 Legislative History of the LMRDA, 1959* at 1714 (emphasis added), describing H.R. Rep. 86-1147, at 1 (September 3, 1959), reprinted in *1 Legislative History of the LMRDA, 1959*, at 934 (conference report).<sup>38</sup>

Thus, the amendment to Section 3(b) did not expressly or implicitly alter the scope of the pre-election "appropriate hearing" required to be held on contested issues. In 1961, when the Board amended its Rules and Regulations to delegate its powers pursuant to Section 3(b)'s authorization, the amended rules likewise remained consistent with the traditional broad view of an "appropriate hearing." Section 101.20(c) stated, in relevant part: "The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure the record contains as full a statement of the pertinent facts as may be necessary for determination of the case.

28, 1959), reprinted in *1 Legislative History of the LMRDA, 1959* at 82 (included in President Eisenhower's initial "20-point program"). See also S. 1555, 86th Cong. § 705 (bill passed by the Senate on April 25, 1959), reprinted in *1 Legislative History of the LMRDA, 1959*, at 581.

<sup>38</sup> Senator Goldwater similarly described the new provision authorizing delegation of the Board's election powers to regional directors as a Conference Committee substitution adopted because of opposition by other conferees to any change in pre-election hearing procedure. 105 Cong. Rec. A8522 (October 2, 1959), reprinted in *2 Legislative History of the LMRDA, 1959* at 1856.

The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions." Section 102.66(a) stated, in relevant part: "Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence." Section 102.64(a) stated, in relevant part: "It shall be the duty of the hearing officer to inquire fully into all matters and issues necessary 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."

Were there any doubt remaining about the required scope of a mandatory appropriate pre-election hearing—and there should have been none—it was put to rest in trio of Board decisions in the 1990s. First, the Board held in *Angelica Healthcare Services Group*, 315 NLRB 1320 (1995), that an acting regional director erred by denying a union a hearing on a contested contract bar issue before directing a decertification election to be held. The Board remanded the case for a hearing, but found no need to decide in advance "the type of hearing that would be necessary to satisfy the Act's 'appropriate hearing' requirement." Id. at 1321 fn.6.

The question left unanswered in *Angelica Healthcare* was addressed in *Barre-National*, 316 NLRB 877 (1995). The regional director in that case precluded the employer from presenting evidence at a pre-election hearing about the supervisory status of a group of employees constituting 8 to 9 percent of the potential unit. Instead, the regional director only permitted the employer to make an offer of proof, then directed an election at which the disputed employees were allowed to vote subject to challenge. Resolution of their alleged supervisory status was deferred to the post-election challenge procedure. The Board held that the regional director erred by refusing to allow the employer to present the evidence of supervisory status and, therefore, the pre-election hearing "did not meet the requirements of the Act and the Board's Rules and Statements of Procedure." Id. at 878. It thereby confirmed the longstanding statutory interpretation and Board practice requiring that an appropriate pre-election hearing must include full evidentiary litigation of contested issues, including those related to unit

<sup>36</sup> I note the blatant inconsistency between my colleagues' reliance, at 76 FR 80160, on the statement of Senator Goldwater, a single legislator, in support of their interpretation of the 1959 Sec. 3(b) amendments, and their dismissal, at 76 FR 80165 fn. 116., of the statement of Senator Taft as insignificant to the interpretation of Sec. 9(c)(1).

<sup>37</sup> See H.R. Rep. 86-741, at 24-25 (July 30, 1959), reprinted in *1 Legislative History of the LMRDA, 1959*, at 782-83. See S. Rep. 86-10, at 3 (January



inclusion/exclusion and voter eligibility.<sup>39</sup>

In attempting to reconcile the Board's rationale in *Barre-National* with the new Rule's direction that pre-election hearing litigation should be limited to issues concerning whether a question concerning representation exists, my colleagues mischaracterize the Board's holding as resting only on the hearing requirements in Section 102.66(a) and 101.20(c) of the existing regulations, not the Act itself, because of the Board's use of the conjunctive "and" rather than "or." 76 FR 80165. They assert that their revision of Section 102.66(a) and the elimination of Section 101.20(c) thus "removes the basis for the Board's holding in *Barre-National*" and that they will "no longer follow *Barre-National*." 76 FR 80164, 80165.

The majority's reliance on the use of "and," rather than "or" in support of a claim that the Rule does not overrule *Barre-National* is semantic nonsense, and disingenuous to boot. Clearly and expressly, the Board relied on the requirements of Section 9(c)(1) of the Act and its implementation in the cited Rules in concluding that the regional director in *Barre-National* denied the employer a full pre-election evidentiary hearing on a unit inclusion/exclusion issue to which it was entitled. As the concurring and partial dissenting opinions make clear, the root source of that entitlement is the Act, not the implementing Rules.<sup>40</sup> A Board panel confirmed this view in *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999). The hearing officer, affirmed by the regional director, precluded litigation of contested unit placement issues, deferring any litigation and decision to post-election challenge and objection procedures. Relying on *Barre-National's* holding that such a limitation on litigation at the pre-election hearing "did not meet the requirements of the Act or of the Board's Rules and Statements of Procedure," the Board remanded the proceeding to the regional director to reopen the hearing for the required presentation of evidence on disputed unit placement issues.<sup>41</sup>

<sup>39</sup> At the same time, the Board confirmed the longstanding practice of deferring to the post-election stage a decision on issues involving the voting eligibility of a minimal number of individuals. 316 NLRB at 878 fn. 9.

<sup>40</sup> See *Barre-National*, 316 NLRB at 880 (Member Stephens, concurring) ("[I]n my view, the statute—even apart from our implementing rules and regulations—entitles parties to preelection testimonial hearings"); and (Member Cohen, dissenting) ("My colleagues concede, as they must, that the Regional Director violated the procedures of the Act, as well as the Rules of the Board, by not permitting the Employer to adduce evidence on the issue of supervisory status").

<sup>41</sup> 328 NLRB at 372–373.

Manifestly, the decisions in *Angelica Healthcare*, *Barre-National*, and *North Manchester Foundry*, despite resting in part on the Board's implementing regulations, all explicitly rely on the requirement in Section 9(c)(1) that an appropriate pre-election hearing must include full litigation of all legitimate contested election issues. Just as manifestly, my colleagues' Rule limiting pre-election litigation to issues relevant to questions concerning representation, leaving all else to the post-election stage of proceedings, overrules this precedent and flies in the face of the statutory language, legislative history, and decades of consistent Board practice and precedent. The Rule's restriction is an impermissible interpretation of the Act.

#### *B. Elimination of Pre-Election Requests for Review Cannot Be Reconciled With the Language and Intent of Section 3(b)*

The Board is \* \* \* authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

As set forth above, Section 3(b) of the Act permits the Board to "delegate to its regional directors" the Board's authority in representation cases, but is conditioned on the right of "any interested person" to seek Board review and a potential Board-ordered "stay" of "any action." The inclusion in Section 3(b) of a potential Board "stay of any action" by the regional directors shows that Congress clearly intended that a party have the right to seek pre-election Board review following a hearing because it clearly preserved the right to request a Board ordered "stay" of the election. This was viewed as a necessary check on the exercise of delegated powers.<sup>42</sup> See, e.g., *Avon Prods.*, 262

<sup>42</sup> Representative Barden clarified that the legislative intent was that "the regional directors in making any decisions or rulings pursuant to a delegation permitted by that section would be subject to and bound by [established Board] precedents and rules and regulation [and that] \* \* \* an appeal to the Board is provided to prevent and/or remedy any abuse of discretion or departure from Board precedent or Board rules and regulations by the regional directors." 105 Cong. Rec. A8061 (September 4, 1959) reprinted in 2 *Legislative History of the LMRDA*, 1959, at 1812.

NLRB 46, at 48 fn.8 (1982) (explaining that the Board should have stayed the election following the employer's request for review of unit inclusion of a large number of employees).

The statutory provision permitting the stay of an election will have no meaning if, as the Rule provides, a party is no longer able to obtain pre-election Board review of a regional director's direction of election. Obviously, the Board cannot stay an election if, as the Rule provides, the right to seek review is foreclosed until after the election.<sup>43</sup> Section 3(b) contemplates that the Board, in some cases, will exercise its discretion to order a stay of a direction of election where there are unresolved questions that could affect the results of the election. For purposes of a *Chevron* step one analysis, it does not matter whether the Board has rarely exercised this discretion or whether, in the absence of express statutory language, it is rational to permit pre-election requests for review.<sup>44</sup> The Rule impermissibly contravenes the Act by failing to give meaningful effect to an express term of Section 3(b). It is invalid to eliminate a party's right to seek pre-election review (and a potential "stay" of the election) simply because such requests are often denied.<sup>45</sup>

In sum, the Rule contravenes decades of Board practice consistent with the plain meaning of the language of the Act and Congressional intent manifested in

See also Representative Kearns ("To make certain Board policy is followed by regional directors, provision is made for appeal to the Board.") 105 Cong. Rec. A4307–4308 (May 21, 1959) reprinted in 2 *Legislative History of the LMRDA*, 1959, at 1749–1750.

<sup>43</sup> Although the Rule ostensibly provides the possibility for an appeal by "special permission" in an "extraordinary" situation, that possibility is entirely illusory. The "new, narrower standard" my colleagues impose limits "special permission" to "extraordinary circumstances where it appears that the issue will otherwise evade review." 76 FR 80162(emphasis added). This severely narrow standard offers no meaningful alternative to seek review that compensates for the Final Rule's elimination of Sec. 3(b)'s right to seek pre-election Board review. See, e.g., 76 FR 80141 ("the Board has decided \* \* \* to eliminate the parties' right to file a pre-election request for review of a regional director's decision and direction of election, and instead to defer all requests for Board review until after the election"); 76 FR 80172 (final rule "adopts" proposals "to eliminate the preelection request-for-review procedure").

