

## NLRB ELECTIONS: AMBUSH OR ANTICLIMAX?

*Jeffrey M. Hirsch\**

*The National Labor Relations Board's (NLRB) new election procedures represent a comprehensive reform of its representation process. As is the case for many broad reforms, the new rules have prompted significant criticisms and accolades. Many employers have decried the new rules as implementing an unfair "ambush" election process that will deprive employees of needed information and employers of their right to express their views about unionization. In contrast, unions have largely applauded the new rules as an improvement on an election system that they view as stacked against them.*

*The truth appears far less monumental. Although the NLRB's new rules provide a much-needed update to election procedures and aim to decrease many sources of unwarranted delay, they seem incapable of causing a significant impact on employees, employers, or unions. The new rules should result in a quicker election process, but not so quick that they can be fairly described as "ambush" or a deprivation of employers' ability to communicate with employees. Moreover, the modestly shorter time periods for elections are unlikely to improve unions' election win rates or increase union density in a significant way. In short, the NLRB has implemented a modest set of improvements to its representation process, and critics and proponents should not exaggerate the limited impact of those reforms.*

---

\* Associate Dean for Academic Affairs and Geneva Yeagan Rand Distinguished Professor of Law, University of North Carolina School of Law. I thank Isaac Vargas for his research assistance.

INTRODUCTION .....	1649
I. NLRB-ELECTION PROCEDURES .....	1651
II. THE NEW ELECTION RULES .....	1654
A. <i>Electronic Filing</i> .....	1654
B. <i>Excelsior List</i> .....	1654
C. <i>Preelection Challenges</i> .....	1657
D. <i>Scheduling the Election</i> .....	1660
E. <i>Election Disputes</i> .....	1662
F. <i>Blocking Charge Policy</i> .....	1663
III. PRACTICAL EFFECTS AND EMPLOYEE INFORMATION .....	1664
CONCLUSION .....	1668

## INTRODUCTION

The basic procedures of the National Labor Relations Board's (NLRB or Board) election process has been largely stable for decades. That stability, however, camouflaged great dissatisfaction with the election process, particularly among unions.<sup>1</sup> The primary criticism is that parties, especially employers, are able to delay elections and unduly coerce employees before casting their ballots.<sup>2</sup> Many of these problems are out of the NLRB's hands, as they result from statutory or judicial limits.<sup>3</sup> But others were well within the Board's control, especially delays involved in holding elections and certifying the results, which can substantially reduce employees' support for a union.<sup>4</sup> As a result, unions' perception of the NLRB-election process has deteriorated to the point that they have increasingly opted to avoid elections and seek voluntary recognition from employers instead.<sup>5</sup>

With these problems in mind, the NLRB engaged in a comprehensive rulemaking process to revise its election rules in 2011.<sup>6</sup> Facing legal hurdles

---

<sup>1</sup> Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 5–24 (2008); Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091, 1125 (2011); Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 571 (2007).

<sup>2</sup> Among the problems are employers' widespread use of threats, firings, discipline, and harassments against union supporters. See Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. & EMP. POL'Y J. 317, 330 (1998) (estimating that one out of eighteen employees face unlawful discrimination during campaigns); Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing* 10–11 tbl.3 (Econ. Policy Inst., Briefing Paper No. 235, 2009), available at <http://www.epi.org/publication/bp235/> (finding discharge of union supporters in 34% of surveyed campaigns, threats in 69%, harassment in 41%, and interrogations in 64%).

<sup>3</sup> For instance, the Board cannot fine parties for unlawful conduct and employers frequently exercise their right to use "captive-audience speeches," in which they force employees to listen to anti-union statements because such speeches are effective at reducing support for unions. See Bronfenbrenner, *supra* note 2, at 10 tbl.3, 13 tbl.4 (finding 89% of employers used, on average, 10.4 captive-audience speeches per campaign and unions won only 47% of those campaigns compared to 73% of campaigns without such speeches); see also Paul M. Secunda, *Toward the Viability of State-Based Legislation To Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209, 214 (2008).

<sup>4</sup> Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 78–79 & tbl.5.1 (Sheldon Friedman et al. eds., 1994) (stating that unions' rate of success declines from 53% if election occurs within 50 days after petition to 41% if election occurs 61–180 days later). Delays in certifying a union win can also make it harder to negotiate a contract. Hirsch, *supra* note 1, at 1136 (discussing "first contracts").

<sup>5</sup> James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 832 (2005); Hirsch, *supra* note 1, at 1128–29.

<sup>6</sup> Representation—Case Procedures, 79 Fed. Reg. 74,308, 74,311–15 (Dec. 15, 2014) ("On November 30, 2011, the Board members engaged in public deliberations and a vote about whether to draft and issue a final rule, and, on December 22, 2011, a final rule issued."). Although the NLRB asserted that these procedural

based on the possible lack of a quorum during the rulemaking process, the Board abandoned the reforms in 2013.<sup>7</sup> However, in 2014, the Board—with a full complement of members—adopted a new version of election rules.<sup>8</sup>

Employers have strongly criticized the election rules, primarily because they reduce the amount of time to run and certify an election.<sup>9</sup> According to these critics, the new “ambush” elections will infringe employers’ free speech interests and employees’ right to make an informed choice about unionization.<sup>10</sup> In contrast, unions have reacted positively, although many thought the rules did not go far enough.<sup>11</sup>

Employers and unions taking opposing opinions about NLRB action is par for the course, but the disagreement raises a question about the rules’ true impact. Will they create “ambush” elections that allow unions to secretly steamroll employees into a vote for unionization that would not have occurred before? Or will they merely paper over other problems with the representation process and have little actual impact? Only time will tell, but the rules appear to be fairly modest. We should see quicker elections, but not to the degree that they can be characterized as “ambush.” Moreover, even with faster elections, it seems unlikely that unions’ fortunes will improve dramatically—the hurdles to unionization are far too great for improved election procedures to overcome. In short, the NLRB is to be commended for eliminating many sources of unnecessary delay, but the rules’ critics and supporters seem to be exaggerating their effect.

---

rules were exempt from notice-and-comment requirements, it considered and responded to substantial testimony and comments. *Id.*

<sup>7</sup> Chamber of Commerce of the U.S. of Am. v. NLRB, 879 F. Supp. 2d 18 (2012); Jeffrey M. Hirsch, *NLRB Voluntarily Dismisses Election Rules Appeals*, WORKPLACE PROF BLOG (Dec. 10, 2013), [http://lawprofessors.typepad.com/laborprof\\_blog/2013/12/nlr-voluntarily-dismisses-election-rules-appeals.html](http://lawprofessors.typepad.com/laborprof_blog/2013/12/nlr-voluntarily-dismisses-election-rules-appeals.html).

<sup>8</sup> 79 Fed. Reg. 74,308; *see also* Notice of Proposed Rulemaking, Representation—Case Procedures, 79 Fed. Reg. 7318, 7318 (Feb. 6, 2014) (noting that 2011 and 2014 rules were very similar).

<sup>9</sup> *See, e.g.*, Tim Devaney, *Biz Groups to Sue Labor Board over “Ambush” Elections*, HILL (Jan. 5, 2015, 11:53 AM EST), <http://thehill.com/regulation/228483-businesses-groups-suing-labor-board-over-ambush-elections>.

