UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Representation—Case Procedures RIN 3142-AA08

REPLY COMMENTS OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") on behalf of its affiliated national and international labor organizations, submits these reply comments in response to the National Labor Relations Board's Notice of Proposed Rulemaking (NPRM), issued on June 22, 2011. 76 Fed. Reg. at 36812 - 36847. The comments filed by the AFL-CIO on August 23, 2011, comprehensively addressed the NPRM and responded to concerns expressed during the NLRB's public comment hearing on July 18 and 19, 2011. Although our review of the written comments filed by the August 23, 2011, deadline, does not reveal any new issues which were not addressed in our previously-filed comments, these reply comments further address particular concerns expressed in the written comments regarding the pre-election hearing process, voter eligibility list requirements, and blocking charge procedures.

1. PRE-ELECTION HEARINGS PROVIDED FOR IN THE PROPOSED RULES COMPORT WITH SECTION 9 OF THE ACT; NO PARTY IS DENIED DUE PROCESS.

The proposed rule provides for a hearing that fully comports with the Act's requirements and accords due process to all parties. It states that "[a]ny party shall have the right to appear at any hearing ... and any party ... shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence relevant to any genuine dispute

as to a material fact." 76 Fed. Reg. at 36841, § 102.66(a). The only limitation is that the evidence must be "relevant to any genuine dispute as to a material fact." *Ibid.* There is no statutory or due process requirement for the Board to expend resources on a hearing to litigate issues that are neither material nor in dispute. Claims to the contrary are unfounded.[1]

The NLRA provides that, upon the filing of an election petition, "if it has reasonable cause to believe that a question concerning representation affecting commerce exists," the Board "shall provide for an appropriate hearing upon due notice." 29 U.S.C. § 159(c). This requirement, unchanged by the Labor Management Relations Act of 1947, was addressed by the U.S. Supreme Court in *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 706 (1945). The Court explained that "great latitude concerning procedural details [of the contours of the hearing] is contemplated," while any "requirements of formality and rigidity are altogether lacking."[2]

As the Court made clear, the statutory requirement for a hearing does not establish any particular form of hearing.[3] The NLRA does not specify a full hearing or a hearing of any particular character and there are no such generally applicable due process requirements. "In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Cleveland Bd. of Ed. v. Loudermill*, 420 U.S. 532, 544 (1984).[4] Neither

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[1] U.S. Chamber of Commerce, p. 3; National Association of Manufacturers, p. 11; Assisted Living Federation of America, p. 7; American Hospital Association/American Society for Healthcare Human Resources Administration/American Organization of Nurse Executives, p. 16-17.

[2] The subsequently enacted Administrative Procedure Act (APA) expressly exempts certification of worker representatives from its formal adjudication requirements. 5 U.S.C. §554(a)(6).

[3] *Lawrence Typographical Union v. McCulloch*, 349 F. 2d 704, 707 (D.C. Cir. 1964) ("Congressional use of the term 'appropriate hearing' shows that 'great latitude concerning procedural details is contemplated.'").

[4] *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1479-80, 1483-85 (D.C. Cir. 1989) (Written information and argument without direct or cross-examination of witnesses, satisfied procedural due process for informal hearings in certain corrective action proceedings against operators of hazardous waste facilities by under EPA rules.); *Weinberger v. Hynson, Wescott &*

due process nor the NLRA requires that a hearing provide for oral testimony or cross-examination. "There is no inexorable requirement that oral testimony must be heard in every administrative proceeding in which it is tendered." *FDIC v. Mallen*, 486 U.S. 230, 247-248 (1987). "Some hearings held entirely on paper may comport with the Due Process Clause." *Carfora v. New York*, 705 F. Supp 1007, 1010 (S.D. N.Y. 1989). Rather, the nature of a hearing is shaped by the "risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." *Califano v. Yamaski*, 442 U.S. 682, 696 (1978), citing *Mathews v. Edridge*, 424 U.S. 319, 344 (1975); *see Biliski v. Red Clay Consol. Sch. Dist. Bd. of Ed.*, 574 F.3d 214, 233 (3rd Cir. 2009). When considering the right to call witnesses, "the alleged benefits to be derived must be weighed, largely on a case-by-case basis, against the possible detriments, notably harassment and delay."[5]

