

**National Labor Relations Board**

Submission of Professor Martin H. Malin and Professor Jon M. Werner in response to the National Labor Relations Board's Request for Information Regarding Representation Election Regulations

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## Introduction

Professors Martin H. Malin and Jon M. Werner submit this response to the NLRB's Request for Information Regarding Election Regulations published in the Federal Register. We take no position as to whether the revisions that took effect April 14, 2015, should be retained, modified or repealed. However, we have been engaged in an on-going research project evaluating the effects of the regulation revisions and submit our work to date for the benefit of the Board should the Board decide to use it.

Professor Malin is Professor of Law and Co-director of the Institute for Law and the Workplace at Chicago-Kent College of Law, Illinois Institute of Technology. He is author of more than 80 articles and six books, including *Labor Law in the Contemporary Workplace* (West 2009, 2<sup>nd</sup> ed. 2014, 3<sup>rd</sup> ed. in progress), a leading law school labor law casebook. He is a past Chair of the Association of American Law Schools Section on Labor Relations and Employment Law, a past Secretary of the American Bar Association Section on Labor and Employment Law and a past member of the Board of Governors of the College of Labor and Employment Lawyers.

Professor Werner is Professor of Management and Chair of the Management Department at the University of Wisconsin-Whitewater. He is author of more than 50 articles, two books, and six book chapters – eight of which focus on legal and public policy issues. His article with Mark Bolino, “Explaining U.S. Courts of Appeals decisions involving performance appraisal: Accuracy, fairness, and validation” (1997), *Personnel Psychology*, 1-24, was listed among the most cited articles in industrial-organizational psychology textbooks (Aguinis et al., 2017, *Industrial and Organizational Psychology*, 507-557). He presently serves as Co-Editor of *Human Resource Development Quarterly*. Our prior collaboration may be found at “*14 Penn Plaza v. Pyett*: Oppression or Opportunity for U.S. Workers – Learning from Canada”, 2017 *University of Chicago Legal Forum* 347.

During the summer of 2017, having had two years of experience under the revised representation case regulations, we decided to compare the experience during the first two years of the revised regulations with the experience in the two years immediately preceding the effective date of the revisions. Unfortunately, the fiscal year election reports available on the Board's website did not contain all of the data we needed for the comparison. During summer and fall 2017, we communicated informally with Board personnel to ascertain whether the Board would be able to provide the data that we desired. After being assured that the Board could do so, we filed a formal Freedom of Information Act (FOIA) request on December 4, 2017. We received almost all of the data we requested on March 6, 2018. Three files were made available based upon our FOIA request of December 4, 2017:

- File 1: [\*NLRB-2018-000234.final records.stip consent and directed election info\*](#)
- File 2: [\*NLRB-2018-000234.final records.RC RD RM Case Data-APR 14 2013-APR 13 2017\*](#)
- File 3: [\*NLRB-2018-000234.final records.Blocking Case Dispositions\*](#)

Even with the extensions granted to file comments on the rule change, it was not possible to do a thorough checking and data cleansing on these files. Some minor discrepancies were noted in the files, e.g., some cases where both a Certification of Representative and a Certification of Results was listed for the same case. We pursued each of these cases with individuals connected to these cases, and based on their responses, listed the case as either a Certification of Representative or a Certification of Results. Adding in formulas into the Excel files also revealed some cases where the number of votes for and

against the labor organization exceeded the number of eligible voters. These were also pursued and reconciled before data analyses were conducted. These individual case changes are available from Professor Werner upon request. Given the large number of cases involved in these analyses, and the relatively small number of such data discrepancies, it is extremely unlikely that any findings presented below have been impacted by any such data irregularities.

The first file (“stip consent and directed”) contains relevant data for the four years in question (4/14/2013 through 4/13/2017) on three separate tabs. Tab 1 has individual rows of data from 5,746 cases with single labor organization elections, Tab 2 has data from 296 cases with two labor organization elections, and Tab 3 has data from 23 cases with three labor organization elections. RC, RD, and RM cases are combined in each of the tabs in this file, and all cases listed were closed. This file provides data on the dates petitions were filed, the dates elections were held, and the dates files were closed. There is also data on the number of eligible voters, valid votes for and against the labor organization, whether the election was stipulated, consent, or directed, as well as the outcome of each case (Certification of Representative or Certification of Results). For our later analyses, Elapsed Time was calculated in Microsoft Excel in three ways. First, the number of days between when the petition was filed to the election was calculated. Second, the number of days was calculated from the election to the closing of the case. Third, the number of days was calculated from the date the petition was filed to the closing of the case. For statistical analyses, these formula values (in Excel) were converted to numerical values, which were then used in the Stata statistical package. Outcome was coded as 1 for Certifications of Representative, and 0 for Certifications of Results.

The second file (“RC RD RM Case Data”) contains data on two tabs, with the first tab containing data from 5,496 cases where the petition was filed between 4/14/2013 and 4/13/2015, and the second tab containing data from 5,038 cases where the petition was filed between 4/14/2015 and 4/13/2017. As in the first file, RC, RD, and RM cases are all included in both tabs. After removing duplicate cases (for statistical analyses), this file had 5,151 cases before the rule change, and 4,821 cases after the rule change. File 2 includes cases where no election was held, i.e., petitions that were withdrawn or dismissed. For all cases in this file, information is available concerning the dates when petitions were filed, and the dates the files were closed. For those cases where there was an election, that information is available as well. There is considerable other information available in this file that was not used for the present analyses, including considerable information concerning blocking issues, position statement dates, and objection filed dates. For the analyses reported below, we focus primarily on the Closed Reason, in particular, whether a case outcome was Certification of Representative, Certification of Results, Withdrawal, or Dismissal. Any Closed Reason listed as “NULL” was ignored for purposes of our analyses, as these appeared to be cases that were still open as of the date the data was compiled by Board personnel in response to our FOIA request.