<sup>44</sup> As stated below, I find that the Rule's elimination of pre-election requests for review is also impermissibly arbitrary and capricious.

<sup>45</sup> There is no support for the view that the elimination of a party's right to seek pre-election review "carr[ies] out 3(b)'s instruction that Board review shall not \* \* \* operate as a stay unless specifically ordered by the Board." On the contrary, as set forth above, this language in 3(b) that, "review shall not \* \* \* operate as a stay" will be rendered meaningless by the Final Rule's elimination of the right to pre-election review.

legislative history.<sup>46</sup> The Rule cannot be upheld under *Chevron* step one because it represents an impermissible limitation on the intended scope of an “appropriate hearing” that, since enactment of the Taft-Hartley Act, must be held prior to an election on all genuine and material contested issues. It is likewise contrary to Congressional intent that delegation to regional directors of duties in representation matters be conditioned on the right of parties to seek pre-election review by the Board of a regional director’s action and to obtain an order from the Board staying an election while reviewing such action.

### III. The Rule Is Arbitrary and Capricious

The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of “reasoned decisionmaking.” \* \* \* Not only must an agency’s decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies’ scope of authority, are not supported by the reasons that the agencies adduce.<sup>47</sup>

Even if one were to find that Congress has not directly addressed issues in Section 9 and Section 3(b) of the Act in a manner contrary to the Rule’s electoral revisions, the Rule in general and in several particulars still does not warrant deference under the Administrative Procedure Act (APA)<sup>48</sup> or *Chevron* step two<sup>49</sup> because the Rule is “arbitrary or capricious.” *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). *See also American Hosp. Ass’n*, 499 U.S. at 618–

20 (applying arbitrary and capricious standard in its consideration of the Board’s rule on acute care hospital bargaining units). “Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). The Rule is arbitrary under multiple counts of the *State Farm* test.

#### A. What delay does the rule rationally address?

My colleagues repeatedly assert in both the NPRM and the Rule that their purpose is to address the problems of “delay” and “unnecessary litigation” in election case processing. As a general matter, who could quarrel with such a proposition? Further, anecdotal identification of representation cases which took too long to bring to conclusion is about as difficult as shooting ducks in a barrel. Yet my colleagues never meaningfully define the purported *systemic* problems they seek to address. Neither do they set forth any rational measures or standards by which one might understand the contours of the problems, much less evaluate whether their Rule is reasonably drawn to correct them. Instead, they reason in reverse, pronouncing solutions first, then identifying affected procedures as problems.

The Rule nominally addresses two types of delay: Delay from the time of the petition to an election, and delay from the time of an election until certification of results or representative. Notwithstanding the Acting General Counsel’s characterization of the agency’s performance as “outstanding”<sup>50</sup> and “excellent”<sup>51</sup> when measured by current agency median time targets, my colleagues implicitly find that the targets for these stages are too long. They never quite say why. Instead, they simply contend that

it will take less time to process cases with their procedural revisions.

Implicit in their analysis, however, is the conviction that the primary contributor to delay is litigation, either in pre-election hearings, filing of briefs, pre-election requests for review, or nondiscretionary Board review of post-election contested issues. Eliminate this, they say, and the problem of delay is significantly lessened, subject of course to their further review of the remaining reserved proposals in the NPRM.

In sum, my colleagues view litigation as the devil’s work, and the devil presumably works for those who oppose a rapid electoral process ending in a union’s certification as employees’ bargaining representative.<sup>52</sup> Not only does litigation cause delay per se, regardless of the merits of issues raised or their importance to the parties and employee voters, but it is susceptible to abuse. Further, at least prior to an election, delay from litigation affords more time for employers to go on an unfair labor practice rampage to eliminate union support as well as its union supporters, according to some commenters to the rulemaking, including pro-union authors of some highly questionable academic “studies.”<sup>53</sup>

It cannot be disputed that the efficient and expeditious exercise of our statutory mandate is an appropriate and important goal that is central to our mission. But labeling litigation as a generic and principal cause of undefined delay and abuse, warranting immediate remediation over all other possible causes of delay, is an

<sup>52</sup> There is, of course, an exception to this presumption. That is the contrary presumption of legitimacy in litigation of union unfair labor practice charges that support the Board’s current blocking charge policy, with resultant delays of months or even years.

<sup>53</sup> John Logan, Erin Johansson, & Ryan Lamare, “New Data: NLRB Process Fails to Ensure A Fair Vote” (June 2011), [http://laborcenter.berkeley.edu/laborlaw/NLRB\\_Process\\_June2011.pdf](http://laborcenter.berkeley.edu/laborlaw/NLRB_Process_June2011.pdf); Kate Bronfenbrenner & Dorian Warren, “The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence” (2011), [http://iserp.columbia.edu/sites/default/files/working\\_papers/working\\_paper\\_cover\\_2011-final.pdf](http://iserp.columbia.edu/sites/default/files/working_papers/working_paper_cover_2011-final.pdf); and Kate Bronfenbrenner, “No Holds Barred: The Intensification of Employer Opposition to Organizing” (May 20, 2009), <http://www.epi.org/page/-/pdf/bp235.pdf?nocdn=1>; My colleagues tiptoe to the edge of endorsing these studies, but claim not to do so. They nevertheless clearly do share with the authors the presumption that employer representation case litigation is presumptively illegitimate, or an unnecessary impediment to elections, while union unfair labor practice charges are presumptively legitimate and, as such, an accurate reflection of unlawful employer interference with elections. The latter presumption informs and, alone, irreparably flaws the authors’ studies.

<sup>46</sup> My colleagues, of course, may not rely on precedent holding that an administrative agency is “not estopped from changing a view [it] believes to have been grounded upon a mistaken legal interpretation.” *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). That authority is good only so long as the new interpretation “is otherwise legally permissible and is adequately explained.” *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1481 (D.C. Cir. 1989). The Rule is neither. Moreover, where as here, the rule overturns the Board’s 65 year-old interpretation, little if any deference is due. “An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 n. 30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

<sup>47</sup> *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

<sup>48</sup> 5 U.S.C. 706(2)(A).

<sup>49</sup> As the D.C. Circuit has observed, inquiry at the second step of *Chevron*, i.e., whether an agency has made a permissible statutory interpretation, overlaps with the APA’s “arbitrary and capricious standard.” *See Shays v. FEC*, 414 F.3d 76, at 96–97 (2005), and cases cited there.

<sup>50</sup> NLRB General Counsel Memorandum 11–03, “Summary of Operations Fiscal Year 2010” at “Introduction” (Jan. 10, 2011), available at <http://www.nlr.gov/publications/general-counsel-memos>.

<sup>51</sup> NLRB General Counsel Memorandum 12–03, “Summary of Operations Fiscal Year 2011” at “Introduction” (Mar. 3, 2012), available at <http://www.nlr.gov/publications/general-counsel-memos>.

impermissibly arbitrary way of meeting that goal.

*B. Failure To Consider the Board's Own Statistical Evidence*

"There are some propositions for which scant empirical evidence can be marshaled,"<sup>54</sup> but that is certainly not the case in this rulemaking venture. The Board has access to a vast and detailed wealth of representation casehandling information that can readily be obtained through its own records. "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). See also *Business Roundtable et al v. SEC.*, 647 F.3d 1144 (D.C. Cir., 2011) (finding SEC acted arbitrarily and capriciously by relying on insufficient empirical data supporting its rule and by completely discounting contrary studies). No such effort was made here, evincing an arbitrary disregard for identifying the real problem areas in representation case processing.

First, there is the matter of the Agency's official performance goals. I find perplexing my colleagues' indifference to these published goals and statistical evidence of whether the Board meets or exceeds them. These are, after all, the reported standards by which we annually ask Congress and the public to evaluate how well we are doing our job of processing election petitions. They are also the measures by which the performance of senior agency managers is evaluated. In any case, in the absence of any standard or measure presented by my colleagues to replace the Agency's published goals as measures of efficiency, these measures would seem to be the rational starting point for an assessment of what cases took too long to process.

According to information in the Acting General Counsel's recent summary of operations for Fiscal Year (FY) 2011:<sup>55</sup>

- The Board closed 84.7% of all representation cases within 100 days, just short of the performance goal of 85%.
- The Regions conducted 1,423 initial representation elections, of which 89.0% were held pursuant to agreement of the parties. In FY 2010, 1,790 initial elections were held, with a 92.1% election agreement rate. The

target election agreement rate is 85% of elections.

- The median time to proceed to an election from the filing of a petition was 38 days, the same rate achieved in FY 2010, and well below the target median of 42 days.
- 91.7% of all initial representation elections were conducted within 56 days of the filing of the petition, above the target rate of 90%. In FY 2010, 95.1% of elections were conducted within 56 days.
- Regional directors issued 203 pre-election decisions in contested representation cases after hearing in a median of 33 days from the filing of the petition, well below the target median of 45 days. In FY 2010, regional directors issued 185 pre-election decisions in a median time of 37 days.
- In 45 cases, post-election objections and/or challenges were filed requiring the conduct of an investigative hearing. Decisions or Supplemental Reports were issued in those cases in a median of 62 days. The goal is a median of 80 days.
- Post-election objections and/or challenges that could be resolved without a hearing were filed in 70 cases. Decisions or Supplemental Reports in those cases issued in a median of 21 days. The goal is a 32-day median.

The foregoing statistics fail to disclose any widespread problem of delay in election case processing. They do invite inquiry into the approximately 15% of cases that took more than 100 days to close and the approximately 8% of those that took more than 56 days to move from petition to election. My colleagues made no such investigation. Commenter Samuel Estreicher did. Referring to a study of Board casehandling statistics for 2008, he said

It is not clear, however, that the median [time from petition to election] can be significantly reduced without the agency also addressing the "long tail" of the distribution—the fact that in 2008, for example, 251 of 2024 (or 12.43% of) elections were held more than 56 days after the filing of the petition. The causes of delay in these cases warrant further study. There may well be a substantial overlap between these cases and the 284 petitions that were "blocked" in 2008 (pursuant to the Board's "blocking charge" policy) where the median time in 2008 between petition and election was 139 days compared to 38 days overall.