<sup>10</sup> *Id.*

<sup>11</sup> Timothy Noah, *Labor’s Big Comeback*, POLITICO (Dec. 22, 2014, 1:29 PM EST), <http://www.politico.com/story/2014/12/labor-comeback-113735.html> (describing unions’ description of rules as “modest but important”).

## I. NLRB-ELECTION PROCEDURES

Although the new election rules represent important changes, at base they merely provide a modest update of the Board's current procedures. NLRB elections, which are technically a means to test a "question concerning representation," occur for two primary purposes. The first is the more common "initial election," in which a union seeks to represent a unit of employees. The second is a "decertification election," in which unionized employees vote on whether to keep their current union. For both types, the Board will order an election only when at least 30% of eligible employees want one.<sup>12</sup>

The representation process begins with a party filing an election petition with the Board. In most cases, the union and employer enter into a voluntary preelection agreement that sets out the procedures for the election, such as which employees are eligible to vote and when the vote will occur.<sup>13</sup> Although the new rules will affect many aspects of these "stipulated elections," they primarily target "contested elections" in which there is no agreement.

When there is a contested election petition, the NLRB regional office will conduct a hearing to resolve any disputes—such as the 30% threshold and eligibility of certain employees—and decide whether to order (or "direct") an election.<sup>14</sup> Parties can appeal preelection determinations to the NLRB but review is discretionary and rare.<sup>15</sup>

After the "direction of election" and resolution of any preelection appeals, the employer must provide an "*Excelsior* list,"<sup>16</sup> providing the union with contact information for eligible employees. Moreover, the employer must post NLRB Notices of Election at the worksite.<sup>17</sup> Under the previous rules, there was also a mandatory twenty-five day waiting period for the Board to consider

---

<sup>12</sup> 29 C.F.R. § 101.18(a) (2014); NAT'L LABOR RELATIONS BD., CASEHANDLING MANUAL, PART TWO: REPRESENTATION PROCEEDINGS § 11023.1 (2007), available at <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/chm2.pdf> [hereinafter CASEHANDLING MANUAL]. A third type, which is essentially an employer-submitted decertification election, requires an employer to demonstrate good-faith reasonable uncertainty that a union has majority support. *Levitz Furniture Co. of the Pac., Inc.*, 333 N.L.R.B. 717 (2001).

<sup>13</sup> Parties enter into voluntary preelection agreements over 90% of the time. 79 Fed. Reg. at 74,317.

<sup>14</sup> See *infra* Part II.D.

<sup>15</sup> Parties also have seven days to submit a post-hearing brief. Thus, along with the twenty-five day period, a party can guarantee at least a thirty-two day delay between a hearing and the actual election. Moreover, regions take a median of twenty days to review the hearing transcript and write a decision. 79 Fed. Reg. at 74,387.

<sup>16</sup> See *infra* Part II.B.

<sup>17</sup> See *infra* note 88 and accompanying text.

preelection challenges, despite rarely doing so.<sup>18</sup> After that period, the region conducts a secret-ballot vote and counts the ballots. Immediately following the election, parties may raise further challenges, including allegations of misconduct during the campaign, which the region considers in a postelection hearing. The previous rules provided parties a right to appeal to the NLRB any postelection determinations.<sup>19</sup> Once the Board resolves these challenges, it either certifies the results or orders a new election.

The Board's election reforms are intended to further the NLRA policy of resolving representation questions quickly and fairly.<sup>20</sup> Critics of the new rules argue that elections already occur within a reasonable time frame,<sup>21</sup> and for most cases—especially uncontested ones—that is not an unreasonable view. However, unnecessary delay occurs in all elections<sup>22</sup> and the time it takes to resolve many representation questions, especially in vigorously contested cases, is indefensible.<sup>23</sup>

Over the last decade, the median time between the filing of the election petition and the actual vote has ranged from about 37–39 days.<sup>24</sup> However, there are sharp differences between the time to conduct stipulated elections, which occur in a median of 36–39 days, and contested elections, which take

---

<sup>18</sup> The new rules eliminated this period. *See infra* notes 91–95.

<sup>19</sup> The new rules made postelection review discretionary. *See infra* notes 98–103.

<sup>20</sup> *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946) (emphasizing NLRA policy for quick and fair resolution of representational questions).

<sup>21</sup> Representation—Case Procedures, 79 Fed. Reg. 74,308, 74,317 (Dec. 15, 2014).

<sup>22</sup> *See supra* note 19 and accompanying text.

<sup>23</sup> For example, in *Kansas City Repertory Theatre, Inc.*, a union was certified 424 days after the filing of a representation petition. OFFICE OF THE GENERAL COUNSEL, NAT'L LABOR RELATIONS BD., NO. GC-11-09, REPORT ON MIDWINTER ABA PRACTICE AND PROCEDURE COMMITTEE OF LABOR AND EMPLOYMENT SECTION 18 (2011). Moreover, in Fiscal Year 2014, almost 12% of representation cases took over 100 days after the election petition to close. NAT'L LABOR RELATIONS BD., PERFORMANCE AND ACCOUNTABILITY REPORT FY 2014, at 50 (2014), available at <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1674/13682%20NLRB%202014%20PAR%20v5%20-%20508.pdf> [hereinafter PERFORMANCE AND ACCOUNTABILITY]; *see also id.* at app. C 125 (noting variance of 12.6%–15.6% over previous five years).

<sup>24</sup> *Median Days from Petition to Election*, NLRB, <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election> (last visited May 9, 2015).

59–70 days.<sup>25</sup> Much of the difference between stipulated and contested elections result from the Board’s need to resolve preelection disputes.<sup>26</sup>

Delay also occurs after the election. For instance, in Fiscal Year 2012, parties filed postelection objections in 55 cases and, although a minority of all elections, these cases involved significant delay.<sup>27</sup> For the 42 challenges that required a hearing, it took regions a median of 73 days to issue a decision; for the 13 challenges that did not require a hearing, regions took 43 days.<sup>28</sup> Further delay occurs when parties exercised their former right to appeal postelection determinations to the NLRB, which adds approximately 95–127 days to the process.<sup>29</sup> Some of this delay is the result of complex issues and the need for three Board members to review the case;<sup>30</sup> yet, many postelection challenges are not substantive and face delay due to the lack of Board resources.<sup>31</sup>

Although the NLRB asserted that delay was not the “sole or principal purpose” behind its election reforms, a major goal of the Board was clearly to reduce the amount of time to run elections, especially the rare cases that take an inordinate amount of time.<sup>32</sup> But no matter the Board’s central aim, there is little doubt that the speed of elections is the principal concern of most interested parties. Unions typically want faster elections to reduce employers’ opportunity to fight unionization while employers want slower elections for the opposite reason.<sup>33</sup>

In Part II, I describe some of the major changes that the Board hopes will accelerate the representation process, as well as others unrelated to delay. Moreover, in Part III, I discuss the fact that the election timetable is relevant not only to unions and employers but also to employees’ ability to make a free

---

<sup>25</sup> In most years, contested elections took 64–67 days. *Id.* In Fiscal Year 2014, initial elections occurred in a median of 38 days, and almost 95.7% of elections occurred within 56 days. PERFORMANCE AND ACCOUNTABILITY, *supra* note 23, at 36, 41 (noting that 2,507 petitions were filed to conduct secret ballot elections).