The third file (“Blocking Case Dispositions”) provides information on the disposition of blocking charges. This file contains data on two tabs, with the first tab containing data on 617 cases from 4/14/2013 through 4/13/2015, and the second tab containing data from 380 cases from 4/14/2015 through 4/13/2017. As above, RC, RD, and RM cases are all included in both tabs.

The number of cases in File 2 that were closed by certification of representative or certification of results should encompass all cases in which elections were held and should match the number of cases in

File 1, but they did not. We were not able to determine precisely why this occurred, but this seems to be driven by the particular query that was answered in each file. However, when we ran election-specific analyses using either File 1 or File 2, the results were not significantly different from each other.

File 2 contains all cases, including those where blocking charges were filed. File 3, which focuses exclusively on the disposition of blocking charges, contains many rows of data for the same case number, and each line has some unique information on it. File 2, on the other hand, lists each of these cases on one row. We report below the source or file used for each comparison.

In our analyses reported below, we are making fairly straightforward “before and after” comparisons, i.e., combining cases in the two years before the rule change, and comparing these to cases in the two years subsequent to the change. More fine-grained analyses would be valuable to view trends in NLRB R cases over time. The present analyses provide an initial snapshot, and can be used as the NLRB considers whether to retain, modify, or repeal the Election Regulations currently in effect.

### **Impact of the Rule Revisions on Case Outcomes**

The revisions to the rules were controversial, with most of the controversy focused on the likely reduction in the amount of time that would elapse between the filing of a petition and the holding of an election. Some in the management community critiqued the revised rules as calling for “ambush elections.” However, the revisions made other changes that could also impact outcomes, such as the addition of personal telephone numbers and personal email addresses to the *Excelsior* list. There is no way to isolate the effects of changes to the *Excelsior* list, but we are able to examine the effects of the revisions as a whole. We have looked at all representation cases filed during the period April 14, 2013 through April 13, 2015, and during the period April 14, 2015 through April 13, 2017. These included petitions that were dismissed and withdrawn. We excluded petitions in cases that were not closed as of the date the Board provided the data. (Most of these cases were still open because of review pending before the Board.) Our first look was at all cases, i.e., RC, RD, and RM cases combined. The data show that there were somewhat fewer total cases after the rule change than before, i.e., 5,124 total cases before April 14, 2015, and 4,749 cases on or after April 14, 2015 (see Table 1). Overall, the percentage of case outcomes that were Certifications of Representative was higher after the rule change, i.e., from 41.7% before the rule change, to 44.5% after the rule change, and this difference was statistically significant ( $p < .01$ ). A separate analysis of the decline in the percentage of cases with dismissals, i.e., from 3.7% to 3.0%, was statistically significant ( $t=2.02$ ,  $p < .05$ ), indicating that there were relatively fewer dismissals after the rule change.

**Table 1**

Outcomes Before and After the NRLB Rule Change for All Cases Combined (RC, RD, and RM)

Type of Outcome	Cases filed 4/14/2013- 4/13/2015	Cases filed 4/14/2015- 4/13/2017	Statistical Significance
Certifications of Representative	2,135 (41.7%)	2,111 (44.5%)	<b>t= 2.79 (p &lt; .01)</b>
Certifications of Results	1,165 (22.7%)	1,068 (22.5%)	
Dismissals	192 ( 3.7%)	143 ( 3.0%)	<b>t = 2.02 (p &lt; .05)</b>
Withdrawals	1,632 (31.8%)	1,427 (30.1%)	
Totals:	5,124	4,749	

Source: File 2 (with duplicates and open cases removed)

The utility of this overall analysis is limited because the same category of outcome may have a different meaning in different types of cases. For example, the withdrawal or dismissal of an RC petition may be regarded as a union loss, while the dismissal or withdrawal of an RD petition may be regarded as a union win. Therefore, we broke the data down by type of petition: RC, RD and RM. This is presented in Table 2. Similar to the overall results presented in Table 1, with each type of case, the percentage of outcomes that were Certifications of Representative was higher after the rule change than before. However, looking at the cases separately, none of comparisons reaches statistical significance at the traditional minimum level of significance of  $p < .05$  (n.s. stands for not significant at this minimum level of statistical significance). This is a function of the smaller sample sizes used to compute the t-tests for these various comparisons. The higher rate for Certifications of Representative for RD cases approaches significance, but at best would be considered only “marginally” statistically significant.

We are a bit baffled by the higher percentage of Certification of Representative in RD cases after the rules change. Intuitively, shortening the time from petition filing to election in RD cases would be expected to disadvantage the incumbent exclusive representative. This may be explained by the declines in the percentage of RD petitions that were withdrawn (42.6% to 38.7%) and dismissed (12.2% to 9.4%). We regard withdrawal or dismissal of an RD petition as a union win. When withdrawals and dismissals in RD cases are combined with Certifications of Representative, this provides a total of 609/860, or 70.8% of such RD cases before the rule change. After the rule change, this combination of RD cases was 432/636, or 67.9%. Thus, the union win rate declined as expected. Indeed, the converse of this is that the percentage of RD cases resulting in Certification of Results increased from 29.2% to 32.1%. However, this difference was not statistically significant ( $t= 1.51$ , n.s.), and thus it cannot be said that this shows any substantial change favoring either party in RD cases after the rule change.