My colleagues' response to Professor Estreicher was effectively to say they would get to that study of blocking charges later, if at all, but the Rule's revisions should come first. They give a similar response to suggestions that the

Board could effectively and immediately attack representation case delay, without any rule revisions, by cleaning its own house. Indeed, my review of the Board's internal computerized case information system indicated that on the date of the Rule's publication there were at least 20 election cases that had been pending before the Board for more than 100 days. The Board, not any systemic flaw in extant rules, is responsible for this clearly unacceptable delay. Nevertheless, rather than focusing on deciding these cases, my colleagues choose their Rule-first approach. They rationalize that the reduction of cases reaching the Board as a result of the Rule will give them more time to attend to such matters. I address that embarrassing rationale in a subsequent section.

I asked members of my staff to conduct a study of the Board's internal computerized case tracking information system maintained by the Acting General Counsel's personnel in order to ascertain the details of cases that took longer than the 56/100 day time targets to process. The results of that study, which is instructive even if concededly not exhaustive, indicate that the Rule may do little to speed up overall election case processing.

The staff study confirmed Professor Estreicher's observation that when cases take longer than 100 days to process, much of the "delay" can be attributed to the effects of post-election case processing, blocking charges, or delays in case deliberations by the Board itself. There is little evidence that, as a systemic matter, conducting pre-election hearings, permitting the filing of post-hearing briefs, and processing pre-election requests for review unreasonably delayed an election or the ultimate conclusion of cases. In some cases where there was arguable delay prior to the election, explanations for this had nothing to do with the hearing and its aftermath. Instead, the additional time before an election resulted from a post-hearing scheduling agreement by the parties or the need to accommodate a seasonal workforce pattern of employment.

The aforementioned statistical studies, as limited as they may be, are some evidence that my colleagues' Rule is misdirected if intended to achieve greater efficiency in representation election casehandling. But the more salient point underscoring the arbitrary nature of the Rule's substance is that my colleagues have made no effort themselves to examine such data and to establish a "rational connection

<sup>54</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S.Ct. 1800, 1813 (2009).

<sup>55</sup> General Counsel Memorandum 12-03, *supra* at Introduction and p.2-3.

between the facts found and the choice made.”<sup>56</sup>

### C. The Pre-Election Rule Revisions

#### 1. Stipulated Election Agreements

In recent years, about 90% or more of representation elections were expeditiously held pursuant to election agreements. The stipulated election agreement was by far the preferred alternative to the consent agreement.<sup>57</sup> The stipulated agreement resolved all pre-election disputes but preserved the automatic right to Board review of a regional director or hearing officer's disposition of post-election challenges and objections. The Rule now eliminates that right, substituting for mandatory review a discretionary request for review procedure that currently exists for the disposition of pre-election issues.<sup>58</sup> Without any empirical support, my colleagues contend that this will have no deterrent effect on the percentage of pre-election agreements.

This is a classic case of “if it ain't broke, don't fix it.” It seems natural that parties would negotiate resolution of known pre-election issues but at the same time assure the possibility of highest agency review of unforeseen election conduct and eligibility issues that arise during the critical election period. It also seems natural that the willingness of parties to compromise on pre-election issues would be adversely affected by the elimination of the right to agree to mandatory post-election Board review. Not so, claim my colleagues. In deciding whether to enter into an election agreement, parties will still prefer one that preserves even a limited right of Board review over one that provides for final disposition of post-election issues at the regional level.<sup>59</sup> In all other respects, they contend, parties will continue to consider the same factors previously considered when deciding whether to enter into an election agreement at all.

Of course, my colleagues could be wrong, and it was their rulemaking responsibility to give more than cursory thought, if that, to this possibility. The assurance of mandatory, as opposed to

discretionary, Board review of challenge and objections issues *could* be a prime consideration to some employers in agreeing to forego what otherwise must be litigated pre-election issues, even under the Rule's limitations, *and*, perhaps more importantly, to resolve most eligibility and unit placement issues prior to an election rather than litigate them post-election as determinative challenges. If the percentage of election agreements diminishes by even a few points as a result of this changed calculus, the consequent increase in pre- and post-election litigation will almost certainly wipe out what little actual redress of perceived delay is effected by the Rule's implementation.

My colleagues' willingness to undertake such speculative risk without adequate consideration of its potential adverse consequences is at least partially explained by their apparent agreement with commenters who contend that employers use the election agreement process to extort unwarranted concessions from unions, who capitulate in order to avoid the delay attendant to litigation of disputed issues. Again, this view is based on the presumption that employers could not really have legitimate issues to raise in litigation. If there are legitimate disputes, and I dare to say this can be the case, then the process of negotiating an election agreement in which an employer waives such litigation rights in exchange for concessions about unit scope, unit placement, or election details, seems to fairly resemble the give-and-take bargaining that would ensue after a petitioning union wins an election and is certified.

In sum, apart from other reasons, discussed below, I find the Rule's elimination of mandatory Board review of post-election disputes to be arbitrary and capricious. The resultant elimination of a highly-favored process that encouraged the negotiated resolution of all pre-election issues is not only wholly unsubstantiated but also contrary to the purpose for which the Rule is purportedly drawn.

#### 2. Pre-Election Hearings

As previously discussed, the Rule's limitation of issues that can be litigated in a pre-election hearing is impermissibly contrary to the language and Congressional intent for Section 9(c)(1). Even if the Board had the discretion to impose this limitation, it has failed to offer a rational justification for doing so.

Obviously, the length of the hearing itself is not a significant problem. Even under current rules permitting litigation

of disputed issues other than those relevant to whether a question concerning representation exists, the average hearing lasts one day and few last more than two. Further, while hearing officers must currently create a complete record, they clearly have had the ability under existing procedures to limit the introduction of evidence on issues where a party bears the burden of proof and fails to take a position.<sup>60</sup>

My colleagues are essentially concerned with the time it takes to get to a hearing and the time it takes to get from a hearing to an election. Accordingly, they seek to limit the number of pre-election hearings by limiting the issues that can be litigated, and they eliminate the pre-election review process and the attendant recommended 25-day waiting period prior to the election.

Although it can take longer to get to an election when the Board conducts a pre-election hearing, an initial question is how much longer? My staff's review of agency statistics indicates that more than half of the pre-election hearing cases are closed within 100 days of the petition, thus meeting the agency performance goals.<sup>61</sup> Also, in recent years, the median days from petition to election in cases with pre-election hearings is about 64 days, just 8 days above the agency performance goal for elections where no hearing is held.

Nevertheless, my colleagues repeat as a mantra the claim that their revisions will alleviate unnecessary litigation and delay because “the issues in dispute in such litigation are often rendered moot by the election results or resolved by the parties post-election.”<sup>62</sup>

Once again, my colleagues offer no empirical support whatsoever for a stated premise, in this instance the premise that the now-deferred issues are *often* rendered moot.<sup>63</sup> One would think, at the very least, that they would want to examine case statistics from recent years to get an idea of what issues would still have to be litigated pre-election and what issues that will now be deferred would still have to be

<sup>56</sup> See *Bennett Industries, Inc.*, 313 NLRB 1363 (1994).

<sup>61</sup> In FY 2010, 43% of cases that went to a pre-election hearing (68 of 158) closed in more than 100 days; in FY 2009, 45% (57 of 127), and 51% (78 of 152) in FY 2008.

<sup>62</sup> 76 FR 80141.

<sup>63</sup> My colleagues define mootness relative to a particular election. Of course, the failure to resolve a “mooted” issue may well contribute to what would be unnecessary uncertainty, litigation, and delay in the processing of a rerun election or an election following a new union campaign. The more individuals whose status is left in limbo by the Rule's revisions, the greater is the likelihood of this happening.

<sup>56</sup> *Burlington Truck Lines*, supra, 371 U.S. at 168.

<sup>57</sup> In 2008, 1579 elections were held pursuant to stipulation, while only 75 consent elections were held. NLRB Annual Report FY 2008. In 2009, 1370 elections were held pursuant to stipulation, while only 41 consent elections were held. NLRB Annual Report FY 2009.

<sup>58</sup> Even in the absence of an election agreement, the Rule eliminates the automatic right of review in cases where a regional director makes the discretionary choice of issuing a report and recommendations on post-election issues.

<sup>59</sup> 76 FR 80161.

litigated in the post-election hearing. It seems logical that some issues will indeed be mooted by the election outcome. It seems just as logical that some issues will survive, particularly in light of the strong possibility that the deferral of unit eligibility and placement issues without limitation for the number of individuals involved will greatly increase the number of elections with a determinative number of challenged ballots. If so, then the Rule only backloads litigation, with no real shortening of the time to process a representation case from petition to closing.

In any event, balanced against any potential net gain in the time for election case processing is the need to resolve many, if not most, disputed election issues sooner rather than later. In other words, even if litigation means an election will be held at a later time, is the delay reasonably necessary and could it even expedite final resolution of the election process? See, e.g., *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1243 (1966), reasoning the early identification of “bona fide disputes between employer and union over voting eligibility” may avoid resorting to “the formal and time-consuming challenge procedures.”

My colleagues may not think so, but there are employees, employers, and unions who believe that there is value in the early resolution of individual issues that do not bear on whether an election should be held at all. In particular, employees quite reasonably would like to know if they are eligible to vote and will be part of a bargaining unit that the union seeks to represent. Telling them they can cast a challenged ballot, with their eligibility possibly to be resolved later, is hardly an inducement to participate in the electoral process. Further, individuals whose status as supervisors is disputed would reasonably like to have that issue resolved before an election, as would their employer and the participating union. It is unbecomingly blasé of my colleagues to state that, because resolution of this issue would in any event not undo the effect of antecedent actions taken in the election campaign, there is no problem with postponing such resolution until after the election, if then. They are aware, I believe, that an employer can lawfully discharge or discipline a statutory supervisor for engaging in union activity, even if the individual mistakenly believed he was an employee, or was told so by the union.