<sup>26</sup> In Fiscal Year 2012, regions took a median of thirty-four days to issue a decision after a preelection hearing. OFFICE OF THE GENERAL COUNSEL, NAT’L LABOR RELATIONS BD., NO. GC 13-01, SUMMARY OF OPERATIONS FY 2012, at 5 (2013) [hereinafter SUMMARY OF OPERATIONS FY 2012].

<sup>27</sup> *Id.* at 5 (noting that the regions conducted 1,611 initial representation elections).

<sup>28</sup> *Id.*

<sup>29</sup> See 79 Fed. Reg. at 74,332 (NLRB took average of 94.5–127 days over last three years to resolve postelection appeals); see also *infra* notes 98–100 and accompanying text.

<sup>30</sup> See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

<sup>31</sup> See *infra* note 101 and accompanying text.

<sup>32</sup> 79 Fed. Reg. at 74,315 (identifying efficiency, fair and accurate voting, transparency and uniformity, and use of technology as justifying the need for the rule).

<sup>33</sup> The parties’ views on delay can be reversed in a decertification election.

and informed decision about unionization. I then argue that the Board's new rules provide modest improvements to the representation process that adequately balance the interests of all three parties.

## II. THE NEW ELECTION RULES

The crux of NLRB's representation proceedings is to ensure that employees have a free and fair opportunity to choose whether to seek collective representation—a duty that requires the Board to “accurately, efficiently, and speedily” determine employees' votes.<sup>34</sup> In its rulemaking, the Board focused on improving its ability to hold an accurate and quick vote, while resolving any postelection disputes without undue delay. In this Part, I describe some of the most prominent ways in which the Board tried to advance these goals.

### A. *Electronic Filing*

One of the ways in which the Board tried to reduce delay and inefficiencies was to make its procedures less burdensome. For instance, in a long-overdue move, the Board will now permit parties to file election documents electronically.<sup>35</sup> Some commenters argued that small businesses may lack access to e-mail and that there may be security issues that could increase litigation; however, the Board emphasized that this concern is speculative and that many courts and agencies have used with electronic filing with significant problems.<sup>36</sup>

### B. *Excelsior List*

In its new rules, the Board attempted to improve the accuracy of the vote by giving parties greater access to information, particularly through the *Excelsior* list requirement.<sup>37</sup> Under the Board's 1966 *Excelsior Underwear Inc.* decision, an election order or agreement triggers a requirement that an employer provide the union a list of potential voters and their home

---

<sup>34</sup> NLRB v. A.J. Tower Co., 329 U.S. 324, 331 (1946); see also *Boire v. Greyhound Corp.*, 376 U.S. 473, 479 (1964); 79 Fed. Reg. at 74,316.

<sup>35</sup> 79 Fed. Reg. at 74,478, 74,489 (proposing 29 C.F.R. §§ 102.113, 102.60). Moreover, employers must e-mail employees Notices of Election if e-mail is a customary mode of communication at the workplace. *Id.* at 74,486 (proposing 29 C.F.R. § 102.67(k)).

<sup>36</sup> 79 Fed. Reg. at 74,327 (providing the example of spam filters blocking documents).

<sup>37</sup> *Id.* at 74,480, 74,486 (proposing 29 C.F.R. §§ 102.62, 102.67(l)).



addresses.<sup>38</sup> One of this rule's central aims is to ensure that employees had adequate time to learn about unionization and make an informed vote.<sup>39</sup>

The Board's new rules now require employers, in addition to the previous information, to include the personal e-mail addresses and personal home or mobile phone numbers of unit employees, although employers do not have to provide work e-mail addresses or work phone numbers.<sup>40</sup> This requirement extends only to e-mail addresses that employers actually possess; they need not seek out contact information from employees. Moreover, the new rules require *Excelsior* lists to include information about unit employees' work locations, shifts, and job classifications—information that will more quickly clarify issues about employees' eligibility to vote.<sup>41</sup>

In finalizing its rules, the Board rejected a host of privacy-based objections, noting that many of them were merely a rehash of the *Excelsior* case.<sup>42</sup> As for the new points of contact, which could increase privacy intrusions, the Board concluded—as it had in *Excelsior*—that the usefulness of that information outweighed its costs.<sup>43</sup> Indeed, the new information is likely to reduce personal intrusions by further encouraging unions' already declining use of home solicitations.<sup>44</sup> Further, unwanted e-mail and phone calls are far easier to ignore than home visits, especially given the prevalence of spam e-mails and solicitation calls.<sup>45</sup> This is especially true given that employees have already given the new *Excelsior* information to their employers, and unions can use the

---

<sup>38</sup> 156 N.L.R.B. 1236, 1240–41 (1966). In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), the Supreme Court approved *Excelsior* over objections about employee privacy and other concerns.

<sup>39</sup> The NLRB requires that a union have the *Excelsior* list for at least ten days before an election, although a union can waive that period. See *infra* notes 85–86 and accompanying text.

<sup>40</sup> 79 Fed. Reg. at 74,480, 74,486 (proposing 29 C.F.R. §§ 102.62; 102.67(l)); see also *id.* at 74,341 (noting that rule is flexible enough to allow Board to require new forms of communications).

<sup>41</sup> *Id.* at 74,480, 74,486 (proposing 29 C.F.R. §§ 102.62; 102.67(l)); see also *id.* at 74,341. Employers must also provide this information for individuals in a unit that it argues should replace a proposed unit. See *infra* notes 65–66.

<sup>42</sup> 79 Fed. Reg. at 74,341–42. But see *id.* at 74,452–55 (dissenting members' criticizing new rules because of privacy concerns and lack of necessity; also arguing for opt-out procedure).

<sup>43</sup> *Id.* at 74,342.

<sup>44</sup> *Id.* at 74,339, 74,343–44 & n.168, 74,350.

<sup>45</sup> *Id.* at 74,343–44; Jeffrey M. Hirsch, *Email and the Rip Van Winkle of Agencies: The NLRB's Register-Guard Decision*, in *WORKPLACE PRIVACY: PROCEEDINGS OF THE NEW YORK UNIVERSITY 58TH ANNUAL CONFERENCE ON LABOR 185* (Jonathan Remey Nash ed., 2009).

information only for organizational purposes until the representation proceedings are finished.<sup>46</sup>

In addition to requiring new information, the Board also shortened the *Excelsior* list deadline from seven calendar days to two business days following the election order or agreement.<sup>47</sup> Rejecting claims that two days did not provide enough time, the Board emphasized improvements in recordkeeping, retrieval, and records transmission technology over the decades since it decided *Excelsior*.<sup>48</sup> Moreover, even in the requirement's early years, many employers could produce *Excelsior* lists within two days and virtually all did so within four days in order to guarantee that the Board would receive them by the seven-day deadline.<sup>49</sup> Given current technology and the Board's extensive experience in this area, it is likely that most employers acting in good faith will be able to complete the lists within two days. But for the rare employer that faces legitimate problems, the region has discretion to extend the deadline.<sup>50</sup>

The NLRB's *Excelsior* reforms reflect the fact that, although not universal,<sup>51</sup> employee use of e-mail is ubiquitous in many workplaces.<sup>52</sup> By providing unions more relevant means of communication, especially ones that allow quick and regular contact, the rules improve employees' access to useful information and promote the policies underlying *Excelsior*.