**Table 2**

Outcomes Before and After the NRLB Rule Change for RC, RD, and RM Cases Separately

Type of Outcome	Cases filed 4/14/2013- 4/13/2015	Cases filed 4/14/2015- 4/13/2017	Statistical Significance
<b>RC Cases Only</b>			
Certifications of Representative	1,981 (47.7%)	1,969 (49.1%)	t= 1.26 (n.s.)
Certification of Results	891 (21.4%)	825 (20.6%)	
Dismissal	70 ( 1.7%)	74 ( 1.8%)	
Withdrawal	1,211 (29.2%)	1,143 (28.5%)	
Totals:	4,153	4,011	
<b>RD Cases Only</b>			
Certifications of Representative	138 (16.0%)	126 (19.8%)	t= 1.89 (p= .06)
Certifications of Results	251 (29.2%)	204 (32.1%)	
Dismissals	105 (12.2%)	60 ( 9.4%)	
Withdrawals	366 (42.6%)	246 (38.7%)	
Totals:	860	636	
<b>RM Cases Only</b>			
Certifications of Representative	16 (14.4%)	16 (15.7%)	t= 0.26 (n.s.)
Certifications of Results	23 (20.7%)	39 (38.2%)	
Dismissals	17 (15.3%)	9 ( 8.8%)	
Withdrawals	55 (49.6%)	38 (37.3%)	
Totals:	111	102	

Source: File 2 (with duplicates and open cases removed)

We next performed the same analyses (all petitions, RC, RD, RM) excluding the petitions that were dismissed. These results are presented in Table 3. This data set thus consists of petitions that were withdrawn and petitions that proceeded to election. This data set is particularly important for the RC cases, as we assume that a union's withdrawal of an RC petition reflects its determination that it will likely lose the election and therefore it is better to have the shorter bar to refiling that comes when withdrawing the petition.<sup>1</sup>

The results in Table 3 largely mirror what is shown above, in that when RC, RD, and RM cases are combined, the increase in the percentage of Certifications of Representative after the rule change remains statistically significant, although now at the  $p < .05$  level of statistical significance (for these comparisons, the numbers for Certifications of Results and Withdrawals were combined for statistical analyses). As shown in Table 3, none of the analyses for RC, RD, and RM cases separately were statistically significant.

<sup>1</sup> We recognize that some withdrawals occur when there is a decision expanding the bargaining unit beyond what the petitioner requested and the petitioner withdraws the petition because it no longer has an adequate showing of interest but we believe that these are the exceptions and most withdrawals occur because of a fear of losing the election.

**Table 3**

Outcomes Before and After the NRLB Rule Change for RC, RD, and RM Cases, Excluding Dismissals

Type of Outcome	Cases filed 4/14/2013- 4/13/2015	Cases filed 4/14/2015- 4/13/2017	Statistical Significance
<b>All Cases (RC, RD, RM)</b>			
Certifications of Representative	2,135 (41.7%)	2,111 (44.5%)	<b>t= 2.50 (p &lt; .05)</b>
Certifications of Results	1,165 (22.7%)	1,068 (22.5%)	
Withdrawals	1,632 (31.8%)	1,427 (30.1%)	
Totals:	4,932	4,749	
<b>RC Cases Only</b>			
Certifications of Representative	1,981 (48.5%)	1,969 (49.1%)	t= 1.33 (n.s.)
Certification of Results	891 (21.8%)	825 (20.6%)	
Withdrawal	1,211 (29.7%)	1,143 (28.5%)	
Totals:	4,083	4,011	
<b>RD Cases Only</b>			
Certifications of Representative	138 (18.3%)	126 (19.8%)	t= 1.63 (n.s.)
Certifications of Results	251 (33.2%)	204 (32.1%)	
Withdrawals	366 (48.5%)	246 (38.7%)	
Totals:	755	636	
<b>RM Cases Only</b>			
Certifications of Representative	16 (17.0%)	16 (15.7%)	t= 0.03 (n.s.)
Certifications of Results	23 (24.5%)	39 (38.2%)	
Withdrawals	55 (49.6%)	38 (37.3%)	
Totals:	94	102	

Source: File 2 (with duplicates and open cases removed)

We then performed the same analyses, this time excluding the petitions that were either dismissed or withdrawn. These are the petitions that went to an election, i.e., either Certifications of Representative or Certifications of Results. These findings are shown in Table 4. The data reflect the following: as before, the percentage of cases that were Certifications of Representative was higher after the rule change than before (66.4% vs. 64.7%). However, now this difference is not statistically significant. As in Table 3, none of the separate comparisons for RC, RD, and RM cases by themselves were statistically significant. Finally, while the number of RM cases that went to election was very low (94 cases before the rule change, and 102 cases after), the number of RM cases that were Certifications of Representative went down after the rule change.

