

NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101 and 102

RIN 3142-AA12

Representation-Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Request for information.

SUMMARY: The National Labor Relations Board (the Board) is seeking information from the public regarding the representation election regulations located at 29 CFR parts 101 and 102 (the Election Regulations), with a specific focus on amendments to the Board's representation case procedures adopted by the Board's final rule published on December 15, 2014 (the Election Rule or Rule). As part of its ongoing efforts to more effectively administer the National Labor Relations Act (the Act or the NLRA) and to further the purposes of the Act, the Board has an interest in reviewing the Election Rule to evaluate whether the Rule should be (1) retained without change, (2) retained with modifications, or (3) rescinded, possibly while making changes to the prior Election Regulations that were in place before the Rule's adoption. Regarding these questions, the Board believes it will be helpful to solicit and consider public responses to this request for information.

DATES: Responses to this notice and request for information must be received by the Board on or before February 12, 2018. No late responses will be accepted. Responses are limited to 25 pages.

ADDRESSES: You may submit responses by the following methods: *Internet*—Electronic responses may be submitted by going to www.nlr.gov and following the link to submit responses to this Notice and Request for Information. The Board encourages electronic filing. *Delivery*—If you do not have the ability to submit your response electronically, responses may be submitted by mail to: Roxanne Rothschild, Deputy Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570. Because of security precautions, the Board experiences delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting responses. It is not necessary to submit responses by mail if they have been filed electronically on www.nlr.gov. If you submit responses by mail, the Board recommends that you confirm receipt of your delivered responses by checking www.nlr.gov to confirm that your response is posted there (allowing time for receipt by mail). Only responses submitted as described above will be accepted; *ex parte* communications received by the Board will be made part of the record and will be treated as responses only insofar as appropriate.

The Board requests that responses include full citations or internet links to any authority relied upon. All responses submitted to www.nlr.gov will be posted on the Agency's public website as soon after receipt as practicable without making any changes to the responses, including

changes to personal information provided. The Board cautions responders not to include in the body of their responses personal information such as Social Security numbers, personal addresses, personal telephone numbers, and personal email addresses, as such submitted information will become viewable by the public when the responses are posted online. It is the responders' responsibility to safeguard their information. The responders' email addresses will not be posted on the Agency website unless they choose to include that information as part of their responses.

FOR FURTHER INFORMATION CONTACT: Roxanne Rothschild, Deputy Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570, (202) 273-2917 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background

On December 15, 2014, the Board published the Election Rule, which amended the Board's prior Election Regulations. 79 Fed. Reg. 74308 (2014). The Election Rule was adopted after public comment periods in which tens of thousands of public comments were received. The Rule was approved by a three-member Board majority, with two Board members expressing dissenting views. Thereafter, the Rule was submitted for review by Congress pursuant to the Congressional Review Act. In March 2015, majorities in both houses of Congress voted in favor of a joint resolution disapproving the Board's rule and declaring that it should have no force or effect. President Obama vetoed this resolution on March 31, 2015. The amendments adopted by the final rule became effective on April 14, 2015, and have been applicable to all representation cases filed on or after that date. Multiple parties initiated lawsuits challenging the facial validity of the Election Rule, and those challenges were rejected. See *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2015), affg. No. 1-15-CV-026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015); *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015). These rulings did not preclude the possibility that the Election Rule might be invalid as applied in particular cases.

II. Authority Regarding Board Review of the 2014 Election Rule Amendments

Agencies have the authority to reconsider past decisions and rules and to retain, revise, replace, and rescind decisions and rules. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-515 (2009); *Motor Vehicle Manufacturers Ass'n of U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983); *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038-1039, 1043 (D.C. Cir. 2012).

The Election Rule has been in effect for more than 2 years. The current five-member Board includes only two members who participated in the 2014 rulemaking: Member Pearce, who joined the majority vote to adopt the final rule, and Chairman Miscimarra, who joined former Member Johnson in dissent. In addition to the proceedings described above, and other congressional hearings and proposed legislation, numerous cases litigated before the Board have presented significant issues concerning application of the Election Rule. See, e.g., *UPS Ground*

Freight, Inc., 365 NLRB No. 113 (2017); *European Imports, Inc.*, 365 NLRB No. 41 (2017); *Yale University*, 365 NLRB No. 40 (2017); *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016).