My colleagues also rely on the traditional Board practice of deferring final decision on some individual

eligibility and unit status issues until after an election. They describe the Board’s practice as “regular” and “frequently” used, but once again make no effort to provide statistical support for this characterization. It is certainly true that over the years, an informal guideline has evolved in Board law and practice that permits the holding of elections in appropriate circumstances when it remains unclear whether a small number of voters belong in the voting unit by permitting the disputed individuals to vote under challenge. Usually, the number of such challenges does not exceed about 10–12% of the unit. See, e.g., *Silver Cross Hospital*, 350 NLRB 114, 116 fn. 10 (2007) (the Board permitted two employees, which was about 11% of the unit, to vote under challenge.) This practice is not, however, *per se*. It merely informs the Board’s consideration of individual cases when difficult issues or insufficient record evidence would otherwise tie up processing the case for some time. The Board considers whether there is a cognizable possibility that votes cast by a small percentage of a voting unit will make no difference in the outcome of the election, and the parties may have a final outcome regarding the question concerning representation sooner. This is not done without thought or without recognition of the risk that failing to resolve disputes before the election may lead to more litigation. By this discretionary case-by-case practice, the Board has recognized practical *exceptions* to its established standards of litigating and resolving all disputes before an election, including voter eligibility and unit placement questions.

The fact that the Board has deferred some pre-election issues for a limited number of individuals in an indeterminate number of cases hardly justifies doing so axiomatically for an unlimited number of individuals. Although decided under the pre-Taft Hartley “substantial issue” rule for pre-election hearings, the court’s opinion in *SW. Evans & Son* speaks directly and critically to my colleagues’ rationale for doing so.

It is a simple matter, from the vantage point of hindsight, to determine the substantiality of issues raised, as the petitioner suggests, on the basis of election results which, fortuitously, may be such as could remain unaffected by the ultimate conclusion of those issues. But the problem of substantiality, in our view, is one to be determined prospectively. Indeed, were it otherwise, the very purpose of the amendment to the Rules and Regulations, to avoid delay, would be annulled. We are of the opinion that the respondent here raised substantial issues and under the Rules and

Regulations of the Board it was entitled to a pre-election hearing.<sup>64</sup>

### 3. Post-Hearing Briefs

Under current rules, parties are afforded the opportunity to file post-hearing briefs within seven days after the pre-election hearing, or later with special permission. Whether or not required as a matter of minimum due process, the right to file post-hearing briefs has become an established Board practice. Yet, my colleagues now claim that this practice “often delays issuance of the regional director’s decision and direction of election, thereby delaying resolution of the question of representation even when the issue or issues in dispute can be accurately and fairly resolved without briefing.” (emphasis added)<sup>65</sup> Accordingly, the Rule generally prohibits the filing of post-hearing briefs, except in the event of the hearing officer’s “special permission.”<sup>66</sup>

I need not belabor this issue. Recall that the Acting General Counsel’s annual summary for FY 2011 stated that regional directors issued 203 pre-election decisions in contested representation cases after hearing in a median of 33 days from the filing of the petition, well below the target median of 45 days. Nevertheless, my colleagues once again proceed on a factually unsubstantiated premise that a particular, long-established feature of Board pre-election procedure “often” delays the issuance of a regional director’s decision. Is there any comment in the record by a regional director, past or present, to this effect? Is there any apparent reason why, in cases where the issues litigated are straightforward and few, a regional director or regional staff could not commence the drafting of a decision prior to receipt of briefs?<sup>67</sup> For that matter, is there any comment in the record that parties routinely submit briefs in such simple cases?

On the other hand, my colleagues are totally dismissive of the potential value of post-hearing briefs in narrowing factual disputes, defining issues, and possibly creating grounds for settlement that would obviate the need for a regional director’s decision and expedite the electoral process. Even if there is no settlement, is there any

<sup>64</sup> 181 F.2d at 431.

<sup>65</sup> 76 FR 80141.

<sup>66</sup> 76 FR 80185.

<sup>67</sup> In fact, the Agency’s internal training program expressly instructs decision-writers to begin drafting pre-election regional directors’ decisions before the briefs arrive. See NLRB Professional Development Program Module 5: Drafting Regional Director Pre-Election Decisions, last updated May 23, 2004, Participants Guide and Instructors Guide.

record support for my colleagues' view that post-hearing briefs are apparently so worthless that they should only be allowed in the rare case where a hearing officer gives special permission?<sup>68</sup>

It is obvious that my colleagues' real objective in generally eliminating the filing of post-hearing briefs has no rational relationship to whether such a practice unreasonably delays the electoral process. They are simply shortening the pre-election timeline wherever they can, without any real consideration of the merits of the practice eliminated.<sup>69</sup>

#### 4. Pre-Election Requests for Review

I have previously discussed why the elimination of pre-election requests for review is impermissibly contrary to Section 3(b) of the Act and Congressional intent. The same action is indefensibly arbitrary and capricious.

This action is part and parcel of the backloading of representation case issues also mandated by the Rule's deferral of litigation of unit eligibility and placement issues, and it warrants the same criticisms. My colleagues again parrot the factually unsubstantiated claim that contested issues will "often" be mooted by the election results. If not, they say, rather than bifurcating the resolution of all contested issues in a representation case, final resolution of litigated pre-election issues can still wait and be decided in a single proceeding with post-election issues. Of course, the supposed bifurcation would only occur if there are post-election issues other than those for which a request for review will now be deferred.<sup>70</sup>

My colleagues also denigrate the pre-election request for review process as essentially useless, given how rarely the Board grants review, in which case a decision generally issues after the election, and even more rarely that it stays an election.<sup>71</sup> They miss the point that in those cases where review is

denied, the Board action provides finality. They also fail to acknowledge that in cases where a regional director improperly directs an election and review would otherwise be granted, the Rule will result in such elections being run unnecessarily. See, e.g., *Sanctuary At McAuley Employer*, Cases 7-RC-23402, et. al (April 8, 2011) (granting the employer's request for review of the regional director's direction of election which raised a substantial issue with respect to whether the unit managers were statutory supervisors); *State Bar of New Mexico*, 346 NLRB 674 (2006) (the Board determined that the employer, the State Bar of New Mexico, is exempt from the Board's jurisdiction, reversed the regional director's direction of election and dismissed the petition); *In re Canal Carting, Inc.*, 339 NLRB 969 (2003) (the Board granted the employer's request for review of the regional director's direction of election, finding a contract bar to the union's petition). It is illogical to go forward with an election if the regional director erred in finding a question concerning representation. Thus, whether or not the Board grants review, the pre-election request for review promotes efficiency by ensuring that the regional director has properly ruled on the existence of a question concerning representation, as well as on other issues under current pre-election procedure.

This is all of little matter to my colleagues. Their primary purpose in eliminating the pre-election request for review is to eliminate the companion recommended minimum 25-day waiting period for scheduling an election after a regional director's decision and direction of election. In their view, this delay is unwarranted because the request for review is unnecessary, and they reject any suggestion that there might be alternate justifications for a post-decisional waiting period. Inasmuch as I believe the pre-election request for review process is mandated by the Act and has substantial value in bringing final resolution to litigated issues as quickly as possible, and that my colleagues have failed to articulate a rational basis for its elimination, I need not posit an alternative justification for the process. However, I think there could well be both an agency administrative justification for at least some post-decisional time to arrange the details of election. More importantly, as discussed below, I believe that in at least some instances it will be critically important to provide some post-decisional time for employers to exercise their free speech rights to

communicate their view on unionization to employees

#### D. The Post-Election Rule Revision

One justification for my colleagues' elimination of nondiscretionary Board review of post-election challenge and objections issues is jaw-droppingly pretentious. They claim that "[t]he final rule will enable the Board to separate the wheat from the chaff, and to devote its limited time to cases of particular importance."<sup>72</sup> Shortly thereafter, my colleagues reason that "the discretionary review provided for in the final rule parallels that used by the Supreme Court to ensure uniformity among the circuit courts of appeals."<sup>73</sup> I am afraid that my colleagues take their analogy to the Supreme Court's discretionary review far too literally. The Board is an administrative agency, and the Board members comprise the only forum for internal administrative review of regional actions. However mundane the supposed chaff of cases may seem to them, it is our duty to provide employees and parties in those cases the same decisional attention, guidance, and care as in "cases of particular importance."

Beyond that, how in common sense can my colleagues maintain that the Board has such limited time as to warrant departing from the current nondiscretionary review practice? This is not 1959, when Congress enacted Section 3(b)'s delegation authority to address the Board's undisputed inability to handle its pending caseload.<sup>74</sup> In 1959, there were 9,347 representation case filings, 8,840 case closings, and 2,230 cases pending at the end of the year. The Board itself decided 1880 cases.<sup>75</sup>

In Fiscal Year 2011, 2,634 representation case petitions were filed in the regions, a decrease of 11.2% from 2,969 in FY 2010. In addition, the Board's pending caseload is at a near-historical low.<sup>76</sup> According to statistics compiled by the Board's Executive Secretary, as of January 3, 2012, there were 137 pending unfair labor practice

<sup>68</sup> It is quite clear to me, as it will be to regional personnel, that a hearing officer's discretion to grant motions to file briefs is severely limited by the "special permission" language. Notably, my colleagues gave no apparent consideration to the alternative of a broad discretionary standard that would enable a hearing officer to make a real case-by-case evaluation of whether a post-hearing brief would benefit the regional director's decisionmaking.

<sup>69</sup> Indeed, my colleagues state that the "temptation to use the threat of unnecessary litigation to gain \* \* \* strategic advantage is heightened by \* \* \* the right to take up to seven days to file a post-hearing brief \* \* \*."