**Table 4**

Outcomes Before and After the NLRB Rule Change for RC, RD, and RM Cases, For Elections Only

Type of Outcome	Cases filed 4/14/2013- 4/13/2015	Cases filed 4/14/2015- 4/13/2017	Statistical Significance
<b>All Cases (RC, RD, RM)</b>			
Certifications of Representative	2,135 (64.7%)	2,111 (66.4%)	t= 1.44 (n.s.)
Certifications of Results	1,165 (35.3%)	1,068 (33.6%)	
Totals:	3,300	3,179	
<b>RC Cases Only</b>			
Certifications of Representative	1,981 (69.0%)	1,969 (70.5%)	t= 1.22 (n.s.)
Certification of Results	891 (31.0%)	825 (29.5%)	
Totals:	2,872	2,794	
<b>RD Cases Only</b>			
Certifications of Representative	138 (35.5%)	126 (38.2%)	t= 0.75 (n.s.)
Certifications of Results	251 (64.5%)	204 (61.8%)	
Totals:	389	330	
<b>RM Cases Only</b>			
Certifications of Representative	16 (41.0%)	16 (29.1%)	t= 1.20 (n.s.)
Certifications of Results	23 (59.0%)	39 (70.9%)	
Totals:	39	55	

Source: File 2 (with duplicates and open cases removed)

**Elapsed Time, Number of Eligible Voters and Election Outcomes**

Much of the controversy concerning the revised regulations centered around the expectation that elections would happen faster than under the prior rules. In RC cases, opponents of the revisions expressed concerns that employees would not hear all views as to whether representation was in their interests. Implicit in these critiques was a view that the revisions with respect to RC petitions would inappropriately advantage petitioning unions in RC cases. The reduction in time between petition filing and election might also disadvantage incumbent unions in RD and RM cases.<sup>2</sup> Conventional wisdom also holds that the larger the number of eligible voters,<sup>3</sup> the less likely it is that an exclusive representative will be certified. Our data analyses for all cases, RC, RD and RM cases reflects the following. There was a substantial reduction in the average elapsed time from the dates petitions were filed to the dates elections were held, and then to the dates cases were closed, and this was true for all types of cases (RC, RD, and RM). As shown in Table 5, all comparisons are statistically significant ( $p < .01$ ) for all of the cases combined, and for the RC cases by themselves. The number of cases in parentheses in the columns for cases before and after the rule change refers to the number of cases that had available data for that

<sup>2</sup> The NLRB was unable to advise us for RM petitions whether there was an incumbent exclusive bargaining representative when the petition was filed. We believe that most RM petitions involve challenges by an employer to the continuing majority status of an incumbent exclusive representative.

<sup>3</sup> We speak of number of eligible voters rather than size of the bargaining unit because in some cases the employees are voting on whether they should be accreted to an existing unit.

comparison. For example, the average time from petition file date to election before and after the rule change was 18.7 days shorter for all cases combined, and 19.1 days shorter for RC cases only, indicating that considerable time in the process was reduced after the rule change. The pattern for RD and RM cases is similar, i.e., cases are being decided more quickly. In RD cases, elections were held on average 11.2 days faster under the new rules and were closed an average of 26.1 days faster. In RM cases, elections were held an average of 8.5 days faster and closed an average of 34.5 days faster under the new rules. However, because the sample sizes for RD and RM cases were much smaller than for RC cases, only one difference between cases before and after the rule change for such cases was statistically significant at  $p < .05$ , and that was the discrepancy for RD cases from date petition filed to date closed (at  $p < .01$ ).

**Table 5**

Average Elapsed Time (Comparing Petition Filed, Election Date, and Date Case Closed) Before and After the NRLB Rule Change for RC, RD, and RM Cases

Type of Outcome	Cases filed 4/14/2013-4/13/2015	Cases filed 4/14/2015-4/13/2017	Statistical Significance
<b>All Cases (RC, RD, RM)</b>			
Petition Filed to Election	48.1 days (3,356 cases)	29.8 days (3,293 cases)	<b>t= 14.87 (p &lt; .01)</b>
Election Date to Date Closed	37.3 days (3,324 cases)	26.7 days (3,227 cases)	<b>t= 5.32 (p &lt; .01)</b>
Petition Filed to Date Closed	75.4 days (5,127 cases)	49.6 days (4,750 cases)	<b>t= 12.32 (p &lt; .01)</b>
Total Number of Cases:	5,151 cases	4,821 cases	
<b>RC Cases Only</b>			
Petition Filed to Election	45.9 days (2,918 cases)	26.8 days (2,904 cases)	<b>t= 17.06 (p &lt; .01)</b>
Election Date to Date Closed	36.9 days (2,894 cases)	26.7 days (2,842 cases)	<b>t= 4.94 (p &lt; .01)</b>
Petition Filed to Date Closed	71.5 days (4,156 cases)	46.7 days (4,012 cases)	<b>t= 11.84 (p &lt; .01)</b>
Total Number of Cases:	4,169 cases	4,058 cases	
<b>RD Cases Only</b>			
Petition Filed to Election	62.8 days (401 cases)	51.6 days (333 cases)	t= 1.81 (p = .07)
Election Date to Date Closed	38.0 days (393 cases)	27.9 days (330 cases)	t= 1.49 (n.s.)
Petition Filed to Date Closed	91.0 days (860 cases)	64.9 days (636 cases)	<b>t= 3.62 (p &lt; .01)</b>
Total Number of Cases:	871 cases	655 cases	
<b>RM Cases Only</b>			
Petition Filed to Election	64.6 days (37 cases)	56.1 days (56 cases)	t= 0.46 (n.s.)
Election Date to Date Closed	65.7 days (37 cases)	20.5 days (55 cases)	t= 1.81 (p = .08)
Petition Filed to Date Closed	100.1 days (111 cases)	65.6 days (102 cases)	t= 0.19 (n.s.)
Total Number of Cases:	111 cases	108 cases	

Source: File 2 (with duplicates and open cases removed)

As a check for consistency, elapsed time was also computed using the RC cases provided in File 1. The same averages for elapsed time were found using data from File 1 as is shown above in Table 5 (which used data from File 2), i.e., 45.9 days from petition filed to election, 36.9 days from election to closing, and 71.5 days from petition filed to closing. This suggests that, despite some differences in the

number of cases found in Files 1 and 2, the findings reported here are not impacted by which file was used for our analyses.