III. Request for Information from the Public

The Board invites information relating to the following questions:

1. Should the 2014 Election Rule be retained without change?
2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Election Regulations? If the Board should make changes to the prior Election Regulations, what should be changed?

IV. Response to the Dissents

It is surprising that the Board lacks unanimity about merely posing three questions about the 2014 Election Rule, when none of the questions suggests a single change in the Board's representation-election procedures. Nonetheless, two dissenting colleagues object to the request for information regarding the Election Rule because, among other things, they believe that (i) the Election Rule has worked effectively (or even, in Member Pearce's estimation, essentially flawlessly), (ii) any request for information from the public about the Rule is premature, (iii) merely requesting information reveals a predetermination on our part to revise or rescind the Election Rule, and (iv) future changes will be based on "alternative facts" and "manufactur[ed]" rationales.

It is the Board's duty to periodically conduct an objective and critical review of the effectiveness and appropriateness of our rules. In any event, our dissenting colleagues would answer the above Question 1 in the affirmative: they believe the Election Rule should be retained without change. That is their opinion. However, the Board is seeking the opinions of others: unions, employers, associations, labor-law practitioners, academics, members of Congress, and anyone from the general public who wishes to provide information relating to the questions posed above. In addition, we welcome the views of the General Counsel and also the Regional Directors, whose experience working with the 2014 Election Rule makes them a valuable resource.

One thing is clear: issuing the above request for information is unlike the process followed by the Board majority that adopted the 2014 Election Rule. The rulemaking process that culminated in the 2014 Election Rule (like the process followed prior to issuance of the election rule adopted by Members Pearce and Becker in 2011) started with a lengthy proposed rule that outlined dozens of changes in the Board's election procedures, without any prior request for information from the public regarding the Board's election procedures. By contrast, the above request does not suggest even a single specific change in current representation-election

procedures. Again, the Board merely poses three questions, two of which contemplate the possible retention of the 2014 Election Rule.¹

V. Dissenting Views of Member Mark Gaston Pearce and Member Lauren McFerran

MEMBER PEARCE, dissenting.

I dissent from the Notice and Request for Information, which should more aptly be titled a “Notice and Quest for Alternative Facts.” It ignores the Final Rule’s success in improving the Board’s representation-case procedures and judicial rejection of dissenting Members Miscimarra and Johnson’s legal pronouncements about the Final Rule.

Some two and a half years ago, the National Labor Relations Board concluded lengthy rulemaking pursuant to the Administrative Procedure Act to reexamine our representation-case procedures. We had proposed a number of targeted solutions to discrete problems identified with the Board’s methods of processing petitions for elections with a goal of removing unnecessary barriers to the fair and expeditious resolution of representation cases. The rulemaking sought to simplify representation-case procedures, codify best practices, increase transparency and uniformity across regions, eliminate duplicative and unnecessary litigation, and modernize rules concerning documents and communication in light of changing technology. After a painstaking three and a half year process, involving the consideration of tens of thousands of comments generated over two separate comment periods totaling 141 days, and 4 days of hearings with live questioning by the Board Members, we issued a final rule that became effective on April 14, 2015. *Representation-Case Procedures*, 79 FR 74308 (Dec. 15, 2014).

The Final Rule was careful and comprehensive—spanning over 100 pages of the Federal Register’s triple-column format in explaining the 25 changes ultimately made to the Board’s rules and regulations. For each change, the Final Rule identified the problem to be ameliorated, catalogued every type of substantive response from the public, and set forth the Board’s analysis as to why the proposed amendment was either being adopted, discarded or modified.¹

Complying with the rulemaking process, and dealing with the deluge of public comments generated, was not an easy task for our Agency. Thousands of staff hours were expended; research and training was required into statutes and procedures with which we were unfamiliar;

¹ Member McFerran contends that the Board’s open-ended request “depart[s] from the norms of rulemaking under the Administrative Procedure Act.” Her contention is misplaced. The Board is merely requesting information. We are not engaged in rulemaking.