<sup>70</sup> This not unlikely circumstance gives the lie to my colleagues' characterization of the pre-election request for review as interlocutory.

<sup>71</sup> As previously discussed, the right to petition for that rare stay is statutorily mandated.

<sup>72</sup> 76 FR 80159.

<sup>73</sup> 76 FR 80160.

<sup>74</sup> In any event, the delegation was primarily, if not exclusively concerned with permitting regional directors to make unit determinations prior to an election. See *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, at 138, 141 (1971). See also *Meyer Dairy, Inc. v. NLRB*, 429 F.2d 697 (10th Cir. 1970) (the "section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings \* \* \*").

<sup>75</sup> Twenty-Fourth Annual Report of the National Labor Relations Board for Fiscal Year Ended June 30, 1959, Appendix A—Tables 1 and 3.

<sup>76</sup> GC Memorandum 12-03, supra at p. 2.

cases and 31 pending representation cases. That caseload is not likely to increase in light of the dramatic decline in regional intake. In these circumstances, I think it is clear that the Board has time and staff enough to handle both the wheat and chaff of post-election issues raised before us under the existing practice of mandatory review.

There is the additional problem of my colleagues' failure to rationalize the significant difference between the existing rule and the new Rule as to the review standard imposed for post-election issue litigation. Under the practice of mandatory review, the Board would engage in de novo review of the entire record with respect to factual findings, other than credibility findings, of the decision maker below.<sup>77</sup> Under the Rule's discretionary review standard, the Board will only grant review of regional factual finding based on a showing that the finding was clearly erroneous and prejudicial. This standard is not often likely to be met.

My colleagues assert that the change in review standards is of little consequence because the Board affirms the majority of post-election decisions made at the regional level. This may be true as to decisional outcome, but there have been numerous Board decisions reversing the hearing officer's or regional director's findings in post-election cases.<sup>78</sup> Also, in many cases, even if the Board has affirmed the decision below, it has modified or clarified the supporting findings.<sup>79</sup> There also have been many cases in which a Board member or members dissent to the factual findings below.<sup>80</sup> The Rule's discretionary review standard affords far less opportunity for reversal, clarification, or dissent with

respect to such findings and their application to the controlling legal principles.<sup>81</sup>

The aforementioned Board decisions focusing on factual findings may not be of much import as to major legal issues, but they are of great significance in assuring the public and reviewing courts that the law is being uniformly and consistently applied. While the Board may delegate representation case duties under Section 3(b), it cannot abdicate its administrative responsibility as principal overseer of the exercise of those duties. That is exactly what it has done through the Rule's substitution of a post-election discretionary review process for a mandatory review process.

Discretionary Board review under a clearly erroneous and prejudicial standard greatly increases the possibility that individual regions will reach different nonreviewable results in factually identical or similar circumstances.<sup>82</sup> This decisional balkanization will introduce uncertainty and lack of uniformity in representation case law. It will effectively create a system in which parties have to litigate issues in light of regional precedent, in spite of the well-established Board doctrine that regional directors' decisions do not have precedential value.<sup>83</sup> It is particularly concerning that the Board will now be deciding few appeals involving election misconduct because the issues raised in such appeals go to the essence of employee free choice, and narrow factual distinctions have often made the difference in determining whether specific conduct has had an objectionable effect on that choice.

Finally, I note that the elimination of mandatory post-election Board review, coupled with the deferral of many issues to the post-election phase of proceeding, may well cause an increase in "test of certification" cases for

employers denied discretionary review by the Board of issues that previously would entail mandatory de novo review. Whether or not any employer would be successful in securing judicial reversal of a regional director's decision is beside the point. Any test-of-certification delays final resolution of the representation procedure, and that delay can sometimes be substantial.

#### *E. The Chairman and Member Becker Arbitrarily Departed From Well Settled Board Procedure in Promulgating the Rule*

"Because the arbitrary and capricious standard focuses on the rationality of an agency's decisionmaking process rather than on the rationality of the actual decision, '[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'"<sup>84</sup> "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."<sup>85</sup> In proceedings leading to adoption and issuance of the Rule, my colleagues abruptly departed from established Board decisionmaking practices and policies.<sup>86</sup>

#### *1. Departure from practice of not overruling precedent without the affirmative vote of at least three Board members.*

At least since the mid-1980s, it has been Board practice that the power to overrule precedent will be exercised only by the affirmative vote of three members of the Board. See, e.g., *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154 (2010); *DaimlerChrysler Corp.*, 344 NLRB 1324 fn. 1 (2005); *International Transportation Service Inc.*, 344 NLRB 279, 279 fn. 2 (2005); *Tradesmen International*, 338 NLRB 460 (2002); *Temple Security*, 337 NLRB 372, 373 fn. 7 (2001); *G.H. Bass Caribbean, Inc.*, 306 NLRB 823, 833 fn. 2 (1992); *Atlantic Interstate Messengers, Inc.* 274 NLRB 1144 fn. 3 (1985); and *Redway Carriers, Inc.*, 274 NLRB 1359 fn. 4 (1985). This practice provides some degree of stability, predictability, and credibility in our agency

<sup>77</sup> My colleagues mistakenly rely on *Stretch-Tex*, 118 NLRB 1359 (1956), for the proposition that the Board's review of a hearing officer's factual findings is, in general, "highly deferential." 76 FR 811059. The standard referred to, as in the unfair labor counterpart case of *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951), is limited to contested credibility findings. Otherwise, the de novo review standard applies. *Id.* at 545.

<sup>78</sup> See, e.g., *Sweetwater Paperboard and United*, 357 NLRB No. 142 (2011); *Go Ahead North America, LLC*, 357 NLRB No. 18 (2011); *Rivers Casino*, 356 NLRB No. 142. (2011); *Trustees of Columbia University*, 350 NLRB 574 (2007); *Madison Square Garden CT, LLC*, 350 NLRB 117 (2007); *In re Woods Quality Cabinetry Co.* 340 NLRB 1355 (2003); *Manhattan Crowne Plaza*, 341 NLRB 619 (2004).

<sup>79</sup> See, e.g., *Automatic Fire Systems*, 357 NLRB No. 190 (2012); *Enterprise Leasing Company-Southeast, LLC*, 357 NLRB No. 159 (2011).

<sup>80</sup> See, e.g., *FJ Foodservice Employer*, Case 21-RC-21310 (December 30, 2011) 2011 WL 6936395; *Mastec DirectTV Employer*, 356 NLRB No. 110 (2011); *American Medical Response*, 356 NLRB No. 42 (2010).

<sup>81</sup> The majority cites to *Mental Health Association, Inc.*, 356 NLRB No. 151 (2011), as an example of a case which did not require Board review because it involved the application of settled precedent. However, the Board modified the hearing officer's findings because it disagreed with part of the hearing officer's analysis and found it unnecessary to rely on another part. *Id.* at slip op. 1, fn. 4.

<sup>82</sup> I note that my critique of this aspect of the Rule has nothing to do with the expertise and competence of regional directors and hearing officers, for whom I have great respect. However, as with administrative law judges deciding unfair labor practice cases, expert and accomplished persons sitting in review of the same or similar set of facts can reach different conclusions of law. It is the Board's responsibility to reconcile those differences.

<sup>83</sup> E.g., *Rental Uniform Service, Inc.*, 330 NLRB 334, 336 fn.10 (1999), citing *S.H. Kress & Co.*, 212 NLRB 132 fn. 1 (1974).

<sup>84</sup> *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994), quoting from *State Farm*, 463 U.S. at 50.

<sup>85</sup> *Allentown Mack*, 522 U.S. at 374.

<sup>86</sup> I adhere to the view expressed in my dissent to the NPRM, and echoed by many commenters, that there were numerous procedural deficiencies in the overall rulemaking process that collectively evidence an arbitrary process inappropriate to the scale of proposed revision in election procedures. See 76 FR 36829-36830. However, in this dissent, I find it necessary to rely only on those arbitrary processes attendant to the published Rule from the time of its initial November 2011 proposal to its final approval by Chairman Pearce and Member Becker on December 16.



decisionmaking, even as Board membership changes and political winds shift accordingly. Individuals reliant on Board law are at least assured that the law will not be changed by a “minority majority”<sup>87</sup> consisting of only two members of the congressionally intended full body of five.

The three-affirmative-vote requirement has been consistently followed by both Republican and Democrat Board Members. See *Ryan Iron Works, Inc.*, 345 NLRB 893, 895 fn. 13 (2005) (Republicans), and *Ingram Barge, Co.*, 336 NLRB 1259, 1259 fn. 1 (2001) (Democrats).<sup>88</sup> Circuit courts have acknowledged the Board’s practice as a reasonable institutional means of ensuring the stability of Board decisions. See *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 872 (9th Cir. 2011); *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 552 (D.C. Cir. 2006); and *International Transportation Service, Inc. v. NLRB*, 449 F.3d 160, 165 (D.C. Cir. 2006). Chairman Pearce and I both adhered to the practice in *Hacienda Resort Hotel & Casino*, supra, notwithstanding our acute awareness that the reviewing Ninth Circuit might disagree with the resultant Board decision that was based on extant precedent.<sup>89</sup>

In publishing the Rule, my colleagues readily acknowledge that they have failed to follow this established practice. As discussed below, none of the three arguments made in their defense provides a reasoned explanation for their action. Accordingly, the Rule is invalidly based on an arbitrary and capricious process.<sup>90</sup>

My colleagues first contend that they were not required to adhere to the three-affirmative-vote practice in this rulemaking proceeding because the Rule is “purely procedural” and thus does “not implicate the sorts of reliance interests that underlie the Board’s practice.”<sup>91</sup> They further contend that,

inasmuch as the Rule is procedural, it is exempt from the APA’s notice-and-comment rulemaking requirements.