Although the new *Excelsior* rules are beneficial, the Board should be careful not to exaggerate their effectiveness. For instance, it may be hyperbole to suggest, at least in the labor context, that electronic communications are becoming more important than face-to-face communications.<sup>53</sup> Despite unions'

---

<sup>46</sup> 79 Fed. Reg. at 74,480, 74,486 (proposing 29 C.F.R. §§ 102.62(d), 102.67(l)); see *id.* 74,344. The Board did not specify a remedy for violation of this rule, leaving such determinations to a case-by-case analysis, as it currently does. See *id.* at 74,359.

<sup>47</sup> *Id.* at 74,480, 74,486 (proposing 29 C.F.R. §§ 102.62(d), 102.67(l)) (requiring also that employers must provide *Excelsior* list electronically, unless employer is unable to do so).

<sup>48</sup> *Id.* at 74,343, 74,351, 74,353.

<sup>49</sup> *Id.* at 74,353 (noting that some employers recently were able to produce lists on same day they signed election agreements).

<sup>50</sup> *Id.* at 74,401 (permitting extension based on extraordinary circumstances or parties' agreement).

<sup>51</sup> Jeffrey M. Hirsch, *Worker Collective Action in the Digital Age*, 117 W. VA. L. REV. (forthcoming 2015) (manuscript at 4), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2551117](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551117).

<sup>52</sup> 79 Fed. Reg. 74,338–39 (citing studies).

<sup>53</sup> *Id.* at 74,337 (crediting Justice Kennedy for idea that electronic communications produce most significant exchange of ideas in *Denver Area Educational Telecommunications Consortium, Inc. v. FTC*, 518 U.S. 727, 802–03 (1996) (Kennedy, J., dissenting)).

increasing reliance on electronic communications,<sup>54</sup> face-to-face communications are typically the most effective means to convince employees to vote for a union.<sup>55</sup> This fact does not undermine the justification for the new rules, but it should remind the Board and courts that in-person communications remain critically important in other circumstances.<sup>56</sup>

Finally, one curious aspect of the new *Excelsior* requirement is the exclusion of work e-mail addresses. Although the NLRB may have been accommodating employers' proprietary claims to such information, the dissenting Board members have a point in noting that the exclusion of work e-mail seems to contradict the Board's recent recognition of employees' limited right to use company e-mail.<sup>57</sup>

### C. Preelection Challenges

Among the greatest sources of delay in the NLRB-representation process is the handling of election disputes. Both before and after an election, parties can raise challenges that often significantly delay the scheduling of an election or certification of the results. For example, parties can challenge the election's details, such as the identity of eligible voters, as well as the decision to hold an election at all. Regions first consider these issues in preelection hearings to determine whether a genuine "question concerning representation" exists—that is, whether there is a proper petition involving an appropriate bargaining unit with the requisite 30% employee support.<sup>58</sup> If a region determines that such a question exists, it will order an election to answer it. In its new rules, the Board made changes to the timing of preelection challenges, as well as their substance.<sup>59</sup>

---

<sup>54</sup> *Id.* at 74, 350; *see also id.* at 74,337 (citing cases).

<sup>55</sup> Hirsch, *supra* note 1, at 1108–09.

<sup>56</sup> For instance, the Supreme Court and the Board have dramatically reduced unions' ability to communicate with employees at a worksite. *See* *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533, 541 (1992) (allowing employers to bar nonemployees except in discriminatory fashion or if no other means of access); *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110, 1117–18 (2007) (adopting narrow discrimination exception), *overruled in part on other grounds by* *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, 2014 WL 6989135 (Dec. 11, 2014). As I have urged elsewhere, the Board should encourage more in-person communications by adopting a broader definition of discrimination, which it may do. Hirsch, *supra* note 45, at 204–09; *see also* Notice and Invitation to File Briefs, *Roundy's Inc.*, NLRB Case No. 30-CA-17185 (Nov. 12, 2010), [http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3253/roundys\\_notice\\_and\\_invitation.pdf](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3253/roundys_notice_and_invitation.pdf) (inviting briefs on whether to change *Register-Guard* discrimination rule).

<sup>57</sup> 79 Fed. Reg. at 74,452 (citing *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126).

<sup>58</sup> 29 U.S.C. § 159(c) (2012); 29 C.F.R. § 101.18(a) (2014).

<sup>59</sup> Postelection challenges are discussed below in Part II.E.

One timing change is a new deadline requiring hearings within eight calendar days following the service of a Notice of Hearing, which was already a practice in some regions.<sup>60</sup> The Board chose to adopt this policy nationwide as a means to quicken elections without imposing burdens on parties.<sup>61</sup>

Moreover, the rules codified previous practice by not allowing parties to file post-hearing briefs without regions' permission.<sup>62</sup> However, parties are entitled to a "reasonable period" of time to make oral arguments at the end of preelection hearings.<sup>63</sup>

In addition to these timing issues, the new election rules made several substantive changes to the preelection dispute process. One set of reforms involves the "Statement of Position" form, which gives parties a means to identify issues they may raise in a preelection hearing. The new rules now require a non-petitioning party (employers in initial elections or unions in decertification elections) to submit their Statement of Position one day before the preelection hearing.<sup>64</sup> The Board also codified some regions' practice of requiring parties to state in their forms any challenges they intend to raise, including an objection to the appropriateness of proposed unit.<sup>65</sup> If a party proposes adding employees to the unit, the Statement of Position must list those employees and their *Excelsior* job characteristics.<sup>66</sup> Petitioning parties, in turn, must respond to these issues at the start of the hearing.<sup>67</sup> These new

---

<sup>60</sup> 79 Fed. Reg. at 74,470 (proposing 29 C.F.R. § 102.63) (excluding federal holidays; exempting cases with "unusually complex issues"; and permitting two additional days based on "special circumstances" and two more days based on "extraordinary circumstances"). Parties must file a Statement of Position one day before the hearing, although those forms may be amended for good cause. *Id.* at 74,473. *But see id.* at 74,444 (dissenting members criticizing good cause standard as too strict).

<sup>61</sup> *Id.* at 74,370 (citing *Croft Metals, Inc.*, 337 N.L.R.B. 688, 688 (2002)) (noting that previous policy guaranteed parties only five business days' notice before a hearing).

<sup>62</sup> *Id.* at 74,484 (proposing 29 C.F.R. § 102.66(h)); *see also id.* at 74,401–03 (rejecting call for fourteen-day maximum time to submit briefs).

<sup>63</sup> *Id.* at 74,484 (proposing 29 C.F.R. § 102.66(h)).

<sup>64</sup> *Id.* at 74,481–82 (proposing 29 C.F.R. § 102.63(b)(1), (b)(2), (b)(3)); *see also id.* at 74,362–64 (arguing that one-day rule will help spur negotiations and narrow the scope of preelection hearings and noting that the time frame is similar to current practices). The Statement of Position should also include parties' preference for the date, time, and location of the election. *Id.* at 74,481–82 (proposing 29 C.F.R. § 102.62(g)).