Focusing on RC election outcomes only, File 1 gives us data from which we could run multivariate analyses. As noted above, the exact number of cases with elections differs between Files 1 and 2. Using File 1 data, there was a slight increase in the percentage of Certifications of Representative (election won by unions) after the rule change, i.e., from 1,680/2,506 (67.0%) Certifications of Representative before the rule change, to 1,720/2,468 (69.3%) Certifications of Representation after the rule change. Even though these numbers do not match those shown in Table 4 (which used data from File 2), the general pattern is the same. Using data from File 1, however, this difference is marginally statistically significant ( $p = .089$ ), whereas in Table 4, this difference was not significant. However, using File 1 data, the number of eligible voters was a stronger predictor of certification of representative than was the rule change. That is, the number of eligible voters is strongly negatively related to Certification of Representative ( $z = -5.37, p < .01$ ). This would indicate that the larger the number of eligible voters, the less likely the union is to win the election, and that this result was not changed or impacted by the rule change.

Analyses were conducted on the elapsed time between various events (i.e., between petition filing and election, between election and closing, and between filing and closing) and case outcome. As shown in Table 5, the amount of time cases were open was considerably shorter after the rule change than before. However, this change in elapsed time was not predictive of case outcomes, i.e., the increased speed after the rule change was not significantly related to union win rate.

Switching again to the number of eligible voters (only available to us in File 1), a comparison can be made of the number of eligible voters in RC elections by quartile before and after the revisions took effect. This breaks out data into four relatively equal portions. This analysis can be seen in Table 6. There was very little difference in the mean number of eligible voters before and after the rule change, with the mean number of eligible voters before the rule change of 57.1, and a mean of 59.0 after the rule change. This difference was not statistically significant. Similarly, there was little difference in the number of eligible voters by quartile before and after the rule change. As can be seen in Table 6, before the rule change, Quartile 1 (the smallest 25% of cases) consisted of up to 11 eligible voters, and after the rule change, Quartile 1 consisted of cases where there were up to 10 eligible voters. The decrease in the union win rate by number of eligible voters is evident both before and after the rule change. Before the rule change, in the smallest 25% of cases, unions won 77.6% of the time, whereas in the largest 25% of cases, unions won 56.2% of the time. After the rule change, these comparisons were 80.7% to 60.3%. This is consistent with the multivariate findings reported above that the strongest predictor of outcome in this data set was the number of eligible voters, and that this relationship is negative (the smaller the number of eligible voters, the more likely the union is to win, i.e. the result is certification of representative).

**Table 6**

Number of Eligible Voters, and Union Win Rate, Before and After the NRLB Rule Change (RC Cases Only)

<b>Type of Outcome</b>	<b>Cases filed 4/14/2013- 4/13/2015</b>	<b>Cases filed 4/14/2015-4/13/2017</b>	<b>Statistical Significance</b>
Quartile 1	0-11 voters (77.6% Cert. of Representative)	0-10 voters (80.7% Cert. of Representative)	(n.s.)
Quartile 2	12-25 voters (70.1% Cert. of Representative)	11-24 voters (70.8% Cert. of Representative)	(n.s.)
Quartile 3	26-59 voters (63.6% Cert. of Representative)	25-56 voters (64.4% Cert. of Representative)	(n.s.)
Quartile 4	60-1,731 voters (56.2% Cert. of Representative)	57-3,269 voters (60.3% Cert. of Representative)	(n.s.)
Mean number of eligible voters:	57.1	59.0	(n.s.)

Source: File 1

Focusing on the fourth or top quartile (i.e., the 25% of cases with the largest voting units), we find a slight increase in the percentage of elections resulting in certification of representative in such elections, but as with the other comparisons by quartile, this difference before and after the rule change was not statistically significant ( $t= 1.47$ , n.s.).

### **Consent/Stipulated Elections and Pre-election Hearings**

We examined RC cases to see if there had been any significant change in the percent of petitions that resulted in stipulated or consent elections and the percent that go to hearing. We found that there was basically no difference in the percentage of stipulated elections before and after the rule change, i.e., before the rule change, 2,265/2,506 of elections were stipulated (90.4%); whereas after the rule change, 2,202/2,468 (89.2%) of elections were stipulated (Source: File 1). This difference is not statistically significant.

We also determined whether there has been a change in the length of pre-election hearings held and in the elapsed time between the holding of the hearing and the rendering of the Regional Director's decision. There was basically no change in the length of pre-election hearings before and after the rule change. Before the rule change, the average length of pre-election hearings was 1.85 days, and after the rule change, it was 1.92 days (Source: File 2). We computed the number of days from the pre-election hearing closed date to the decision and direction of election (DDE) issued date. Before the rule change, the average number of days between these events was 29.09 days (based on 233 cases where data was available for both). After the rule change, the average number of days between these events was 30.94 days (based on 206 cases). This difference is not statistically significant. In cases in which elections were held, we compared the elapsed time between petition filing and election in stipulated/consent elections to

directed elections (i.e., elections held after hearings) before and after the revisions took effect. We found that directed elections were slower than stipulated/consent elections, and this was true both before and after the rule change. This is shown in the t-tests at the bottom of Table 7. As also shown in Table 5, the difference before and after the rule change for stipulated/consent elections is large and statistically significant. However, for directed elections, even though the average elapsed time decreased after the rule change, this change was not statistically significant.