In examining the nature of Section 9(c) hearings, it is instructive that they are considered investigatory and not adversarial. *Casehandling Manual* ¶ 11181. Indeed, the Hearing Officer does not make any recommendations, participate in the decision-making process, or make credibility findings. *Casehandling Manual* ¶ 11185. The purpose of the hearing is to efficiently collect information about the workplace for the sole purpose of determining whether "a question of representation" exists. 29 U.S.C. § 159(c). A section 9(c) hearing need not resolve every possible issue and need not encompass any specific format. The Board has discretion to conduct such a hearing in a manner that accomplishes this fact-finding without undue expense or delay for the Agency or for the parties. This is precisely what the proposed rules provide.

Dunning, Inc., 412 U.S. 609, 609, 620-621 (1973) (FDA hearing is not required "where it is apparent at the threshold that the applicant has not tendered any evidence which on its face meets the statutory standards [for a new drug application].").

[5] Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1282, June 1975.

Contrary to certain of the written comments, the proposed rules allow any party to present its position on any issue. If the position indicates that there may be material factual disputes, offers of proof are taken. If the offers indicate that the disputes are genuine, evidence is taken. In sum, evidence is taken as to any material factual issue genuinely in dispute. If a party does not take a position, it does not make an offer of proof. If there is no genuine dispute as to the issue, no evidence is taken. To do otherwise is to open the hearing process to irrelevant issues not in dispute. There can be no legitimate justification for such a waste of Agency and party resources.

Many comments critical of the pre-election procedures set forth in the proposed rules are based on fundamental misunderstandings of either the proposed rules or current Board law and procedures, or both. These are addressed, below:

a) Claims that the proposed rules establish "one-sided pre-hearing discovery."[6] In fact, the petitioning union always takes a position first – when it files its election petition it must set forth its position on the appropriate unit. In addition, it must list inclusions and exclusions and state the number of employees it believes are in the proposed unit. The employer's Statement of Position is a response to the petition.

b) Claims that additional pre-hearing requirements are imposed on employers, but not petitioners.[7] This argument overlooks the following additional requirements imposed by the proposed rules on the petitioner: it must file its showing of interest simultaneously with its petition; it must serve on all interested parties a copy of the description of procedures in representation cases and a Statement of Position form; it must assert that a substantial number of

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[6] HR Policy Association/Society for Human Resource Management, p. 34; American Council on Education, p. 8; Assisted Living Federation of America, p. 23.

[7] HR Policy Association/Society for Human Resource Management, p. 36; American Council on Education, p. 10.

employees wish to be represented; and it must designate its representative. 76 Fed. Reg. at 38619, § 102.60 and 61. This argument also overlooks the fact that many of the requirements on employers which are listed in the proposed rule are not new, but rather, are existing practice. For example, the employer has always been requested to post a Notice to Employees, to fill out a Commerce Questionnaire and to provide "a list, containing the alphabetized full names of the employees encompassed by the petition, together with their job classifications" and its "position as to the appropriateness of the unit described in the petition." *Casehandling Manual* ¶ 11009.1. Currently, employers are required, "as the case develops and other unit contentions are made," to provide "a list of employees in each such unit." *Casehandling Manual* ¶ 11025.1. The proposed rules merely codify these requirements.

c) Claims that the proposed rules deny "the right to resolve unit composition … issues."[8] This is not what the proposed rule provides. The NPRM unambiguously states that "the unit's scope must be established and found to be appropriate prior to the hearing." [Emphasis supplied.] 76 Fed. Reg. at 38624. The proposed rule does not state otherwise. It provides that "[i]f at any time during the hearing … the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer shall close the hearing." [Emphasis supplied.] 76 Fed. Reg. at 36841, § 102.66(d).[9]

There is a difference between issues relating to unit definition, which would be resolved pre-election, and issues relating to voter eligibility, which would be subject to the 20% rule.