<sup>65</sup> *Id.* at 74,481–82 (proposing 29 C.F.R. § 102.63(b)(1)(i), (2)(i), (3)(i)) (requiring statement of why unit is inappropriate and list of classifications, locations, or employees to add or exclude to make unit appropriate); *see also id.* at 74,365–69 (explaining the Board's rationale for incorporating these requirements).

<sup>66</sup> *Id.* at 74,481–82 (proposing 29 C.F.R. § 102.63(b)(1), (2), (3)); *see also id.* at 74,361–62 (explaining the elements of the new rule); *supra* note 41 and accompanying text.

<sup>67</sup> *Id.* at 74,483–84 (proposing 29 C.F.R. § 102.66(b)).

requirements have teeth because the failure to raise issues in the Statement of Position will typically constitute a waiver.<sup>68</sup>

The new rules also sought to streamline preelection hearings. One of the main new policies limits the scope of preelection hearings by tabling most challenges to individuals' eligibility to vote until postelection proceedings.<sup>69</sup> In its proposed rules, the Board had planned to codify a common regional practice by allowing preelection consideration of eligibility questions only if they implicated at least 20% of a proposed unit.<sup>70</sup> Citing the need for flexibility, the Board ultimately declined to mandate the 20% threshold, although it noted its expectation that regions will continue to use the threshold in most preelection hearings.<sup>71</sup> This represents a sensible middle ground between commentators who wanted the Board either to codify or to abandon the 20% threshold.<sup>72</sup> When a region does not believe that individual eligibility issues will be dispositive, it makes sense to run the election and consider those issues later, if at all.<sup>73</sup>

The new rules also limited parties' ability to introduce evidence at a preelection hearing. Previously, parties could introduce evidence about any issue, even if it was not relevant to the hearing.<sup>74</sup> Now, only "evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation" is allowed.<sup>75</sup> This rule, in addition to the Statement of Position waiver,<sup>76</sup> will streamline the preelection hearing process and reduce delay. It is true, as the Board conceded, that hearing

---

<sup>68</sup> *Id.* (proposing 29 C.F.R. § 102.66(b), (d)). A region can permit an amendment of the form "in a timely manner for good cause." *Id.* at 74,481–82 (29 C.F.R. § 102.63(b)(1), (2), (3)); *see also id.* at 74,398–40 (discussing comments noting that regions can still take evidence on Board jurisdiction and unit appropriateness).

<sup>69</sup> *Id.* at 74,482 (29 C.F.R. § 102.64(a)). Eligibility may turn on issues such as individuals' classification as an "employee" or inclusion in the petitioned-for bargaining unit.

<sup>70</sup> *Id.* at 74,383–84, 74,403–04 (discussing proposed 29 C.F.R. § 102.66(d)); *see also id.* at 74,485 (proposing 29 C.F.R. § 102.67(b)) (requiring region, if deferring individual eligibility questions, to state in Notice of Election that such individuals are not necessarily included or excluded in unit).

<sup>71</sup> 79 Fed. Reg. at 74,387–88 & n.373 (noting also that, in Fiscal Year 2013, over 70% of elections were decided by margin greater than 20%). *But see id.* at 74,445–46 (dissenting members arguing that 20% guideline is too strict given preelection uncertainties).

<sup>72</sup> *Id.* at 74,387–89.

<sup>73</sup> *Id.* at 74,413. *But see id.* at 74,430 (dissenting members criticizing "election now, hearing later" and "vote now, understand later" rules).

<sup>74</sup> 29 C.F.R. § 102.66(a) (2014); *Barre-Nat'l, Inc.*, 316 N.L.R.B. 877 (1995).

<sup>75</sup> 79 Fed. Reg. at 74,483 (proposing 29 C.F.R. § 102.66(a)); *see also id.* at 74,384 (noting that standard is borrowed from FED. R. CIV. P. 56).

<sup>76</sup> *See supra* note 68 and accompanying text.

officers occasionally may face difficult questions about the relevancy of certain evidence but they will be guided by the regions' extensive experience deferring questions of individuals' eligibility to a postelection hearing.<sup>77</sup>

Finally, the Board altered the preelection appeals process. For instance, under the previous policy, parties had to request NLRB review of a region's direction of election within fourteen days.<sup>78</sup> The Board initially proposed to eliminate these preelection appeals and consolidate remaining issues with any postelection challenges.<sup>79</sup> This was a sensible proposal that reflected the time-consuming nature of NLRB review and the fact that many preelection disputes are eventually mooted by the election or resolved by the parties.<sup>80</sup> However, bowing to an argument that Section 3(b)<sup>81</sup> of the NLRA gives parties a right to interlocutory review, the final rules maintain parties' ability to seek Board review of an election order at any time.<sup>82</sup> But a request for review will not stay the election in most circumstances nor will it result in the impounding of ballots, as used to be the case.<sup>83</sup> Although the Board could have been more aggressive, eliminating the need to file preelection appeals and the impounding of ballots should streamline the representation process and decrease parties' incentive to delay the release of election results through preelection challenges.<sup>84</sup>

#### D. Scheduling the Election

In addition to altering some of the procedures that can delay the election process, the Board's new rules also directly addressed the scheduling of elections. As it did in other areas, the Board appears to have taken a moderate path in which it eliminated some areas of delay but not all.

One issue under consideration was the policy that permits a party entitled to an *Excelsior* list to waive part of the ten day period normally required between

---

<sup>77</sup> 79 Fed. Reg. at 74,384 (citing, *inter alia*, Allegany Aggregates, Inc., 327 N.L.R.B. 658 (1999)).

<sup>78</sup> 29 C.F.R. § 102.67(b), (f) (2014). Failure to meet this requirement resulted in the waiver of the issue. A.S. Horner, Inc., 246 N.L.R.B. 393, 395 (1979).

<sup>79</sup> 79 Fed. Reg. at 74,407.

<sup>80</sup> *Id.*

<sup>81</sup> 29 U.S.C. § 153(b) (2012) (“[U]pon 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 under this paragraph . . .”).

<sup>82</sup> 79 Fed. Reg. at 74,485 (proposing 29 C.F.R. § 102.67(c)); *see also id.* at 74,407 (concluding that Section 3(b) does not guarantee interlocutory review but preserves it).

<sup>83</sup> *Id.* at 74,485 (proposing 29 C.F.R. § 102.67(c)). Like Section 3(b), this rule allows the Board to grant a stay, which it emphasized that it will continue to do “very rarely.” *Id.* at 74,409.

