UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Representation case procedures **RIN 3142-AA08**

REPLY STATEMENT OF MICHAEL D. PEARSON

I was one of the speakers during the public meeting held on July 18, 2011. In my presentation, I indicated that I had been a Field Examiner with Region 7 of the NLRB in Detroit for nearly 34 years and that I retired in 2005. I submitted a supplemental statement on August 22, 2011, and am hereby submitting a reply statement with regard to certain of the assertions made by speakers during the public meeting on July 18 and July 19, 2011.

Several of the speakers expressed the opinion that the election process is working well and that the Board's representation case procedures do not need to be changed.[1] In support of that position, several speakers noted that the Board has an admirable 38 day median from the date of filing of petitions to the date of the election. In my supplemental statement of August 22, I noted that the 38 day median is misleading, because it is directly related to the fact that 92% of petitions result in elections that are held pursuant to an election agreement. With regard to directed elections, which is the major focus of the proposed changes to the Board's representation procedures, a much more relevant statistic is that, in recent years, directed elections have been conducted at a median of between 58 to 70 days following the filing of petitions. As I explained in my supplemental statement, I believe that is plainly excessive delay for employees to have an election. Think for a moment as to exactly how long that is. For example, 58 days is one-half of the entire 2011 regular season of the National Football League (Perhaps not this year, but in most years the Detroit Lions would be eliminated from playoff contention by the midway point of the season.)

During the public meeting, several speakers indicated that the Board should be satisfied that 92% of petitions result in an election that is held pursuant to an election agreement.[2] However, there is one significant issue with regard to the "agreed upon"

[1] Arnold E. Pearl, Transcript p. 11; Peter Kirsanow, Tr. p. 58; Michael Prendergast, Tr. p. 72; Oliver J. Bell, Tr. p. 84; William P. Barrett, Tr. p. 96; Ronald Meisburg, Tr. p. 149; G. Roger King, Tr., p. 236; Francis T. Coleman, Tr., p. 305; Russ Brown, Tr., p. 361.

[2] Ronald Meisburg, Tr. p. 150; Charles I. Cohen, Tr. p. 199.

election date in election agreements that is frequently overlooked. An employer's threat of refusing to sign an agreement requiring that a pre-election hearing be held (resulting in a significant delay in the date of the election) allows the employer (and the NLRB Region) to leverage the petitioning union into "agreeing" to a delayed election date. Described below is a not uncommon scenario during the processing of a representation petition which results in a union's agreement to a significantly delayed election date.[3]

1) a Notice of Hearing issues about one week after the filing of the petition. The hearing is scheduled for 14 days after the petition was filed.

2) At the hearing, or in telephone conversations prior to the hearing, the employer's attorney indicates that he/she will be willing to enter into an election agreement if the election is held 59 days after the petition was filed.

3) The union refuses to accept that date and the hearing officer notes that the Regional Director will refuse to approve an election agreement where the election date is that far beyond the 42 day goal established by the General Counsel.

4) The employer's attorney counters that he/she will very reluctantly agree to an election 49 days after filing, but will refuse to agree to an election any earlier and will raise one or more hearing issues [that have speculative merit, at best] if the union refuses to agree to that date. The employer's attorney notes that:

a) If a hearing is held, it may last two or more days.

b) If a second day of hearing is necessary, the hearing will have to be rescheduled to a later date because the employer is not available the next day.

c) Due to the complexity of the hearing, when the hearing concludes, the employer will request that the parties be allowed 14 to 21 days to file briefs.

d) It will be difficult to predict how long it will take for the Regional Director to issue a Decision, noting that the more complex that the hearing is, the more difficult it will be for the Regional Director to issue the Decision.[4]

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[3] The situation I describe took place several times each year of my career.

[4] There are occasions where the employer intentionally makes it difficult to review the hearing record. I recall one instance where an employer attorney was overheard telling his client that he had sprinkled evidence regarding various community of interest issues in several different locations throughout the record to make it as difficult as possible for the Regional Director to review the record.

e) In accordance with Board policy, once the Decision issues, the election will be held 25 to 30 days thereafter.[5] The employer's attorney also notes that in the event that a Request for Review is filed, there is the possibility that the election might by stayed.[6]

f) The employer's attorney concludes by stating that by having a hearing, it will be nearly impossible for the union to have an earlier election date than the date suggested by the employer.

