Testimony of Caren P. Sencer Before the Senate Committee on Health, Education, Labor and Pensions

On the NLRB's New Election Rule (February 11, 2015)

Chairman Alexander, Ranking Member Murray, and Members of the Committee on Health, Education, Labor and Pensions, thank you for this opportunity to testify about the National Labor Relations Board's rule to streamline and modernize election procedures.

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

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

In my current work, I have had broad exposure to the NLRB representation process and have assisted clients in over 200 representation petitions with direct involvement in 27 petitions in the past year alone. The petition and Board conducted election is the statutory method for recognizing, through a democratic process, the existence of a collective bargaining representative.

The National Labor Relations Act is a recognition that business of our country flows more freely, and our economic system works better, when workers have the protection of the Act to join together to form unions for their collective good. The Act was and remains a response to strikes and other disruptions to commerce. Updating the election procedure rules to conform to modern technology and existing practice does not alter the purpose of the Act but rather streamlines procedure and furthers the purpose of the Act by providing more and clearer information to workers.

For the Act to be effective in its goal of protecting workers, the Board must do more than adjudicate or attempt to mediate disputes between employers and unions. The Board is charged with protecting the rights of employees to organize. Its first and utmost concern should always be the rights of workers seeking to use its process to establish, change or disestablish a collective voice in the workplace. That process should be easily understood and accessible. If something creates a barrier to free choice and self-organization, it should be rejected or modified.

To put the Board's new rules in context, let me first explain the basic election procedure under the current rules.

The representation process formally starts by a union filing a request for representation. The request is made in writing, using a provided form, and must be accompanied by a showing of interest that the union is authorized by at least 30% of the proposed unit to represent the employees for collective bargaining. This seems straightforward, but jockeying for tactical advantage quickly begins.

The Board operates out of 26 regional offices. Each regional director has the authority and discretion to operate her region as she sees fit. This currently includes when the showing of interest must be submitted to process the petition, when to set petitions for hearings, when to grant continuances, when and how subpoenas are issued, and when to extend filing deadlines. Practitioners are not generally aware of these variances between Regional practices.

In most Regions, a hearing will be initially scheduled between the 7th and 12th day after a petition is filed. Employers request and are routinely granted a continuance of up to a week. If the hearing is held, it may last several days, and the parties are given the opportunity to file a closing brief one week (or more) later. The record is thus closed, at the earliest, approximately 3 weeks after the petition is filed. The Regional Director then issues a Decision and Direction of Election or an Order Dismissing the Petition. This generally takes at least two weeks but can take significantly longer. The election is directed no earlier than 25 days after the Regional Director's decision, in order to allow either party an opportunity to seek pre-election review from the Board, even though the Board is not required to rule on the request for review prior to conducting the election and these requests are rarely granted. As a result, in cases where there is no stipulation and a hearing is held, the election is not held until a minimum of 65 days, and often longer, after the petition is filed.

The current system provides many opportunities for employers to delay the process. This puts enormous pressure on the union to agree to unreasonable demands from the employer regarding the composition of the bargaining unit and other issues. Under the current system, the employer can force a hearing solely for delay purposes to resolve issues not relevant to whether there is a question concerning representation requiring an election. This delays an election weeks and sometimes months, because the Regional Director does not have the authority to refuse to take evidence in the absence of dispute requiring resolution. By threatening to delay the election, the employer will often force the union to accept concessions to remove or add workers to an already appropriate unit, to include supervisors in the unit, to agree to a disadvantageous election day or other procedures that the employer believes are advantageous.

In many cases, the parties are able to stipulate to the scope of the bargaining unit and to the time and place for the election because of the efforts of the Region to apply the Board's goal of an election being held within 42 days of a petition being filed. Most employers insist upon the 39th, 40th, or 41st day for an election. The Union has no choice but to agree to this delayed election because, if the matter goes to a hearing without a stipulated election, the hearing will inevitably result in delay of the election for at least several weeks beyond the 42nd day. This is true even when there is no actual dispute between the parties as to the scope of the appropriate unit. The threat of delay by litigation throughout the petition procedure skews the pre-election process.

The NLRB's new rules take important steps toward reducing the opportunity for unnecessary delay. The Regions would be permitted to grant an extension from the hearing date, normally scheduled for the 8th day after the petition is filed, only under special or extraordinary circumstances.