<sup>84</sup> *Id.* at 74,408–09.

the list's deadline and the election.<sup>85</sup> Employers argued that the waiver option undermined their ability to opine about the union and reduced employees' exposure to information.<sup>86</sup> But the Board disagreed, noting that unions will only use the waiver when they are "confident that employees have heard [their] message," and that, even with a waiver, employers have abundant access to employees.<sup>87</sup> The Board also considered, but decided against, shortening the three-working-day period that employers must post a Notice of Election, which provides employees information about the election.<sup>88</sup>

When a region directs an election, the new rules state that "ordinarily" the order will include election details such as the date, time, location, and type of election.<sup>89</sup> This change is intended to avoid delays caused by the fact that an election order used to merely start discussions about the details. However, the Board resisted calls for a maximum or minimum time period before an election and, instead, maintained flexibility by codifying its policy of scheduling the election at the "earliest date practicable."<sup>90</sup>

The Board's most significant change was to eliminate the requirement that contested elections must incorporate an automatic delay of least twenty-five days after the direction of election.<sup>91</sup> The ostensible purpose of this waiting period was to allow the Board to act on any requests for review, which were uncommon.<sup>92</sup> Moreover, the Board rarely granted review and, even when it did, it almost never stayed the election.<sup>93</sup> Thus, this rule did little more than guarantee almost a month's delay in every contested election.<sup>94</sup> Indeed, the

---

<sup>85</sup> See *Mod Interiors, Inc.*, 324 N.L.R.B. 164 (1997); CASEHANDLING MANUAL, *supra* note 12, § 11302.1.

<sup>86</sup> 79 Fed. Reg. at 74,361.

<sup>87</sup> *Id.*; see also *id.* at 74,360 (noting also that goal of waiting period is to provide *nonemployers* access to employees).

<sup>88</sup> See 29 C.F.R. § 103.20(a) (2014); see 79 Fed. Reg. at 74,485 (proposing 29 C.F.R. § 102.67(b)) (requiring electronic posting if e-mail is common mode of communication at workplace); *id.* at 74,486 (preserving three business day rule); see also *id.* at 77,406, 77,442 (rejecting two-day proposal because it abandoned a different proposal that regions electronically send notices to employees); CASEHANDLING MANUAL, *supra* note 12, § 11302.11.

<sup>89</sup> 79 Fed. Reg. at 74,485 (proposing 29 C.F.R. § 102.67(b)). This rule is aided by the new expectation that parties' Statements of Position and responses should include their preferences about election details. See *supra* note 64 and accompanying text.

<sup>90</sup> 79 Fed. Reg. at 74,485 (proposing 29 C.F.R. § 102.67(b)); see also *id.* at 74,409–10; CASEHANDLING MANUAL, *supra* note 12, § 11302.11.

<sup>91</sup> See 29 C.F.R. § 101.21(d) (2014); 79 Fed. Reg. at 74,410.

<sup>92</sup> 79 Fed. Reg. at 74,410 & n.456 (citing annual reports).

<sup>93</sup> *Id.* at 74,410.

<sup>94</sup> *Id.* (noting that policy also delayed stipulated elections by changing negotiating positions and conflicted with Section 3(b)'s default against staying regions' decisions).

twenty-five day waiting period made so little sense that, even though its elimination could significantly reduce the time it takes to run elections, there were few objections to the new rule.<sup>95</sup>

### *E. Election Disputes*

In addition to preelection disputes, the Board's new rules also addressed delay associated with the postelection period. A prime example is the policy that permitted regions to transfer a case to the Board at any time.<sup>96</sup> Although transfers were infrequent, they result in such significant delays that the Board eliminated them.<sup>97</sup>

A related reform is that NLRB review of postelection disputes will no longer be a matter of right. Instead, as has been the case for preelection disputes,<sup>98</sup> the Board will now have discretion whether to review regions' postelection decisions.<sup>99</sup>

The move to discretionary review reflected the inefficiencies in the Board's postelection review process. For instance, in Fiscal Year 2013, parties sought Board review of regions' postelections decisions only in around one-third of cases and, of those, the Board reversed about 10%.<sup>100</sup> Moreover, according to the Board, many requests for review are focused on narrow factual issues or formulaic claims of error that do not come close to overcoming the substantial deference given to regions.<sup>101</sup> Thus, limiting Board review to cases involving more substantive claims helps the agency conserve resources and more efficiently administer the representation process.<sup>102</sup> Although some

---

<sup>95</sup> *Id.*

<sup>96</sup> 29 C.F.R. § 102.67(h), (i), (j) (2014).

<sup>97</sup> 79 Fed. Reg. at 74,403 (listing cases).

<sup>98</sup> *Id.* at 74,331.

<sup>99</sup> *Id.* at 74,485–86 (proposing 29 C.F.R. §§ 102.62(b), 102.67); *see also id.* at 74,479. The Board codified the current practice of regions' determining whether substantial and material factual issues that warrant a postelection hearing, which should occur in twenty-one days. *Id.* at 74,487 (proposing 29 C.F.R. § 102.69(c)(1)(ii) (allowing extension to "as soon as practicable"); *see also id.* at 74,414–16 (discussing decision not to decrease period to fourteen days). Following the hearing, a hearing officer issues recommendations and parties have fourteen days to file exceptions with the regional director, who issues a decision. *Id.* at 74,487 (proposing 29 C.F.R. § 102.69(c)(1)(iii)).

<sup>100</sup> *Id.* at 74,332 n.106 (noting that parties appealed one-third of ninety-eight "post-election decisions concerning objections or determinative challenges," and the Board reversed three of them).

<sup>101</sup> *Id.* at 74,332 (citing *Stretch-Tex Co.*, 118 N.L.R.B. 1359, 1361 (1957)).

<sup>102</sup> *Id.* at 74,485 (proposing 29 C.F.R. § 102.67(c)) (allowing review based on, for example, substantial legal or policy questions, clearly erroneous decisions of substantial factual issues that prejudiced a party,



commentators objected to the Board “abdicating” its responsibilities,<sup>103</sup> the new rule is justified by its ability to save time while maintaining Board review of substantive challenges.

Finally, the Board maintained its current time period for filing objections to an election, which is seven days after the tally of votes.<sup>104</sup> However, the Board eliminated the additional seven days that parties previously had to file evidence supporting their postelection objections; in most cases, that evidence should now be part of the offer of proof submitted along with objections.<sup>105</sup> Given that there was little evidence that parties needed this additional seven-day period, its elimination is a reasonable reform that reduces parties’ ability to delay the resolution of elections.

#### *F. Blocking Charge Policy*

One problematic issue that the Board considered but left undisturbed was its “blocking charge” policy.<sup>106</sup> Under this policy, the Board will generally stay an election if there is a pending unfair labor practice charge involving conduct that would interfere with employees’ vote.<sup>107</sup>

The purpose of the blocking charge policy is to remedy any unlawful conduct so that it does not prevent a fair election.<sup>108</sup> However, it also provides the party opposed to an election the incentive to file unfair labor practice charges and delay the vote. This tactic is available in all elections, but in practice it is primarily a tool of unions facing a decertification vote.<sup>109</sup> The Board is well aware of this incentive and can choose not block an election, but

---

hearing conduct that prejudiced a party, or compelling reasons to reconsider important NLRB rules or policies).

<sup>103</sup> *Id.* at 74,332–33. Moreover, parties can still raise issues in technical Section 8(a)(5) proceedings. 29 U.S.C. §§ 158(a)(5), 159(d) (2012); *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964) (permitting judicial review of employer’s refusal to bargain with union based on disagreement with Board election decision). That said, unfair labor practice adjudication and judicial review is more time consuming than the typical Board representation process. 79 Fed. Reg. at 74,450–51 (dissenting members’ criticism on postelection review rule).

<sup>104</sup> 29 C.F.R. § 102.69(a) (2014).