5) The hearing officer informs the union that the employer's attorney is correct and that the union will not get a quicker election by refusing to enter into an election agreement.

6) The union "accepts" the date offered by the employer.

7) The Regional Director notes that the General Counsel has a "goal", not a rigid policy, of having elections within 42 days of filing and therefore approves the election agreement with an election date 49 days after filing. [7]

8) The union was forced into agreeing to a significantly delayed election date because, if it did not, it would have been required to go through the ordeal of a hearing that would have resulted in an even later election date.

It is my hope that by making changes in the Board's representation procedures, the election process in directed elections will be speeded up. It will be a welcome change if directed elections can be held in such a timely manner that unions will not be effectively forced into agreeing to unacceptable election dates in election agreements.

Several of the speakers asserted that "many" or "most" employers are not aware of organizing activity when petitions are filed, and that, until then, employers are "completely oblivious" to the organizing activities of the employees.[8] In my supplemental statement, I noted that this is not consistent with my experience as a Board agent and the experience of many of the speakers who spoke in favor of the proposed

[5] See R Case Manual Section 11302.1.

[6] See R Case Manual Section 11274.

[7] I recognize that the policy varies from Region to Region, but at least in Region 7 in Detroit, the Regional Director does approve election agreements if the election date is no more than 49 days after filing. While there is a 38 day median for all Board elections, that is the median and many elections held pursuant to an election agreement are conducted well beyond the 38 day median.

[8] Eric C. Schweitzer, Tr. p. 47; Scott Pedigo, Tr., p. 55; Ronald Meisburg, Tr., p. 148; Francis T. Coleman, Tr., p. 304; William Messenger, Tr., p. 344; Jay P. Krupin, Tr., p. 390 and 395.

rules. It is also not consistent with the research of Professors Kate Bronfenbrenner and Dorian Warren.[9] During my investigation of unfair labor practices/objections, it was quite common to find that employer misconduct had occurred prior to the filing of the petition.

Several of the speakers expressed the opinion that the Board's blocking charge policy should be changed, if not outright eliminated. One speaker referred to the policy as "the pinnacle of unfairness and unnecessary delays."[10] If any changes to the current policy are made, I would be very much opposed if the blocking charge rule is eliminated or modified so that an election would go forward and ballots would be impounded. Without the benefit of a remedy for an unfair labor practice charge, is it fair that a union should be required to proceed to an election when the employer has told employees, perhaps several times, that it will close or move its operations if the union is voted in?[11] I see nothing wrong with there being a policy that:

1) if an employer has allegedly engaged in unfair labor practices; and

2) if the union files a charge that it asserts should block the election because it believes that the employer's conduct has made a fair election impossible;

3) the election should be delayed until those unfair labor practices have been fully investigated and remedied if there is a violation of the Act.

Contrary to many of the complaints made by several speakers who opposed the proposed changes to the Board's procedures, I believe that, if the changes are adopted, employers will continue to be able to fully communicate with their employees and to explain why they are opposed to their employees choosing union representation.

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[9] Professor Bronfenbrenner, Tr., p. 432; Professor Warren, Tr., p. 327.

[10] Arnold E. Pearl, Tr., p. 11; Professor Samuel Estreicher, Tr., p. 65; Michael E. Avakian, Tr., p. 410.

[11] The extent of misconduct by employers can at times be staggering and damaging to the ability of a union to win an election. While many cases that result in the issuance of a complaint involve a handful of allegations, it is certainly not rare to have a case where dozens of violations have occurred. Should unions be required to go to an election in the face of that type of misconduct? I recall once having a case where the unfair labor practices found during the investigation were so extensive that when the employer entered into a settlement agreement, the Notice to Employees consisted of three panels where the employer gave assurances that it would not again engage in the conduct set forth in the Notice. A rerun election was scheduled but the union ultimately withdrew its petition in frustration when the employer again engaged in the exact same misconduct. As a result of the employer's coercive conduct, the union realized that it had no chance of winning an election.