**Table 7**

Average Elapsed Time (Comparing Petition Filed to Election Date, and Petition Filed to Decision and Direction of Election) Before and After the NRLB Rule Change for RC Cases

Type of Outcome	Cases filed 4/14/2013-4/13/2015	Cases filed 4/14/2015-4/13/2017	Statistical Significance (by row)
<b>RC Cases</b>			
Petition Filed to Election (Stipulated/Consent)	45.9 days (2,918 cases)	26.8 days (2,904 cases)	<b>t= 17.06 (p &lt; .01)</b>
Petition Filed to DDE Date (Directed Elections)	63.3 days ( 310 cases)	52.4 days ( 281 cases)	t= 1.60 (n.s.)
Total Number of Cases:	4,169 cases	4,058 cases	
Statistical Significance (by column)	<b>t= 5.02 (p &lt; .01)</b>	<b>t= 11.96 (p &lt; .01)</b>	

Source: File 2

### Post-election Activity

The revised rules give Regional Directors discretion to defer resolution of eligibility and inclusion issues that affect less than 20% of the unit until after the election, with the affected employees voting by challenged ballot. General Counsel Memorandum 15-06 advised Regional Directors to consider the “percentage of the unit in dispute; the anticipated amount of time that will be needed to litigate the eligibility/inclusion issue(s) (i.e., number of witnesses, etc.); the anticipated amount of time that will be needed to draft a decision on the issue(s) (i.e., the complexity and novelty of the issue(s)); the size of the unit; whether an eligibility/inclusion issue is the sole issue in dispute; whether inclusion or exclusion of a classification at issue might significantly change the size or character of the unit; the parties' positions on litigating the issue(s); and any other factors that the regional director deems relevant,” in deciding whether to defer resolution until after the election.

In dissenting from the rule revisions, then Board Members Johnson and Miscimarra expressed concern that deferring these issues to post-election hearings would increase the number, length and complexity of post-election hearings and increase the overall length of the representation case process. On the other hand, that concern would be mitigated if, in a large percentage of elections with challenged ballots, the ballots would not make a difference in the election outcome.

Before the rule change, there were 149 post-election hearings, which constituted 3.6% of all such cases. After the rule change, there were 127 post-election hearings, which constituted 3.1% of all such cases. This difference is not statistically significant ( $t= 1.12$ , n.s.). Thus, it appears that deferring resolution of voter eligibility issues until after the election did not increase the frequency of post-election hearings.

A separate question is whether or not the rule change increased the complexity of post-election hearings. An increase in complexity might be reflected in an increase in the length of post-election hearings and it might also be reflected in an increase in the amount of time it takes for the Regional Director to issue a ruling after completing the hearing. We found that, before the rule change, the average elapsed time from the post-election hearing closed date to the post-election Regional Director decision date was 130.17 days, based on 113 cases where both dates were available. After the rule change, the average elapsed time from the post-election hearing closed date to the post-election Regional Director decision date was 93.93 days, based on 91 cases where both dates were available. Despite the limited number of cases available, this difference was statistically significant ( $t= 2.13$ ,  $p < .05$ ), indicating that elapsed time was shorter after the rule change than before, which would suggest that post-election hearing issues did not increase in complexity. However, before the rule change, the average length of post-election hearing was 1.93 days, and after the rule change, it was 2.54 days. This difference was statistically significant ( $t= 2.01$ ,  $p < .05$ ), indicating that post-election hearings did take longer after the rule change. This may indicate that the complexity of such cases did increase. Overall, as reflected back in Table 5, the elapsed time from election date to file closing decreased significantly after the rule change. Thus, although our findings with respect to complexity are inconclusive, it does not appear that deferring voter eligibility issues until after the election is slowing the post-election process.

### **Blocking Charges**

Blocking charges are primarily filed in RD and RM cases. Table 8 reveals that Blocking cases are much more likely in RD and RM cases than they are in RC cases, and this is true both before and after the rule change. Here are the comparisons by column, first for the percentage of Blocking cases before the rule change, and then for cases after the rule change. All comparisons are statistically significant.

Before the Rule Change:

- RC Blocking case mean (6.3%) vs. RD Blocking case mean (37.0%),  $t= 27.60$  ( $p < .01$ )
- RC Blocking case mean (6.3%) vs. RM Blocking case mean (27.0%),  $t= 8.58$  ( $p < .01$ )
- RD Blocking case mean (37.0%) vs. RM Blocking case mean (27.0%),  $t= 2.08$  ( $p < .05$ )

After the Rule Change:

- RC Blocking case mean (3.5%) vs. RD Blocking case mean (27.3%),  $t= 23.52$  ( $p < .01$ )
- RC Blocking case mean (3.5%) vs. RM Blocking case mean (55.5%),  $t= 27.01$  ( $p < .01$ )
- RD Blocking case mean (27.3%) vs. RM Blocking case mean (55.5%),  $t= 5.99$  ( $p < .01$ )