<sup>105</sup> 79 Fed. Reg. at 74,486 (proposing 29 C.F.R. § 102.69); *see also id.* at 74,411–12 (explaining rationale for permitting extension of time for good cause).

<sup>106</sup> *Id.* at 74,418–20 (explaining decision not to change policy).

<sup>107</sup> CASEHANDLING MANUAL, *supra* note 12, § 11730.

<sup>108</sup> *See* 79 Fed. Reg. at 74,418–20.

<sup>109</sup> Zev J. Eigen & Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 MINN. L. REV. 1879, 1896 (2014); Joan Flynn, *Allentown Mack and Economic Strikes: And Now for the Bad News*, 49 LAB. L.J. 1205 (1998).

many observers—particularly employers—believe the Board has not exercised its discretion enough.<sup>110</sup>

Although few challenge the idea that the Board should prevent serious unlawful conduct from interfering with an election,<sup>111</sup> some reform is warranted. In particular, many critics have argued that unions have been able to abuse the blocking charge policy by using less serious charges to delay an election—and they have a point.<sup>112</sup> Despite the fact that the Board puts blocking charge cases under its highest priority,<sup>113</sup> the delays involved are often significant.<sup>114</sup> The Board's new rules indirectly affected the blocking charge policy by requiring parties to file an offer of proof to support a request for a stay,<sup>115</sup> but that requirement is unlikely to change much, if anything. Instead, the Board should have explored new rules such as lowering the presumption that favors staying elections in most circumstances or setting a cap on the length of stays, either of which might have satisfied the blocking charge policy's main purpose while reducing abuse.<sup>116</sup>

### III. PRACTICAL EFFECTS AND EMPLOYEE INFORMATION

The primary focus of both proponents and opponents of the new election rules is the amount of time it takes to hold and certify elections. Delay is generally crippling to unions, which find their support decreasing as employers fight organizing efforts and time passes without any collective bargaining.<sup>117</sup> Employers often welcome delay for the same reasons, although some may prefer not to be caught up in a prolonged campaign and litigation.

---

<sup>110</sup> See 79 Fed. Reg. at 74,419; CASEHANDLING MANUAL, *supra* note 12, §§ 11730, 11731 (listing exceptions).

<sup>111</sup> See, e.g., 79 Fed. Reg. at 74,455–56 (dissenting members arguing for stays only when alleged unlawful conduct both interferes with employee free choice and taints a representation petition, such as employers' unlawful assisting decertification petition).

<sup>112</sup> See Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FIU L. REV. 361, 369 tbl.2 (2010) (noting that in 2008, elections in blocking charge cases took median of 139 days compared to 38 days in unblocked elections).

<sup>113</sup> CASEHANDLING MANUAL, *supra* note 12, § 11740.1.

<sup>114</sup> See *supra* note 112.

<sup>115</sup> 79 Fed. Reg. at 74,490 (proposing 29 C.F.R. § 103.20); see also *id.* at 74,419–20 (noting that regions will now have information, such as identification of witnesses, to more quickly decide whether to issue stay).

<sup>116</sup> Eigen & Garofalo, *supra* note 109, at 1897 (proposing fourteen-day maximum). The Board rejected calls to eliminate or narrow its presumption in favor of a stay when there is evidence of most types of unlawful conduct. 79 Fed. Reg. at 74,420.

<sup>117</sup> See *supra* notes 4–5 and accompanying text. The converse is true for unions facing decertification elections.

For the NLRB, which has the duty to safeguard employees' ability to make a free choice, reducing delay justifiably took a central role.<sup>118</sup> However, there is a countervailing concern that running elections too quickly could prevent employees from receiving balanced information about unionization. In other words, if these were really "ambush" elections and do not leave enough time for employees to hear from their employer, they may have an unduly positive view of unions.<sup>119</sup> This is a far less significant concern than excessive delay,<sup>120</sup> but it is still an important factor that the Board appropriately considered when shaping its election rules.

Many employers commented to the Board that a quicker election schedule inhibits employers' ability to express their views and therefore prevents employees from making an informed choice.<sup>121</sup> In truth, most employers are probably more concerned with avoiding unionization than protecting employees' rights. Yet, regardless of employers' motivation, the issue is a valid one. The election system already fails to expose employees to many types of useful information because it relies primarily on two self-interested parties.<sup>122</sup> If the new election process moves too fast, it could exacerbate this problem by further limiting access exposure to information. But what is too fast?

Given the variability in elections, there is no way to determine an ideal time period. The NLRB election process often takes far too long, but there are examples of election systems that may run too quickly. For instance, in some

---

<sup>118</sup> See *supra* notes 2–4 and accompanying text. Even the dissenting Board members expressed a desire to reduce delay, advocating a rule with a minimum of 30–35 days and maximum of 60 days for all elections, absent special circumstances. 79 Fed. Reg. at 74,459.

<sup>119</sup> But see 79 Fed. Reg. at 74,430 (dissenting members arguing that fast elections gives employees less time to understand important issues); Joseph P. Mastro Simone, *Limiting Information in the Information Age: The NLRB's Misguided Attempt to Squelch Employer Speech*, 52 WASHBURN L.J. 473, 485–506 (2013) (criticizing quicker elections for limiting speech and also proposing alternatives).

<sup>120</sup> See *supra* notes 4–5 and accompanying text.

<sup>121</sup> 79 Fed. Reg. at 74,318. Moreover, although employers complained that unions try to keep their organizing efforts secret, in the vast majority of cases employers are well aware of campaigns long before there is an election petition. *Id.* at 74,320–21; *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969) (noting that unions normally tell employers about campaigns to establish possible unfair labor practice charges and election objections); Kate Bronfenbrenner & Dorian Warren, *The Empirical Case for Streamlining the NLRB Certification Process* 3 tbl.1, 4 (Inst. for Social & Econ. Research & Policy, Working Paper 2011.01, 2011), available at [http://www.rooseveltinstitute.org/sites/all/files/working\\_paper\\_cover\\_2011-01-final.pdf](http://www.rooseveltinstitute.org/sites/all/files/working_paper_cover_2011-01-final.pdf) (finding that 47% of serious allegations of unlawful conduct settled or found meritorious involved pre-petition employer conduct, and over 50% of other allegations involved pre-petition conduct).

<sup>122</sup> 79 Fed. Reg. at 74,438–41 (dissenting members discussing need for employers to inform employees); Bodie, *supra* note 1, at 35–38 (describing information lacking in current system); Hirsch, *supra* note 1, at 1124–25 (discussing importance of information to employees' vote).

Canadian provinces elections are required to occur in as few as five days.<sup>123</sup> This time period is so short that there is a genuine risk that employees will not get necessary information, especially given that some employees might be out sick or on vacation during the brief campaign period.<sup>124</sup> Nevertheless, although too little time can be problematic, more is not always better. Because of the risk of coercion, the NLRB-election process is a rare instance in which less communication can enhance, rather than hinder, employees' right to freely choose whether to unionize.<sup>125</sup> The question is whether the Board's new system falls within a justifiable middle ground.