Putting aside the question whether, having chosen to engage in informal notice-and-comment rulemaking under the APA, my colleagues can even claim that the Rule is purely procedural, I find they have not provided a rational explanation for this claim. A procedural rule is “one that does not itself ‘alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.’” *Chamber of Commerce of the United States v. United States Department of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999). A substantive rule, in contrast, “has a ‘substantial impact’ upon private parties and ‘puts a stamp of [agency] approval or disapproval on a given type of behavior.’” *Id.* Courts have found that this “distinction is often difficult to apply as even a purely procedural rule can affect the substantive outcome of an agency proceeding.” *Id.* Because of this difficulty, courts apply the notice-and-comment exemption set forth in Section 553(b)(3)(A) of the APA “with an eye toward balancing the need for public participation in agency decisionmaking with the agency’s competing interest in ‘retaining latitude in organizing its internal operations.’” *Id.* “[T]he question whether a rule is substantive or procedural for the purposes of § 553b is functional, not formal. That is why [courts] examine how the rule affects not only the ‘rights’ of aggrieved parties, but their ‘interests’ as well. *Id.* at 212., citing *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980).

The Rule here affects every party subject to the Board’s jurisdiction in representation cases and alters the Board’s representation case procedures in a sweeping manner. It substantially limits the right to a pre-election hearing, eliminates the right to pre-election Board review of a regional director’s direction of election, eliminates the right to automatic Board review of post-election issues, changes the standard for Board review of many contested electoral issues, and substantially impacts the rights of employees and employers to engage in communications about election issues prior to the election. These changes represent more than “incidental inconveniences.” *Chamber of Commerce*, 174 F.3d at 211–212. They clearly affect the rights and interests of parties subject to the Board’s representation case procedures and thus are of a substantive, not procedural, nature.

Accordingly, not only is the Rule substantive in impact, it also *does*

implicate the same reliance interests that underlie the adjudicatory practice requiring three affirmative votes for change. Although not dispositive, I suggest that the filing of over 60,000 comments, pro and con, in response to the NPRM supports the conclusion that the Rule is something more than a modest procedural revision. The public perception is that something more is at stake here.

My colleagues next contend that they are not bound by the three-affirmative-vote practice because the concern for “stability of legal rules” that it addresses only applies in case adjudication, not rulemaking proceedings. In doing so, they note that the Administrative Conference of the United States (ACUS) has cited the greater stability inherent in notice and comment rulemaking in recommending its increased use by the Board.<sup>92</sup>

My colleagues fail to explain, however, how departing from the Board’s established practice to permit a minority majority to conclude a sweeping, substantive rulemaking initiative does not raise concerns about the stability of Board law. Indeed, nothing in the ACUS recommendation suggests that rulemaking by the Board can or should be carried out on the vote of just two Board members or that the Board, when engaged in informal notice-and-comment rulemaking, should apply different voting practices than it does when engaged in rulemaking through case adjudication.

Assuming, arguendo, that a rule adopted pursuant to informal notice-and-comment rulemaking is likely to be more permanent than an adjudicated rule, that would seem to provide *greater* reason to require the affirmative votes of three Board members for such an undertaking. On the other hand, I venture that the product of rulemaking is now not much less vulnerable to reversal than an adjudicated rule as a consequence of change in Board membership and policy preference. All that is required is another proposed rule revision, another notice-and-comment period, and a rationally justified final rule.<sup>93</sup> My colleagues have now established that such action may be undertaken with the approval of only two of three sitting Board members, and so they cast doubt on the stability of the very Rule they endorse. Their

<sup>92</sup> ACUS, Recommendation 91–5, *Facilitating the Use of Rulemaking by the National Labor Relations Board* (adopted June 14, 1991), 56 FR 33851 (July 24, 1991).

<sup>93</sup> Of course, according to my colleagues’ reasoning, any subsequent rule revision of their Rule would be procedural and would be exempt from the APA notice-and-comment requirement.

<sup>87</sup> I borrow this phrase from Jonathan Remy Nash, “The Majority that Wasn’t: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements” (August 11, 2008). U of Chicago, Public Law Working Paper No. 227. Available at SSRN: <http://ssrn.com/abstract=1217876> or <http://dx.doi.org/10.2139/ssrn.1217876>.

<sup>88</sup> In the 27 years of this practice, my colleagues cite only two 1997 cases where two members of a three-member Board did not adhere to it.

<sup>89</sup> That is, in fact, what happened. See *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d at 870–876.

<sup>90</sup> I emphasize here that I am addressing an internal action requirement, not a statutory quorum requirement. I leave to others the question whether issuance of the rule runs afoul of the Board’s quorum requirement, as discussed and defined by the Supreme Court in *New Process Steel L.P. v. NLRB*, 560 U.S. \_\_\_, 130 S.Ct. 2635, 2639–42 (2010).

<sup>91</sup> 76 FR 80138, 80146.

reservation for further consideration of other elements of the NPRM just makes the state of representation case law even more uncertain, as does their simultaneous adjudicatory assault on extant law.<sup>94</sup> As a result, any way one looks at it, my colleagues have failed to provide a reasoned explanation for departing from the agency's three-affirmative-vote practice.

Lastly, my colleagues contend that they were not required to adhere to the three-affirmative-vote practice because the Rule does not overrule any Board decisions. In my view, the policy supporting this practice mandates its application to the revision of rules that have a substantive effect on the interests of those involved in representation case proceedings regardless of whether the revision overrules specific case precedent. However, even a cursory review of the Rule establishes that my colleagues misrepresent its effect on precedent as well.

In both *Barre-National, Inc.* and *North Manchester Foundry, Inc.*, discussed supra, the Board reversed regional director actions that denied employers the opportunity to present evidence on eligibility issues. As previously stated, my colleagues' defense of the Rule's narrow interpretation of Section 9(c)(1) misleadingly suggests that these cases are not to the contrary. The Rule clearly overrules this precedent.

## 2. Departure From Board Process With Respect to Dissenting Board Members

As stated in the Background section of this statement, the Rule was issued pursuant to the votes of Chairman Pearce and Member Becker on November 30 to proceed with drafting a final rule, and votes by the same two Board Members on December 15 to direct the Solicitor to issue the Final Rule upon its approval by a majority. I voted against each action. On December 16, my colleagues modified and approved the Rule. Without further action by me, the Rule issued and was forwarded by the Solicitor for publication in the **Federal Register**.

This marked the first known instance in Board history in which Board members intentionally refused to provide a colleague a reasonable period of time in which to prepare and issue a dissenting statement simultaneously with the controlling decisional document.

My colleagues utterly fail to justify their ad hoc action. As an initial matter, they assert that nothing in law compelled them to wait to issue the Rule until after I had an opportunity to review and prepare my dissent to it. Indeed, I can cite to no statute or case expressly holding that they were required to do so. This does not, however, answer the question whether their action should be considered arbitrary and capricious.

As an initial matter, my colleagues ignore the importance of dissents in society, law, and federal administrative practice. In this regard, dissent is a bedrock principle of our democracy and has become deeply engrained in American culture. See *Lee v. Weisman*, 505 U.S. 577, 607 (1992) (Justice Blackmun concurring) ("Democracy requires the nourishment of dialog and dissent"); see also *Johnson v. Raemisch*, 557 F.Supp. 964, 969–970 (2008), citing Cass Sunstein, *Why Societies Need Dissent* 210–212 (2003) ("Dissents have contributed to American democracy by forcing the majority to articulate justifications for widespread practices and by exposing the weaknesses of long held beliefs").

Specific to law, dissents are a useful tool in effecting well-reasoned legal decisions. Indeed, Supreme Court Justice Ruth Bader Ginsburg has stated that dissents are important because they can "lead the author of the majority opinion to refine and clarify her initial circulation" and may be persuasive enough to "attract the votes necessary to become the opinion of the Court." See Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn.L.Rev. 1, 4 (2010). My experience as a Board Member confirms Justice Ginsburg's observation. On numerous occasions, circulated dissents have prompted substantial revision of prior draft majority opinions, and in some instances an initial dissent ultimately became the Board's final decision.

It is true, as my colleagues state, that the APA does not require permitting dissents to promulgated rules. It is also true that the APA does not prohibit or expressly endorse prohibition of dissent. Consistent with the above, dissents are common in the federal administrative decisionmaking processes. See, e.g., *United States Dept. of Homeland Security, Transportation Security Administration and AFGE*, 65

FLRA 242 (2010) (Member Beck dissenting); and *Chambers v. Dept. of the Interior*, 103 MSPR 375 (2006) (Member Sapin dissenting). And, in recent years, dissents have become a widely accepted practice in federal agency rulemaking proceedings. See *Position Limits for Futures and Swaps*, 76 FR 71626, 71699, 71700 (Nov. 18, 2011) (to be codified at 17 CFR part 151) (Commissioners Jill Sommers and Scott O'Malia dissenting); *Demand Response Compensation in Organized Wholesale Energy Markets*, 76 FR 16658, 16679 (March 15, 2011) (to be codified at 18 CFR part 35) (Commissioner Philip D. Moeller dissenting); *Representation Election Procedure*, 75 FR 26062, 26083 (May 11, 2010) (codified at 29 CFR part 1202, 1206) (Chairman Elizabeth Dougherty dissenting); and *Market-based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities*, 72 FR 39904, 40046 (July 20, 2007) (codified at 18 CFR part 35) (Commissioner Philip D. Moeller dissenting). Thus, while my colleagues may not have been legally required to accommodate my dissenting opinion in this matter, by failing to do so they removed an important component from the decisionmaking process and acted inconsistently with good federal administrative practice.

More to the point, my colleagues fail to identify a single instance in which the Board has for any reason issued a rule by adjudication or rulemaking without permitting prior circulation and simultaneous publication of a dissent. As they note, I previously dissented to the NPRM in this rulemaking,<sup>95</sup> and I dissented to both the Final Rule<sup>96</sup> and the Notice of Proposed Rulemaking<sup>97</sup> in the recent employee rights notice-posting rulemaking proceeding. There was also a dissent by Member Johansen to the Final Rule on appropriate bargaining units in the health care industry.<sup>98</sup> In other words, while the number of major Board rulemaking proceedings has been few, there has been a simultaneous dissent in every one.