The hearing would be focused based on the petition and the responding party's written statements (statement of position form), due the day before, which would require: all parties to take a position on the appropriate unit; if there is a dispute on the unit description, an explanation of why the alternatively proposed unit is appropriate and the originally proposed unit is not; the appropriate time, place, and date for an election; and, confirming basic jurisdictional issues. The only issues to be addressed at the hearing would be those that truly present a dispute between the parties. And, based on the discretion of the Regional Director, some issues that affect only a small percentage of potential voters could be postponed for resolution until after the election if the issue is still relevant. The hearing officer, at the direction of the Regional Director, would solicit offers of proof to determine whether the issues in dispute involve factual questions requiring introduction of evidence.

Written briefs would not be a matter of course but rather would be allowed only by special permission, for example, in complex cases. Most cases involve only one or two issues, and they are typically the same issues regarding supervisory status and community of interest.[1] As a result, oral closing arguments would become the norm, thus eliminating up to 2 weeks of delay caused by waiting for transcripts and subsequent briefs to be filed. Not only would this continue to create a complete record, but it would reduce the expense for all parties and allow Regional Directors to start their decision making process sooner.

The NLRB's rule also eliminates the requirement of filing a pre-election request for review to the Board and instead allows for all appeals to be consolidated into a single post-election process. This would allow not only for prompt elections but would also allow both parties to retain the full right to request review. This creates efficiency by allowing parties to litigate, through the post-election review process, only those issues that remain relevant after the election. In contrast, under the current practice, elections are delayed for at least 25 days after a Decision and Direction of Election to allow the parties to seek pre-election review. This would bring the Board's rules in line with most other administrative agencies and courts where interlocutory appeals are discouraged.

Each of these changes to the pre-election procedure will likely reduce the number of hearings involving the presentation of evidence since there would need to be an actual dispute involving a question of fact for the Regional Director to receive evidence. The employer's leverage to push the union into the 42nd day for an election is restricted in the absence of a true representational dispute. If the only issue between the parties is the appropriate date for an election, the Regional Director could rely on the statement of position form of the employer and the direction in the new rules to schedule the election for as soon as practicable and could set the election date without taking evidence. This would, of course, take in to consideration the requirement of posting a notice at the job site explaining the

[1] The Board has issued several manuals and guides to the representation process which are available on its website, to explain both the process as well as substantive approaches to representation issues.

election process, time for the employer to produce the *Excelsior*[2] list and time, if not waived, for the union to use the list to contact employees away from the work site.

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

These new procedures will equally apply to petitions that management can file to resolve a dispute about whether the union either initially or continues to represent a group of workers. This is the RM procedure permitted by Board rules. And the new procedures will apply to petitions filed by workers who wish to decertify an incumbent union. This is the RD procedure. The management community has not pointed to any reason why those procedures should not be modernized and streamlined.

The rules are not ground breaking, nor, to be perfectly frank, do they go far enough. The rules reflect practices that have been applied in some Regions already and are not particularly controversial. Most of my practice is in the seven Regions on the west coast. From my experience, representation hearings are regularly scheduled to be held 7 days after the petition is filed. Under the rules, this would be extended to the 8th day. Petitions are currently accepted by fax as long as the original signatures on the showing of interest are received by the Regional office within 48 hours of the submission. Under the new rules, petitions may be filed electronically and the original showing of interest would have to be filed simultaneously with the petition.

When there is a dispute over scope of the bargaining unit, but the number of employees in the disputed classifications represents a small percentage of the unit, Regional Directors regularly approve stipulations for election allowing employees in the disputed classifications to vote subject to challenged ballots. The rule would leave the discretion with the Regional Director to approve a stipulated election agreement with some disputed classifications or positions but would not set a strict threshold and would add the discretion to decline to take evidence *pre-election* if there is only a limited dispute that is not relevant to whether a question of representation exists requiring an election and is not likely to affect the outcome of the election.

The above examples show how the rules simply codify existing best practices. By standardizing the Regions' best practices, the new rules promote predictability and efficiency and reduce the opportunity to manipulate the procedure. Many employers have accepted these practices although they use the threat of litigation to extract concessions on the composition of the unit and the date of the election because they know the union wants to avoid a lengthy hearing process. It is very likely that, under the new rules, unions and employers will continue to stipulate to elections, and very few cases will actually go to hearing. The difference is that the discussions about what to stipulate to will take place in a

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

context where employers will not have multiple opportunities to force delay. This will help to level the playing field.

I would like to give a few examples from my practice of how the new rules would have made a positive difference.