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[8] U.S. Chamber of Commerce, p. 3; Coalition for a Democratic Workplace, p. 21; Seyfarth Shaw, p. 6; National Association of Manufacturers, p. 18.

[9] It is worth noting that "eligibility" and "unit inclusion and exclusion" are used interchangeably. *N.L.R.B., An Outline of Law and Procedure in Representation Cases*, p. 273 (E.g., "eligibility questions are treated in the chapter on Categories Governed by Board Policy, because these pertain basically to unit inclusion or exclusion issues.").

"[T]he scope of the unit pertains to such questions as to whether it should be limited to one plant rather than employerwide or to one employer as distinguished from multiemployers." Eligibility issues concern "the inclusion or exclusion of disputed employee categories or unit placement in general."[10] Citing from the Board's decision in *Boeing Co.*, 337 NLRB 152, 153 (2001), the *Outline* describes the following process for determining appropriate units:

> The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. See, e.g., *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000); *NLRB v. Lake County Assn. for the Retarded*, 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997).[11]

Further, "a union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless 'an appropriate unit compatible with that requested does not exist.'" *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); and *Purity Food Stores*, 160 NLRB 651 (1966). Indeed, as the *Outline* sets forth, "'the Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employees.'" *Bartlett Collins Co.*, [334 NLRB 484 (2001), citing *State Farm Mutual Automobile Ins. Co.*, 163 NLRB 677 (1967)].[12]

The proposed rules codify and continue this well-established process regarding unit determinations.[13] In no event will the parties, including employees, not know the scope of the bargaining unit prior to the election.[14]

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] This recitation is also useful to an understanding of the requirement in the proposed rules that if a party wants to litigate the appropriateness of a unit different from the petitioned-for unit, it must set forth such a position and, in keeping with the current process for determining unit appropriateness, describe the most similar unit it believes is appropriate. § 102.66(c).

2. THE BLOCKING CHARGE RULE IS NECESSARY TO INSURE FAIR AND FREE ELECTIONS.

Since 1937, the NLRB has postponed elections upon the filing of charges alleging election interference by the employer. The Board interrupts the election process in order "(t)o insure to the employees of the Company a free choice in selecting representatives for purposes of collective bargaining." *United States Coal & Coke Co.*, 3 NLRB 398 at 399 (1937). This is the rationale for the blocking charge rule, i.e., that no free and fair election can be conducted when workers' rights have been violated. The soundness of this policy explains why it has remained a "general policy" of the Board from the beginning. *Casehandling Manual* ¶ 11730. It is a policy premised on the Agency's central mission of "protect[ing] the free choice of employees in the election process." *Ibid.* The AFL-CIO strongly opposes going forward with an election in the face of conduct that appears to have affected the ability of workers to exercise free choice, as is urged in certain comments.[15]

In complaining that the blocking charge policy creates untoward delays, some comments have specifically referenced lengthy investigations.[16] We support an expedited process for investigating blocking charges. A determination should be made as soon as practical whether

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[14] The proposed rules also continue the current practice of leaving eligibility issues unresolved, in various circumstances, as described in our original comments. Here is but one example of the importance of the proposed 20% rule affecting eligibility issues: In Mileage Sales, a division of Bridgestone America, 20-RC-18313 (2010), the union petitioned for all tire workers, excluding an on-site work leader that the union believed was a supervisor. The employer opposed the exclusion. To avoid a hearing, the union agreed to his inclusion, but lost the election. The following year, the union petitioned for the same unit, (NLRB Case No. 20-RC-18363), this time including the work leader, but the employer claimed he should be excluded as a supervisor. A hearing was conducted, although the union later entered into a stipulation to exclude him. Both his initial exclusion [effectively disenfranchising him in order to avoid a hearing], and the subsequent hearing procedure would be avoided under the proposed rule.

[15] HR Policy Association/Society for Human Resource Management, p. 84-85; Coalition for a Democratic Workplace, p. 38-39; Council on Labor Law Equality, p. 25; Center on National Labor Policy, Inc., p. 20.

