there is no certainty that the rule revisions even address the problems that have caused undue delay in a very small number of representation cases or that they will shorten the *overall* timeframe for processing an election case from the filing of a petition until final resolution. What *is* certain is that the proposed rules will (1) substantially shorten the time between the filing of the petition and the election date, and (2) substantially limit the opportunity for full evidentiary hearing or Board review on contested issues involving, among other things, appropriate unit, voter eligibility, and election misconduct. Thus, by administrative fiat in lieu of Congressional action, the Board will impose organized labor's much sought-after ''quickie election'' option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition. Make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining.

It may be best to begin a substantive analysis of the proposed rules with an accounting of the Board's current representation casehandling procedures. The Acting General Counsel's summary of operations for Fiscal Year 2010 took special note of facts that: (1) 95.1 percent of all initial elections were conducted within 56 days of the filing of the petition; (2) initial elections were conducted in a median of 38 days from the filing of the petition; and (3) the agency closed 86.3 percent of all representation cases within 100 days, surpassing an internal target rate of 85 percent.[73] The Acting General Counsel described the achievement of these results as ''outstanding.'' [74]

The Board's total representation case intake for Fiscal Year 2010 (including all categories of election petitions) was 3,204, a 10 percent increase from the Fiscal Year 2009 intake of 2,912. For all petitions filed, the average time to an election was 31 days. Voluntary election agreements were obtained in 92 percent of the merit petitions. In contested cases, Regional Directors issued 185 pre-election decisions after hearing in a median of 37 days, well below the target median of 45 days. In 56 cases, post-election objections and/or challenges were filed that required an investigative hearing. Decisions or Supplemental Reports issued in those cases after hearing in 70 median days from the election or the filing of objections. In 32 cases, post-election objections and/or challenges could be resolved without a hearing. Decisions or Supplemental Reports in those cases issued in 22 median days. The General Counsel's goal in hearing cases is 80 median days and 32 days in non-hearing cases.[75]

It is not at all apparent from the foregoing statistical picture why my colleagues have decided that it is now necessary to (1) eliminate pre-election evidentiary hearings, as much as is statutorily permissible (or arguably well beyond that point), (2) eliminate pre-election requests for review and defer decision on virtually all issues heretofore decided at the preelection stage in the small percentage of contested cases, (3) impose pleading requirements and minimal response times on election parties, most notably on employers, who risk forfeiture of the right to contest issues if they fail timely to comply with these requirements, and (4) eliminate any automatic right to post-election Board review of contested issues.

I absolutely agree that the Board should be concerned about unreasonable delay in any case, particularly in those involving questions concerning representation. It should never take 424 days from the filing of a petition to resolve pre-election issues, as happened with respect to one case in Fiscal Year 2010;[76] nor should it take years to resolve post-election objections, as it did in a trio of recently-decided Board cases.[77] However, as measured by the Board and General Counsel's own time targets and performance goals, such delay is the exception rather than the norm. Notably, my colleagues make no reference to these time targets while drastically departing from them when reducing the number of days from petition filing to an election. Further, the majority makes no effort whatsoever to identify the specific causes of delay in those cases that were unreasonably delayed. Without knowing which cases they were, I cannot myself state with certainty what caused delay in each instance, but I can say based on experience during my tenure as Board member that vacancies or partisan shifts in Board membership and the inability of the Board itself to deal promptly with complex legal and factual issues have delayed final resolution far more often than any systemic procedural problems or obstructionist legal tactics. That was the situation in each of the aforementioned extremely delayed cases, and in none of those cases would the majority's current proposals have yielded a different result.

Further, it is far from clear that shortening the time period from the filing of a petition to the conduct of an election will have the corresponding effect of shortening the median time from filing to final resolution, which should be the primary goal of any revision of the rules. Again, the majority provides no explanation. By impeding the process of timely resolving pre-election issues and eliminating any right to automatic Board review of regional decisions, the proposed revisions seemingly discourage parties from entering into any form of election agreement, thereby threatening the current high percentage of voluntary election agreements. In addition, at least in those cases where the union wins the election, the deferral of pre-election issues seems merely to add time from the pre-election period to the post-election period, with no net reduction in overall processing time. This will not save time or money for the parties or the Board. Finally, the proposed rule revision permitting up to 20 percent of individuals whose eligibility is contested to cast challenged ballots casts a cloud of uncertainty over the election process. Employees who do belong in the bargaining unit may be so mislead about the unit's scope or character that they cannot make an informed choice, instead basing their vote on perceived common interests or differences with employee groups that ultimately do not belong in the unit.[78]

The oft-repeated aim of the Board to resolve questions concerning representation expeditiously does not mean that we must conduct elections in as short a time as possible In truth, the

[73] General Counsel Memorandum 11–03 at ''Introduction'' (Jan. 10, 2011), available at *http://www.nlrb.gov/publications/general-counsel-memos.* Agency performance has continued at essentially the same level for the first 3 months of fiscal year 2011. See GC Memo 11–09, supra at 18.

[74] GC Memo11–03, supra at ''Introduction.''

[75] GC Memo11–09, supra at 18.

[76] *Kansas City Repertory Theatre,* 17–CA–12647.

[77] *Jury's Boston Hotel,* 356 NLRB No. 114 (2011), *Mastec/Direct TV,* 356 NLRB No. 110 (2011), and *Independence Residences, Inc.,* 355 NLRB No. 153 (2010).

[78] As stated by the Fourth Circuit in *NLRB* v. *Beverly Health and Rehabilitation Services, Inc.,* No. 96–2195, 1997 WL 457524, at *4 (4th Cir. 1997):

> Where employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character from the proposed bargaining unit, the employees have effectively been denied the right to make an informed choice in the representation election. *See NLRB* v. *Parsons Sch. of Design,* 793 F.2d 503, 506–08 (2d Cir.1986); *Lorimar Productions,* 771 F.2d at 1301–02; *Hamilton Test Sys.,* 743 F.2d at 140–42. Thus, the Board may not ''inform employees that they are voting for representation in [one] unit and later * * * consider the ballot as a vote for representation in a [different] unit.'' *Hamilton Test Sys.,* 743 F.2d at 140; *see also Lorimar Productions,* 771 F.2d at 1301 (quoting *Hamilton Test Sys.*).