My colleagues suggest that there is no imperative to permit dissent because notice-and-comment rulemaking, as opposed to case adjudication, is, "in effect, a dialogue between the administrative agency and the public—not an intramural debate between or among agency officials."<sup>99</sup> They also

<sup>94</sup> See, e.g., *2 Sisters Food Group*, 357 NLRB No. 168 (2011). In a decision issued only one week after publication of the Rule, Chairman Pearce and Member Becker articulated guidelines for exercise of a regional director's discretion to determine whether to hold an election away from an employer's premises, substantially increasing the likelihood that an election will be held off premise whenever a petitioning union objects to an on-site election. Id., slip op. at 4–8. Moreover, Member Becker's partial dissent advocated overruling precedent to hold that an employer cannot compel employee attendance in a captive audience meeting about unionization at any time during the critical pre-election period. Id. slip op. at 10–14. It requires no great prescience to surmise that this issue will soon be revisited.

<sup>95</sup> 76 FR 36812, 36829.

<sup>96</sup> 76 FR 54006, 54037 (Aug. 30, 2011).

<sup>97</sup> 75 FR 80410, 80415 (Dec. 22, 2010).

<sup>98</sup> 54 FR 16336, 16347 (Apr. 21, 1989).

<sup>99</sup> 76 FR 80107.

suggest that my participation in events prior to issuance of the Rule has been sufficient for purposes of expressing my view. With all due respect, that is utter nonsense, and my colleagues would say the same were they in my position. In adjudicated cases of major import, many of which involve adoption of rules in representation cases, the Board frequently invites and gets public comment well beyond the position statements of the particular parties involved.<sup>100</sup> I have never heard it suggested that this diminishes or defeats the right of a Board member to circulate a written dissent in advance of a final published decision and to have that dissent published simultaneously. Nor have I heard it said, for instance, that a Board member's participation in an oral argument obviates the need to accommodate a subsequent dissent by that member.

At least facially, my colleagues articulate a credible concern that an individual Board member not be allowed to veto a rule or adjudicated decision by inaction or delay. I agree. That is why the Board has since 2001 operated under ES Memo 01-01, a Board-approved procedural order concerning the "Timely Circulation of Dissenting/Concurring Opinions." ES Memo 01-01 provides for issuance of a Board decision in an adjudicated case without a dissent if 90 days have passed following the majority approval of a draft without action by the remaining Board Member or Members.

Obviously, application of that order in this proceeding would have precluded issuance of the Rule until 90 days after its December 16, 2011, approval. Once again, however, my colleagues rely on the distinction without difference that this is a rulemaking proceeding to which ES Memo 01-01 does not expressly apply, as opposed to the Board's frequent rulemaking in adjudicatory proceedings, to which it clearly does apply. In the alternative, they suggest that ES Memo 01-01 is satisfied by my opportunity to circulate a post-issuance statement, which they have already declared in the December 15 Order to be a personal statement "and shall in no way alter the Board's approval of the final rule or the final rule itself." I think not.

Nevertheless, suppose there were no ES Memo 01-01, only an unbroken 76-year practice in all published decisions and notice-and-comment rules giving no indication whatsoever that the Board has ever denied an individual member

the reasonable opportunity to participate in the deliberative process by circulating a dissent prior to final action and to have that dissent published simultaneously. By what rational standard can my colleagues deny me that opportunity on delay grounds, where the nearly 200 page draft of the Rule was circulated in the late afternoon of Friday December 9 and approved for final issuance by my colleagues five working days later?

This brings me to my colleagues' final defense of their action. That is, they say they were entitled to issue the Rule out of apprehension that the rulemaking process would be indefinitely delayed or even derailed, not as any consequence of my action, but solely because Member Becker's term was about to expire. As they stated in the Rule, echoing earlier statements by the Chairman prior to and at the November 30 open meeting, "The Board's decision in this regard is informed by the possibility that after Member Becker's service ends at the end of the current congressional session, no later than January 3, 2012, the Board will be reduced to two Members, and under the Supreme Court's recent *New Process* decision, *supra*, may be unable to act on the proposed rule for a considerable period of time."<sup>101</sup>

As I noted in voting against the December 15 order, the apprehension expressed about a prolonged disruption of Board operations was somewhat allayed by the President's December 14 announcement of the intent to nominate two new Board members, Richard Griffin and Sharon Block. As it came to pass, they and pending nominee Terence Flynn received recess appointments on January 4, 2012. Even were that not the case, vacancies and turnover in agency membership do not generally qualify as a rational justification for departure from agency processes. In a case on point, the DC Circuit rejected the impending

termination of a Securities and Exchange Commissioner's term as a ground for excusing compliance with APA notice-and-comment requirements. The court distinguished from truly exigent or emergency circumstances "the not uncommon circumstance facing commissions when their membership changes during the course of a rulemaking, which may involve appeals and remands and thus extend for a period of years. Although the Commission's membership would change after June 30, 2005, and the even division among the remaining Commissioners could delay further action on the Rule, which the Commission considered necessary to redress 'a serious breakdown in management controls,' \* \* \* the risk of such delay is hardly atypical and does not satisfy the narrow exception."<sup>102</sup>

Further, my colleagues' determination to proceed with issuance of the Rule sharply contrasts with the practice of past Boards confronting the same situation. During the course of a rulemaking initiative in the mid-1990s, the Board considered the possibility of issuing a proposed Rule prior to the departure of one member, with dissenting opinions to follow, but ultimately decided to adhere to traditional agency decisionmaking practices. *See* William B. Gould IV, *Labored Relations* 85-88 (2000).

Again in December 2007, a five-member Board with a three-member Republican appointee majority faced the imminent expiration of the terms of Chairman Battista and Members Walsh and Kirsanow. As is well known, an attempt was made to provide for continued post-expiration decisionmaking by then-Members Liebman and Schaumber. That attempt was ultimately invalidated over two years later by the Supreme Court's *New Process* decision.<sup>103</sup> Even had the Court ruled differently, however, it was understood by all that the two

<sup>101</sup> 76 FR 80146 fn. 25. I note that for this same reason, the Chairman and Member Becker summarily proposed and approved a December 9 emergency memorandum that effectively suspended ES 01-01 in several adjudicatory proceedings by providing for issuance of decisions approved by them on and after December 16 with any dissent by me to follow. As it happened, there was no need to invoke this procedure in any of the subject cases.

The Chairman notes that I joined in approving several contingent rules to assure the maintenance of administrative routines, to the extent legally permissible, in the event the Board lost its quorum. The Chairman was fully aware at the time that these actions did not in any way imply that I endorsed the idea that a pending loss of quorum justified the suspension of customary decisional practices in contemplation of a major change in Board law and procedure, and it is unfortunate that he now suggests otherwise.

<sup>102</sup> *Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 908 (DC Cir. 2006).

*Consolidated Alum. Corp. v. TVA*, 462 F.Supp. 464, 476 (M.D. Tenn. 1978), is not to the contrary. In *Consolidated*, the court held that TVA's deviation from its well-settled traditions regarding rate adjustments was not "totally unjustified" because the impending loss of a quorum was a good reason to make a decision. But the court did not rely solely on the pending loss of a quorum as in finding the agency action was not arbitrary and capricious. Instead, the court found that the agency's action before its loss of a quorum was necessary for the agency to avoid a violation both of its statutory requirements and its covenants with the holders of its bonds. *See id.* at 476. The Board confronted no similar potential for statutory or contractual violations here.

<sup>103</sup> *New Process Steel L.P. v. NLRB*, U.S., 130 S.Ct. at 2639-42 (2010).

<sup>100</sup> See, e.g., *Specialty Healthcare*, *supra*; *Lamons Gasket*, 357 NLRB No. 72 (2011); *UGL UNICCO Service Co.*, 357 NLRB No. 76 (2011).

remaining Board members would only be able decide those routine cases in which they agreed on the disposition of all issues under extant precedent. In December 2007, there were cases of significance pending in which a majority had approved a consensus draft, but expected dissents were not finalized. Unlike Chairman Pearce and Member Becker, the choice was made not to issue decisions in those circumstances, even at the risk of prolonged delay or a different ultimate outcome.

\* \* \* \* \*

Thus, not a single one of my colleagues' asserted reasons for abruptly departing from long-established Board procedural practices holds water here. Their actions in issuing the Rule and in approving the November 30 and December 15 orders were "a totally unjustified departure from well settled agency procedures of long standing."<sup>104</sup> As such, they were arbitrary and capricious, requiring that the Rule be invalidated.

#### IV. The Rule Limiting a Pre-Election Evidentiary Hearing Is Not a Logical Outgrowth of the Notice of Proposed Rulemaking

In at least one critical respect, the Rule is also invalid because it differs too sharply from the proposed rule. The NPRM proposed revised rules that would have permitted litigation in pre-election hearings of individual eligibility and unit inclusion issues affecting 20 percent or more of the potential bargaining unit. The adopted Rule is far more restrictive, effectively eliminating the right to litigate *all* issues not deemed relevant to the question of representation.

In order for the required notice to be deemed adequate in notice-and-comment rulemaking under the APA, a final rule must relate back to the proposed rule published in the **Federal Register**.<sup>105</sup> To determine whether an agency has met these requirements, courts will consider whether the final rule is a "logical outgrowth" of the proposed rule. *Shell Oil Co. v. EPA*, 950 F.2d 741, 747, 750–51 (D.C. Cir. 1992) (*en banc*).<sup>106</sup> Although foreseeable differences between a proposed rule and a final rule will not normally cause

notice to be deemed insufficient, the final rule is invalid if deviation from the proposal is too sharp. See *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983); *American Federation of Labor v. Donovan*, 757 F.2d 330, 338–339 (D.C. Cir. 1985); and *Northwest Tissue Center v. Shalala*, 1 F.3d 522, 528 fn. 7 (7th Cir. 1993).