[16] U.S. Chamber of Commerce, p. 40-41.

there is reasonable cause to believe the violations alleged have occurred such that no fair election can be conducted. It should be noted, in this regard, that blocking charges may be filed in response to employer misconduct that was deliberately engaged in for the precise purpose of triggering such charges and so delaying an election. In any event, an expedited investigation is warranted, as set forth in our original comments.

If it is determined that reasonable cause exists to believe that workers' rights have been violated, as alleged, no election should be conducted until such damage can be remedied, unless the petitioner agrees to go forward with an election. If workers are required to make an election choice before the fear and intimidation caused by the violations has been remedied, the impact of the unlawful conduct will become magnified and entrenched. If the election goes forward, the harm to workers' rights will be impossible to undo at some later time and their right to a free election will be lost. No justification has been offered for tossing out this decades-old policy which serves the Agency's core mission of protecting employees' freedom of choice.

3. NO EVIDENCE OF ABUSE HAS BEEN SHOWN IN CONNECTION WITH THE VOTER LIST.

The proposed rules would change the procedures with respect to production of voter lists by requiring that the list contain available telephone numbers and e-mail addresses for each voter. 76 Fed. Reg. at 36820, § 102.67(j). This commonsense change will result in a more informed employee electorate. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 568 (1979). As discussed in our original comments, the proposed rules regarding the voter list constitute a mere codification and up-dating to reflect modern communications technology and bring the Board's election procedures into the 21st century. But without explanation or support, the proposed rules impose a restriction on use of the list and invite comments on penalties for misuse. The AFL-CIO opposes the proposed restriction.

The Board's initial proposal to require a voter list was met with the objection that such disclosures to unions would "subject[] employees to the dangers of harassment and coercion in their homes." *Excelsior Underwear, Inc.*, 156 NLRB 1237 at 1277 (1966). The hypothesized untoward conduct never materialized. Yet, the exact same argument is being made today against providing unions with access to unit employees. It was rejected then and should be rejected now.

The *Excelsior Underwear* Board held that it would not assume untoward conduct by unions and decided that the "mere possibility" of abuse was not a sufficient basis to deny the disclosure. *Id.* Without explanation or support, the proposed rule suggests otherwise. It provides that "the parties shall use the list exclusively for purposes related to the representation proceeding and related Board proceedings." § 102.62(d). Further, the NPRM seeks comments "regarding what, if any, the appropriate sanction should be for a party's noncompliance with the restriction." 76 Fed. Reg. at 36821.

In support of such a restriction and the creation of additional penalties, certain of the written comments contain speculative, improbable anecdotes of abusive conduct unrelated to any union's use of a voter eligibility list.[17] These include wild claims about identity theft, GPS tracking devices in cell phones, stalking and harassment.[18] None involve NLRB eligibility lists or unions' conduct with respect to such lists. None provide a basis for such a restriction. The proposed rule does not require the provision of social security numbers, birthdates, or drivers' license numbers that underlie identity theft; GPS tracking devices in cell phones can only be accessed by account holders; and unions are already provided with home addresses, without

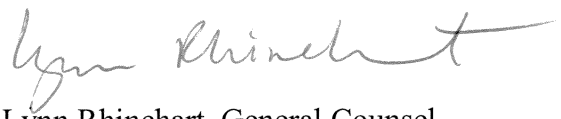
[17] Center on National Labor Policy, Inc., p. 13-14; Coalition for a Democratic Workplace, p. 32.
[18] National Right to Work Legal Defense Foundation, Inc., p. 7-8.

incidents of stalking and harassment.[19] The need for any restriction on the use of eligibility list information, much less the creation of a new remedial scheme, is non-existent. As we stated previously, this limitation in the proposed rule would serve no purpose and has no demonstrable basis. It should be deleted.

CONCLUSION:

For these reasons, the AFL-CIO supports the proposed rules, with modifications, as noted herein and in our comments filed on August 23, 2011.

Respectfully submitted,



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[19] Anything a commenter's wild imagination conjures up regarding a union's use of the eligibility list pales in comparison to the abuse that employers can and, in fact, do inflict on workers in retaliation for their union support. We submit that if the Board is interested in expanding its remedial opportunities, it focus on these pervasive and well-documented violations first.