The revised rules require that a party seeking to block the holding of an election due to new or already-filed unfair labor practice charges must file a specific request to block the election accompanied by a written offer of proof containing the names and expected testimony of its witnesses. In dissent, then Members Johnson and Miscimarra criticized this change as not going far enough to streamline the handling of blocking charges and to curb their potential abuse. We analyzed the filing and handling of blocking charges before and after the revisions took effect. We compared the percentage of RC, RD and RM cases in which blocking charges were filed and the elapsed time between the filing of the charge and the initial disposition (withdrawal or dismissal of the charge, removal of the block, issuance of a ULP complaint, settlement of the charge). As shown in Table 8, we found that the total number of blocking charges decreased after the rule change, although this was not true for RM cases, where the number of RM cases in which blocking charges were filed increased from 30 cases before the rule change, to 60 cases after the rule change. The differences in the percentage of cases with blocking charges before and after the rule change was statistically significant for all cases combined, as well as for RC, RD, and RM cases viewed separately. The t-tests shown in Table 8 show the differences before and after the rule change for all cases within each group of cases. For example, before the rule change, 12.0% of all cases involved Blocking Case Dispositions, whereas after the rule change, 7.9% of all cases involved Blocking Case Dispositions, and this difference is statistically significant ( $p < .01$ ).

It appears that the rule change's additional requirements for blocking charges has made it less likely that such charges will be filed in RC and RD cases. At this point in our research, we have no explanation for the increase in likelihood that blocking charges will be filed in RM cases.

**(Table 8 appears on the following page)**

**Table 8**

Outcomes of Blocking Case Dispositions Before and After the NRLB Rule Change for RC, RD, and RM Cases

Type of Outcome	Cases filed 4/14/2013 - 4/13/2015		Cases filed 4/14/2015 – 4/13/2017		Statistical Significance
<b>All Cases (RC, RD, RM)</b>	<b>N (% Block.)</b>	<b>% All Cases</b>	<b>N (% Block.)</b>	<b>% All Cases</b>	
Withdrawals	215 (34.9%)	4.2%	140 (36.8%)	2.9%	
Dismissals	71 (11.5%)	1.4%	47 (12.4%)	1.0%	
Settlements	155 (25.1%)	3.0%	116 (30.5%)	2.4%	
Other	176 (28.5%)	3.4%	77 (20.3%)	1.6%	
Totals:	617	5,151 (12.0%)	380	4,821 (7.9%)	<b>t= 6.83 (p &lt; .01)</b>
<b>RC Cases Only</b>	<b>N (% Block.)</b>	<b>% All Cases</b>	<b>N (% Block.)</b>	<b>% All Cases</b>	
Withdrawals	122 (46.2%)	2.9%	59 (41.8%)	1.5%	
Dismissals	25 ( 9.5%)	0.6%	18 (12.8%)	0.4%	
Settlements	79 (29.9%)	1.9%	44 (31.2%)	1.1%	
Other	38 (14.4%)	0.9%	20 (14.2%)	0.5%	
Totals:	264	4,169 (6.3%)	141	4,058 (3.5%)	<b>t= 5.98 (p &lt; .01)</b>
<b>RD Cases Only</b>	<b>N (% Block.)</b>	<b>% All Cases</b>	<b>N (% Block.)</b>	<b>% All Cases</b>	
Withdrawals	88 (27.3%)	10.1%	53 (29.6%)	8.1%	
Dismissals	34 (10.5%)	3.9%	29 (16.2%)	4.4%	
Settlements	63 (19.5%)	7.2%	44 (24.6%)	6.7%	
Other	138 (42.7%)	15.8%	53 (29.6%)	8.1%	
Totals:	323	871 (37.0%)	179	655 (27.3%)	<b>t= 4.03 (p &lt; .01)</b>
<b>RM Cases Only</b>	<b>N (% Block.)</b>	<b>% All Cases</b>	<b>N (% Block.)</b>	<b>% All Cases</b>	
Withdrawals	5 (16.7%)	4.5%	28 (46.7%)	25.9%	
Dismissals	12 (40.0%)	10.8%	0 ( 0.0%)	0.0%	
Settlements	13 (43.3%)	11.7%	28 (46.7%)	25.9%	
Other	0	0.0%	4 ( 6.6%)	3.7%	
Totals:	30	111 (27.0%)	60	108 (55.5%)	<b>t= 4.46 (p &lt; .01)</b>

Sources: File 2 (for all cases) and File 3 (for blocking charges only)

We next looked at elapsed time and blocking case dispositions. This is shown in Table 9. We looked at the reason for the blocking case to be closed, i.e., withdrawal, dismissal, or settlement, and looked at elapsed time for each reason from the date the blocking case was filed. There is a restricted number of cases that provide the dates needed for these comparisons. Despite the relatively low sample sizes, a consistent finding was that blocking case settlements took substantially longer after the rule change than before, and this difference was statistically significant for all cases combined, as well as for RC, RD, and RM cases analyzed separately. Table 9 shows that there was a slight decrease in the amount

of time from the date blocking cases were filed to their closing for withdrawals and dismissals (though none of these comparisons were statistically significant). It may be that the enhanced requirements for filing blocking charges are flushing out the weaker cases (those ending in withdrawal or dismissal) somewhat faster and that the cases that remain are stronger or more complex and therefore take longer to settle.