The answer to this inquiry hinges on how the new election system will operate in practice. Some commentators claimed that the elections will now occur in as little as eight days after a petition, but that does not appear possible.<sup>126</sup> At a minimum, a region will schedule a hearing eight days after a petition,<sup>127</sup> take at least one day to conduct the hearing, then spend an unspecified amount of time to consider the evidence and write a decision.<sup>128</sup> If the region orders an election, then an employer must post the Notice of Election for at least three days prior to the election.<sup>129</sup> In other words, even if a region works as fast as possible, there are at least eleven days of delay.

---

<sup>123</sup> See Labour Relations Code, R.S.B.C., c. 244, s. 24(2) (Can.) (providing ten days in British Columbia); Labor Relations Act, C.C.S.M., c. L10, s. 48(3) (Can.) (providing seven days in Manitoba); Labour Relations Act, R.S.N.L., c. L-1, s. 47(4) (Can.) (providing five business days in Newfoundland and Labrador); Trade Union Act, R.S.N.S., c. 475, s. 25(3) (Can.) (providing five working days in Nova Scotia); Labour Relations Act, S.O., c. 1, s. 8(5) (Can.) (providing five business days in Ontario). In reality, the elections usually take longer. See Michele Campolieti, Chris Riddell & Sara Slinn, *Labor Law Reform and the Role of Delay in Union Organizing: Empirical Evidence from Canada*, 61 INDUS. & LAB. REL. REV. 32, 50 tbl.11, 51 (2007) (noting that Ontario took an average of 50.6 days from 1995–1998, and British Columbia an average of 23.8 days from 1987–1992).

<sup>124</sup> Hirsch, *supra* note 1, at 1136–37.

<sup>125</sup> *Id.*

<sup>126</sup> 79 Fed. Reg. at 74,324. Theoretically, uncontested elections could occur that quickly if the region moved extremely fast. However, that possibility also existed under the previous rules. *Id.*

<sup>127</sup> *Id.* at 74,309 (noting that former regional best practice was 7–10 days, although some regions took 15 days or longer).

<sup>128</sup> *Id.* at 74,324. After the hearing, the hearing officer makes an initial set of rulings, which the regional director then reviews before determining whether a question concerning representation exists. See *id.* at 74,483 (proposed 29 C.F.R. § 102.65(c)). In Fiscal Year 2012, regions took a median of thirty-four days to issue preelection decisions, see *supra* note 26, and the Board cited a multiyear median of twenty days. 79 Fed. Reg. at 74,332. The default date to schedule an election is at least ten days after the *Excelsior* list is due, which is two days after the petition; however, a union can waive the ten-day period. See *supra* notes 85–88 and accompanying text.

<sup>129</sup> 79 Fed. Reg. at 74,483 (proposed 29 C.F.R. § 102.65(c)).

Although eleven days represents the minimum time required to run an election, actual practice will almost certainly be significantly longer, especially given that regions typically take weeks to issue preelection decisions.<sup>130</sup> Moreover, as regions schedule elections “for the earliest day practicable,”<sup>131</sup> they will take into account the time it takes to conduct a fair election with well-informed employees.<sup>132</sup> Indeed, in recent years, regions have taken an average of 36–39 days to conduct even uncontested elections. Now-eliminated delays may have influenced these averages by altering parties’ negotiating positions,<sup>133</sup> but it is difficult to believe that regions will schedule contested elections substantially faster than they currently schedule uncontested elections. Speculation about the speed of future elections is inherently unreliable, especially given the Board refusal to set or suggest minimum and maximum time limits.<sup>134</sup> However, the basic resources and considerations involved with most elections lead me to predict that the median time to run contested elections will roughly track the current uncontested election schedule.

If this prediction is close to accurate, it appears that the new election system falls well within the middle ground between unreasonably slow and unjustifiably fast.<sup>135</sup> The rules will reduce some of the delay that has interfered with employees’ rights in the past, yet still provides sufficient opportunity for parties to express their views.<sup>136</sup> The real question is whether the shortened election timeline will actually make a meaningful reduction in campaign-related coercion. The new rules are likely to help some, but their impact is severely limited by the Board’s weak enforcement and remedial authority.<sup>137</sup>

---

<sup>130</sup> See *supra* note 128.

<sup>131</sup> 79 Fed. Reg. at 74,485 (proposed 29 C.F.R. § 102.67(b)).

<sup>132</sup> *Id.* at 74,405.

<sup>133</sup> *Id.* at 74,387 (noting that parties could always force automatic twenty-five day waiting period and seven-day period to file post-hearing brief).

<sup>134</sup> See *id.* at 74,323–24 (preferring to leave decision to schedule election up to the General Counsel to decide on case-by-case basis).

<sup>135</sup> Hirsch, *supra* note 1, at 1137 (arguing that minimum time necessary to provide employees with sufficient exposure to both union and employer views could be as little as fourteen days).

<sup>136</sup> Some argued that the shortened time period infringed employers’ statutory and constitutional right to express their views. 79 Fed. Reg. at 74,432 (dissenting members advocating this position). However, Section 8(c)’s protection for employers’ nonthreatening speech does not apply to representation proceedings. See *id.* at 74,318 (citing cases). Moreover, the First Amendment is not implicated because employers are still free to express their views—they just have less time to do so. *Id.* at 74,319, 74,321–23.

<sup>137</sup> Hirsch, *supra* note 1, at 1126 n.185 (discussing enforcement problems). Even the dissenting NLRB members sought more emphasis on enforcement and remedies. 79 Fed. Reg. at 74,459.

Finally, although the Board rightly focused on process, most parties are primarily concerned with results: that is, whether unions will win more elections. It is too early to tell what impact the rules will have on election results, especially without knowing how quickly elections will occur in practice. One would expect some improvement in unions' success,<sup>138</sup> but I suspect that it will not be dramatic. The forces working against unionization, such as global economic pressures and employers' ability to aggressively fight unions, still persist.<sup>139</sup> Thus, while the new rules are undoubtedly a positive step for unions, the changes are modest and unlikely to result in extensive gains.

### CONCLUSION

This Essay asks whether the new election rules are “ambush” or anticlimax; the answer is neither. The changes are exceedingly modest and could be criticized for not doing enough. However, they are not inconsequential. The Board's reforms should lead to somewhat quicker elections and fewer cases in which employees' freedom to vote is frustrated—all while maintaining employees' access to information.

No major NLRB initiative can avoid partisan wrangling, and these rules are no different. Yet, the Board managed to promulgate a measured set of reforms upholding ideals that even employers have purported to support.<sup>140</sup> Disagreement, and no doubt litigation, will continue to surround the new election rules, but they deserve recognition for what they are: modest and reasonable procedural reforms.

---

<sup>138</sup> In Canada, for instance, speeding up the representation and unfair labor practice processes increased the chance of union certification. See Brudney, *supra* note 5, at 880 n.297; Campolieti et al., *supra* note 123, at 33–34.

<sup>139</sup> Hirsch, *supra* note 1, at 1136 n.242.

<sup>140</sup> During the debate over the Employee Free Choice Act's card-check provisions, employers frequently extolled the indispensability of secret-ballot elections. Steven Greenhouse, *Democrats Drop Key Part of Bill To Assist Unions*, N.Y. TIMES, July 17, 2009, at A1, available at <http://www.nytimes.com/2009/07/17/business/17union.html>.