In the first case, the union petitioned on January 31, 2014, for a small unit that included all employees within a distinct job classification. The employer, a subcontractor of the federal government, is experienced in labor-management relations and had, at the time, six collective bargaining agreements with the international union who filed the petition. The employer asked for an extension of time to hold the representation hearing – "The parties are sure to stip," said the representative. The day before the rescheduled hearing, it was clear that there would be no stipulation because the employer sought to add an additional job classification, doubling the size of the proposed bargaining unit. The employer also informed the Region that it would not be appearing at the hearing scheduled for the following day. The Union still had to appear and provide testimony about its labor organization status, the Board's jurisdiction over the employer, and the propriety of the proposed unit which, under Board law, is a presumptively appropriate unit. That was February 12. The Decision and Direction of Election issued on March 11. It included the mandatory 25 day waiting period to allow the parties to seek review notwithstanding the employer's refusal to participate in the process. The employer then delayed in agreeing to a date for the election. The employees filed their petition on January 31. They finally had an opportunity to vote for union representation on April 7. 67 days passed between the filing of the petition and the election even though the employer did not raise *any* issue in the pre-election hearing.

If the rules were in place, it is questionable whether the continuance of the hearing would have been granted. If the employer had failed to submit the statement of position and failed to appear on the day of the noticed hearing, the Regional Director could have issued a Decision and Direction of Election without taking evidence. The employer would have had 2 days to produce the *Excelsior* List. Given the size of the unit, the Union would likely have waived the right to a full 10 days with the *Excelsior* List. If the rules were in place, the election would have been held around March 10. Only 46 days would have passed between the filing of the petition and the election. The employees would have been able to exercise their right to vote 21 days earlier.

As another example, in 2010 a client filed a petition for a unit of approximately 45 automobile mechanics. Despite well-established Board law that automobile mechanics constitute a traditional craft unit that is presumptively appropriate, the employer insisted on a hearing where it took the position that service writers must also be included. The service writers would have constituted more than 20% of the unit. A hearing was held two weeks after the petition was filed. I did an oral closing. The employer requested and was provided with an extension to file a post-hearing brief. In its brief, the employer abandoned its position that the only appropriate unit needed to include the service writers. As a result, there were only 6 positions (representing less than 15% of the unit) in dispute. The Regional Director issued a Decision and Direction of Election two weeks later. The election was directed in the unit for which the Union had originally petitioned. The election was set for 26 days later. On the 14th

day after the Decision and Direction of Election issued, the Employer filed a Request for Review of the Decision of the Regional Director.

The election was held 78 days after the petition was filed. The employer filed objections to the election. The hearing on the objections was set for a month later and was held over 2 non-consecutive days. The second day was set for the employer to produce witnesses who had not been available the first day of hearing. Those witnesses were not produced on the second day and the employer disingenuously bought additional delay. The Employer filed a closing brief a week later. 162 days after the petition was filed, the Administrative Law Judge issued his recommended decision overruling each of the employer's objections and directing the challenged ballots to be counted. The number of ballots to be opened and counted was insufficient to affect the outcome of the election. The employer took exception to the report of the Administrative Law Judge. The Decision from the NLRB issued 9 months later. 427 days after the petition was filed, the union was certified.

The rules, in addition to requiring the employer to commit to a position in writing regarding the service writers, would have reduced the time it took from the filing of the petition until the election. If the employer had retreated from its position regarding the service writers prior to the opening of the hearing, the remaining disputed positions would have likely voted subject to challenge, and the challenges would have been resolved through a post-election hearing scheduled for twenty-one days after the tally of ballots. The hearing would have been held on consecutive days – not 34 and 44 days later. The Board would have had the discretion to deny review of the decision regarding the challenged ballots as it was insubstantial and did not raise any issue or general importance. Such discretion would likely have substantially reduced the nine-month delay at the Board. Applying the rules, the time between petition and certification would have been reduced to around 141 days.

As is clear from these examples, the rules will unquestionably reduce the time between the filing of a petition and an election while providing more fairness and certainty to the process.

Employers complain that the new rules will rush elections and deprive them of a full opportunity to give their views on unionization to employees. The timing issue is a red herring. I have been involved in elections under the California Agricultural Labor Relations Act where, by statute, elections are conducted within 7 days of the filing of the election petition.[3] That process seems to run smoothly. The employers, their representatives and the Agricultural Labor Relation Board have adapted to the statutory mandate of elections within 7 days, a provision which has been in place since the statute was enacted in 1975. Employers mount full anti-union campaigns, and the persuaders who work in this field have tailored their message to the amount of time provided. So too will employers adapt here – although to be clear, nothing in the rules suggests that elections will take place anywhere near as quickly as under California's Ag Act.