**Table 9**

Average Elapsed Time for Blocking Case Dispositions Before and After the NRLB Rule Change for RC, RD, and RM Cases (Starting Point for all Comparisons: Date Blocking Case Filed)

<b>Blocking Case Closed Reason</b>	<b>Cases filed 4/14/2013 – 4/13/2015</b>	<b>Cases filed 4/14/2015 – 4/13/2017</b>	<b>Statistical Significance</b>
<b>All Cases (RC, RD, RM)</b>	<b>Elapsed Time (# of Cases)</b>	<b>Elapsed Time (# of Cases)</b>	
Withdrawals	95.4 days (194 cases)	83.5 days (130 cases)	
Dismissals	102.2 days ( 89 cases)	86.2 days ( 62 cases)	
Settlements	195.7 days ( 92 cases)	346.2 days ( 83 cases)	<b>t= 4.65 (p &lt; .01)</b>
Total Possible Cases:	617 cases	380 cases	
Date Petition Filed to Complaint Date	207.5 days (119 cases)	194.6 days ( 83 cases)	t= 0.53 (n.s.)
<b>RC Cases Only</b>	<b>Elapsed Time (# of Cases)</b>	<b>Elapsed Time (# of Cases)</b>	
Withdrawals	92.5 days (111 cases)	82.5 days (49 cases)	
Dismissals	108.9 days ( 32 cases)	86.2 days (23 cases)	
Settlements	168.2 days ( 39 cases)	293.9 days (32 cases)	<b>t= 3.10 (p &lt; .01)</b>
Total Possible Cases:	264 cases	141 cases	
Date Petition Filed to Complaint Date	216.3 days ( 65 cases)	204.3 days (35 cases)	t= 0.34 (n.s.)
<b>RD Cases Only</b>	<b>Elapsed Time (# of Cases)</b>	<b>Elapsed Time (# of Cases)</b>	
Withdrawals	101.0 days (77 cases)	93.3 days (50 cases)	
Dismissals	101.6 days (44 cases)	86.3 days (39 cases)	
Settlements	224.0 days (46 cases)	369.0 days (36 cases)	<b>t= 2.67 (p &lt; .01)</b>
Total Possible Cases:	323 cases	179 cases	
Date Petition Filed to Complaint Date	192.8 days (50 cases)	187.7 days ( 48 cases)	t= 0.23 (n.s.)
<b>RM Cases Only</b>	<b>Elapsed Time (# of Cases)</b>	<b>Elapsed Time (# of Cases)</b>	
Withdrawals	74.2 days ( 6 cases)	69.1 days (31 cases)	
Dismissals	87.4 days (13 cases)	-- ( 0 cases)	
Settlements	171.3 days ( 7 cases)	403.1 days (15 cases)	<b>t= 2.31 (p &lt; .05)</b>
Total Possible Cases:	30 cases	60 cases	
Date Petition Filed to Complaint Date	247.0 days ( 4 cases)	-- ( 0 cases)	

Source: File 3

Note: For all analyses concerning elapsed time, cases were only included where there was available data for each date needed for a particular calculation. However, in some cases, the Excel formula produced a negative sign, as for example, the file showed a Blocking Case Complaint Date that predated the Blocking Case Date Filed. Spot checks of the docket sheets available on the NLRB website showed that these dates were captured correctly from the NLRB website onto the Excel spreadsheet provided to us for our FOIA request. However, as this ordering of the dates is inconsistent with the logical ordering of these events, to be cautious, such cases were removed from our analyses.

## **Conclusion**

We have presented the preliminary analyses that we were able to accomplish in the time available between our receipt of the Board's data in response to our FOIA request and the April 18 deadline for submitting comments in response to the Board's Request for Information Regarding Representation Election Regulations. Below, we recap our findings.

Our preliminary analyses show that most of the hopes of proponents of the revisions to the R Case regulations and most of the fears of the opponents of the revisions have not come to pass. When the results of R cases filed during the period two years before the new regulations took effect are compared with the results in R cases filed during the period two years after the new regulations took effect, we find in general that there are no statistically significant differences in case outcomes in RC, RD, or RM cases. In other words, overall, the revisions to the regulations have not significantly advantaged labor or management.

The revisions to the regulations have significantly increased the speed with which R cases are processed and resolved. Elections are being held faster and cases are being closed faster. This is particularly so in RC cases, where all differences in elapsed time before and after the rule changes are sizable and statistically significant. However, the reduction in elapsed time between the filing of RC petitions and the holding of elections did not have a significant effect on election outcomes. Multivariate analysis showed that the strongest variable in election outcomes is the number of eligible voters; the larger the number of eligible voters, the less likely it is that the union will win the election. This finding is consistent before and after the revised regulations took effect.

Not surprisingly, stipulated and consent elections occur significantly faster than directed elections and this result is consistent before and after the rule revisions. There is no significant difference in the percentage of RC cases handled through stipulated and consent elections before and after the rule revisions took effect. Stipulated and consent elections occurred significantly faster under the revised regulations. Directed elections occurred faster under the revised regulations, but this difference was not statistically significant.

Deferral of resolution of voter eligibility issues until after the election does not appear to have had a significant impact on post-election activity. The percentage of RC cases with post-election hearings decreased after the rule revisions took effect, although the decrease was not statistically significant. The length of post-election hearings increased significantly, but the elapsed time between hearing conclusion and Regional Director decision decreased significantly. Consequently, we cannot say that the rule revisions resulted in increased complexity of post-election hearings. However, the time from election to

case closure decreased significantly. Consequently, we can say confidently that the deferral of voter eligibility questions until after the election has not slowed the post-election process.

Finally, we found inconsistent results for the impact of the rule revisions on blocking charges. The increased burden the revised rules place on those filing blocking charges appears to have significantly reduced the likelihood that blocking charges will be filed in RC and RD cases. However, the likelihood that blocking charges will be filed in RM cases increased significantly. At this time, we are unable to suggest an explanation for this, but intend to continue our research into this phenomenon.

We still have a good deal of work to do to complete our study. We will be happy to share updates on our work with the Board should the Board so desire.