Here, the majority's final rule on pre-election evidentiary hearings is not a logical outgrowth of the proposed rule. For reasons previously stated, the proposed rule was invalid under a *Chevron* step one analysis because of its impermissibly restrictive interpretation of what Section 9 requires. Any public concern about notice of this restrictive interpretation might reasonably be subverted by the express indication in the proposed rule that, in practical effect, the change from the current Board procedural norm would be to increase from 10 to 20 percent the number of individuals whose eligibility issues would be deferred to post-election litigation. However, the NPRM gave the public no notice of the possibility that any and all unit inclusion and voter eligibility issues would generally be deferred. Consequently, when my colleagues determined to make this change, it was incumbent upon them to follow a supplemental notice-and-comment procedure.

The majority's claim that it has deferred the 20% issue to another day is disingenuous and misleading. Moreover, their suggestion that the regional directors' discretion in this area remains unchanged is absurd. Quite simply, the Rule to go into effect nationwide on April 30 does not retain the 20% language, while it explicitly overrules the prior discretionary practice of deferring unit inclusion and eligibility involving up to 10% of a unit. Even if not intended, the change from the NPRM to the adopted Rule constitutes a bait and switch. The public is not expected to extrapolate from the Agency's published proposals its unspoken thoughts or guess what the agency really means. *Shell Oil Co.*, 950 F.2d at 751. The public has not had a meaningful opportunity to comment, and the Board has not had a meaningful opportunity to consider this necessary input. Consequently, this aspect of the Rule is invalid for the further reason of the failure to comply with the APA's notice and comment requirements.

#### V. The Rule Impermissibly Burdens First Amendment Free Speech Rights<sup>107</sup>

An employer's right to engage in free speech in the labor relations context has long been recognized by the Supreme Court. See *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477–479 (1941) (nothing in the Act prohibits employers from expressing their views about unions).<sup>108</sup> This right only has meaning if there is a realistic opportunity for the employer to speak to employees about the choice of representation, when that choice has been defined by the filing of an election petition. Furthermore, and of paramount importance in assessing the Rule's validity under the First Amendment, government regulations cannot, absent compelling circumstances, be drawn to redress perceived distortions in the debate about unionization. That is effectively what the Rule does, and I firmly believe that is what my colleagues intend it to do, notwithstanding their denials.

As previously stated, the point of limiting pre-election hearings and eliminating post-hearing briefs, pre-election requests for review, and the customary post-decisional waiting period is not rationally related to systemic problems of procedural delay. It is transparently and rationally related to shortening by three weeks or more the time from the filing of a petition, when support for unionization is often at its peak, to the day of the election.<sup>109</sup> The record in this proceeding is replete with claims and counterclaims about when an employer learns about a unionization campaign and, if so inclined, begins to oppose it. I readily concede than many employers know about a campaign long before a petition is filed, and that some employers make their opposition to unions quite clear before there even is a campaign. On the other hand, it seems that my colleagues do concede there are some employers who only learn of the unionization effort when notified of a petition's filing, and that prior to then they have attended to business operations without expressing to their employees any views about the merits of unionization. As

<sup>107</sup> I emphasize that I find no need in the following analysis to rely on Sec. 8(c) of the Act.

<sup>108</sup> See also *Thomas v. Collins*, 323 U.S. 516, 537–538 (1944) ("employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty.").

<sup>109</sup> The majority claims that the Rule does not necessarily shorten the time between the petition and the election because it does not establish any rigid timelines. Really? In that case, there is no point at all to the pre-hearing elements of their Rule, the express purpose of which is to "directly speed Board processing of representation cases." 76 FR 80150.

<sup>104</sup> *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 542 (1978).

<sup>105</sup> As previously stated, my colleagues err in claiming that the Rule is purely procedural and not subject to the APA's notice-and-comment requirements.

<sup>106</sup> See generally, Philip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 Admin. L. Rev. 213 (1996).

long as this possibility exists, and in the absence of any objective measure in our record of its frequency, the Board is required to consider it in evaluating the consequences of a rule in which at least some employers will have less time than previously to communicate with their employees about the unionization campaign.

What consideration do my colleagues provide in this regard? Feigning a neutral attitude towards the electoral outcome, they emphasize their belief that employers always have the upper hand in campaign communications.<sup>110</sup> My colleagues and pro-union commenters depict an employer on the day a petition is filed as sophisticated and fully knowledgeable about labor unions, collective-bargaining, and election procedures. For those sorry few who are caught unaware and unprepared, labor consultants and counsel will seek them out to offer their services. In any event, through daily contact with employees in the workplace, and with the opportunity to engage in such lawful activities as captive audience speeches, any employer can quickly and effectively present the case against unionization. As if that were not enough to tip the balance against unions, because elections are generally held on an employer's premises, the employer has the great advantage of a "last word" with employees just before they vote.<sup>111</sup>

In sum, it does not really concern my colleagues that the Rule should limit the time in which an employer can exercise First Amendment rights of free speech about unionization because any such effect permissibly redresses an unfair balance of power between unions and employers in the battle for employee support. The problem with this position is that it runs directly counter to the Supreme Court's decision in *Citizens United v. Federal Election Commission*,

130 S.Ct. 876 (2010). The Court there held that the government cannot prohibit independent expenditures in support of a political candidate based on the source's corporate identity.<sup>112</sup> Relevant to this proceeding, the Court explicitly overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and rejected the "anti-distortion theory" in *Austin* that corporate spending limitations could be premised on preventing "corporations from obtaining an unfair advantage in the political marketplace by using resources amassed in the economic marketplace." *Citizens United*, 130 S.Ct. at 904 (citations omitted). The Court reasoned that First Amendment protections cannot turn on a speaker's financial ability and that *Austin* "interferes with the 'open marketplace' of ideas protected by the First Amendment." *Id.* at 907, citing *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008). In short, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 904, quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

My colleagues' Rule has the same impermissible "anti-distortion" purpose applied to the "uninhibited, robust and wide-open debate in labor disputes" that is an essential part of Federal labor policy.<sup>113</sup> By limiting the time for employer speech, they seek to enhance the relative voice of a union and its proponents. The Rule far transcends any Board election speech regulation that would fall within the "narrow zone" deemed permissible by the *Brown* Court.<sup>114</sup> Further, given the

discriminatory purpose and effect of the Rule, which fall more heavily on employers than unions, it cannot be justified as a reasonable and neutral time, place, and manner limitation of speech. The Rule is clearly contrary to the First Amendment.

## V. Conclusion

The current, longstanding Board representation case procedure, now doomed to imminent and radical revision absent judicial intervention, has worked well for most election participants. It could be better. The ideal objective would be to have a system in which no representation case takes longer from start to finish than reasonably necessary, by objective standards, (1) to provide participants an opportunity to resolve legitimate disputes, (2) to provide a meaningful opportunity during the critical pre-election period for proponents and opponents of unionization to exercise their free speech rights, and (3) to assure adequate Board involvement in oversight of duties delegated to the regional directors. I would enthusiastically support and participate in a broad-based agency and public effort to carefully review and selectively reform our electoral procedure to meet this objective. That is not what has happened in this rulemaking.

Stripped of considerable legalistic dross, my colleagues' Rule belies an entirely different, single-minded purpose. They believe that unions should be winning more representation elections, and they revise the Board's electoral procedures to accomplish that end. Their effort contravenes the Act, lacks the requisite rational justification, and infringes on First Amendment rights. That is reason enough as a matter of law for the Rule to be invalidated.

settings such as imminent elections, however, Congress has clearly denied it the authority to regulate the broader category of noncoercive speech \* \* \* *Brown*, 554 U.S. at 74.

<sup>110</sup> 76 FR 80153–80155.

<sup>111</sup> 76 FR 80155. But see *2 Sisters Food Group*, discussed *infra* at fn.66.

<sup>112</sup> 130 S.Ct. at 913.

<sup>113</sup> See *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008).

<sup>114</sup> "The NLRB has policed a narrow zone of speech to ensure free and fair elections under the aegis of § 9 of the NLRA, 29 U.S.C. 159. Whatever the NLRB's regulatory authority within special

From the agency perspective, there is further reason to object. With this Rule, the recent adjudicatory overruling of related representation case law, and the prospect of further change both in the reserved elements of the NPRM and in pending representation cases, my colleagues have deviated so far beyond the norm of partisan shifts in agency policymaking as to imperil the Board's legitimacy in the eyes of the Congress that created it and in eyes of a substantial portion of the public that it serves.<sup>115</sup> To an increasing number of

persons outside and inside this venerable agency, it now appears to be directed by a myopic conviction that all law and procedure must be channeled to assuring the prize of workforce unionization, no matter how incompatible that conviction may be with the Taft-Hartley Act, or the reality that less than 10 percent of private sector employees have chosen collective-bargaining representation. With this Rule, I fervently believe that

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by that Board and the General Counsel veered too far from the elusive standard of neutrality. Jonathan P. Hiatt and Craig Becker, *Drift and Division on the Clinton NLRB*, 16 Lab. Law. 103 (2000). The authors of that article contended that far more radical and fundamental changes in Board law were necessary to revive the interest of American workers in unionization.

my colleagues imperil the Board's future, and as such, they may in the end do far more to damage the interests they promote than to further them.

I now dissent from the Rule. Notwithstanding judicial doctrines of deference to agency action, it should be invalidated. Even if not, it would behoove the current Board to rescind the Rule and start over in search of electoral revisions that would really address what can reasonably be defined as systemic delay.

Signed in Washington, DC, on April 23, 2012.

**Mark Gaston Pearce,**  
*Chairman.*

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<sup>115</sup> It is no coincidence that a 2000 article by two union lawyers criticized the so-called Clinton Board for acting only within "the increasingly confined (indeed, relatively insignificant) doctrinal terrain on which the conflict over U.S. labor policy is enacted," even as Congress complained that actions