Additionally, employers who want to mount an anti-union campaign have plenty of opportunity to do so – their opportunity is not limited to the period after the union's petition is filed. In virtually all the cases where clients have filed election petitions, the employers have been well aware of the organizing efforts

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

prior to the filing. In many cases, employers have already started their overt anti-union campaign. In some cases, they have made a tactical decision, notwithstanding the organizing campaign, to wait to see if a petition is filed. They often wait until the last weeks before the election to mount their campaign. Many employers have anti-union inoculation programs in place which seek to influence employees from the date of hire and throughout employment on a regular basis regardless of whether or not the employer has ever been a target of union organizing. In my experience, virtually every employer is aware of any union organizing effort and can begin its campaign, if it chooses to engage in one, long before any petition is ever filed or an election is set.

Finally, on the timing issue, the employer community generally asserts that its First Amendment right would be impeded by a shorter period between the filing of petitions and holding elections. There is no First Amendment law that supports the idea that employers are allowed, as a constitutional matter, the right to more extensive campaigning. They have had the right to campaign for a union-free workplace from the day each worker is hired and the processing of a petition for an election doesn't change that.

Finally, for the Board's election procedures to be effective, they must keep pace with technology and development. Several of the new changes simply adapt the Board's rules to reflect new technology and forms of communication. Very few businesses operate without computer systems and email. Electronic communication has become the norm. While the federal courts have moved exclusively to electronic filing with electronic signatures, the Board allows electronic filing of only certain documents and, prior to the new rule, had not allowed for electronic filing of petitions or showings of interest. Now that can be done electronically. This is hardly radical.

Since the 1960s, employers have been required to provide the names and home addresses of employees in proposed bargaining units to the Region under the *Excelsior* List rule. In the last decade, the list is always typewritten and appears to have come from an electronic record keeping system.

Since the 1960s, communication and technology has changed. Almost all employers maintain computer systems for processing payroll. Under the Fair Labor Standards Act, the paystubs provided to employees are required to include the employee's home address. Almost all employees have a cell phone, email address or both. Employers keep this information in electronic files along with home addresses. There is no practical reason why the employer should not produce the eligibility list in an electronic document and do so directly to the Region and the Union. In the past year alone, I have seen an increasing number of employers have provided eligibility lists by email. Modern business and government depends on electronic delivery of information, and this should apply to the voter eligibility list as well.[4]

Some opponents of the Board's rules have expressed concern that providing email addresses and phone numbers is more intrusive on employee privacy than the current standard of producing home addresses.

[4] Recent Board decisions recognize the growing importance of electronic communications. In *J. Picini Flooring*, 356 NLRB No. 9 (2010), the Board required intranet posting of its Order in addition to traditional bulletin board posting. In *Purple Communications*, 361 NLRB No. 126 (2014), the Board weighed the property right of the employer against the Section 7 rights of the employees and found employees could use the employer's email system for mutual aid and protection.

This does not make sense. We choose when to read our emails, when to respond, and, most importantly, when to delete. The same is true of phone calls and voicemail. I would anticipate that in many cases, the union will use less intrusive means to communicate with employees in the bargaining unit once the *Excelsior* List requirement is expanded to require employers to provide available email addresses and phone numbers. Management has pointed to no record of abuse by unions of voter eligibility lists.

In my experience, incomplete addresses or PO Boxes are routinely provided, thwarting the purpose of the *Excelsior* list requirement. With the fissured work place and the dispersion of workers, communication at a single work site is less effective. For some groups of employees, including employees who work in multiple locations throughout the year, they use only a PO Box for mail. However, even if seasonal, their employer contacts them to recall them to work using the cell phone numbers that are already in the employer's electronic database. Providing this information is no more intrusive than providing a home address and works in favor of employee free choice as it provides meaningful ways to contact employees and provide information.

In conclusion, these rules are not radically different than the status quo. They reflect an attempt to standardize some of the best practices and create consistency across regions. Many of the changes attempt to align the Board procedures to procedures used by other agencies, bring the process into the 21st century and provide clear notice. The rules reduce unnecessary delay, simplify the procedure, provide more notice to all parties of the process, and permit the parties to seek Board review after the election at which time the parties know which, if any, differences over representational issues that may have existed prior to the election remain relevant or determinative. This saves time and money for employers, unions and the government, and promotes the ability of employees to exercise their right to vote.

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

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