¹ See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 229 (5th Cir. 2016) (noting that the Board “conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions”); *Chamber of Commerce of the United States of America v. NLRB*, 118 F.Supp.3d 171, 220 (D.D.C. 2015) (“[T]he Board engaged in a comprehensive analysis of a multitude of issues relating to the need for and the propriety of the Final Rule, and it directly addressed the commenters’ many concerns[.]”).

expensive licensing was purchased for software to sort, and websites to house, the tens of thousands of comments received; and contributions were made from all corners of the Agency. Through this extensive process, the fundamental questions were asked and answered. The amended procedures have now been in place for some two and a half years, and my colleagues show no serious justification for calling them into question.

Indeed, it is with some irony that I am reminded of the sentiment expressed in dissent to the Final Rule in 2014 that “the countless number of hours spent by Board personnel in rulemaking” would be better spent expeditiously processing cases. 79 FR at 74457. Yet, in the past 9 months, the Board’s case output has fallen precipitously,² and we face the specter of budget cuts that could further hamper our ability to perform our statutory mission. Now, the majority will burden the Agency with the exercise of continued rulemaking in an area that has already been thoroughly addressed.

As a consequence, our attention will be diverted from case processing to explore the rollback of a Final Rule that has provided a bounty of beneficial changes, and which applies equally to initial organizing campaigns and efforts to decertify incumbent unions. A non-exhaustive list includes:

- Parties may now use modern technology to electronically file and serve petitions and other documents, thereby saving time and money, and affording non-filing parties the earliest possible notice.
- Petitions and election objections must be supported, and must be served on other parties.
- Board procedures are more transparent, and more meaningful information is more widely available at earlier stages of our proceedings.
- Issues in dispute are clarified, and parties are enabled to make more informed judgments about whether to enter into election agreements.
- Across regions, employees’ Section 7 rights are afforded more equal treatment, the timing of hearings is more predictable, and litigation is more efficient and uniform.
- Parties are more often spared the expense of litigating, and the Board is more often spared the burden of deciding, issues that are not necessary to determine whether a question of representation exists, and which may be mooted by election results.
- The Board enjoys the benefit of a regional director decision in all representation cases.
- Board practice more closely adheres to the statutory directive that requests for review not stay any action of the regional director unless specifically ordered by the Board.
- Nonemployer parties are able to communicate about election issues with voters using modern means of communication such as email, texts and cell phones, and are less likely to challenge voters out of ignorance.

² Comparing the period February 1 through October 2017, to the equivalent nine-month period from 2016, the Board’s output of contested unfair labor practice decisions and published representation case decisions has been reduced by approximately 45 percent (i.e. a drop in excess of 100 cases). Searches in the Board’s NxGen case processing software show that from February 1, 2017, to October 31, 2017, the Board issued 136 decisions in contested unfair labor practice cases and published representation cases, while from February 1, 2016, to October 31, 2016, the Board issued 247 such decisions.

- Notices of Election are more informative, and more often electronically disseminated.
- Employees voting subject to challenge are more easily identified, and the chances are lessened of their ballots being comingled.

And all of this has been accomplished while processing representation cases more expeditiously from petition, to election, to closure.

So why would the majority suggest rescinding all of these benefits to the Agency, employees, employers, and unions? In evaluating that question, it is worthwhile to remind ourselves of a basic tenet of administrative law: while an agency rule, once adopted, is not frozen in place, the agency must offer valid reasons for changing it and must fairly account for the benefits lost as a result of the change. *Citizens Awareness Network, Inc. v. U.S.*, 391 F.3d 338, 351-352 (1st Cir. 2004).

None of the reasons offered by today's majority constitutes a persuasive justification for requesting information from the public, let alone for rescinding or modifying the Final Rule. The majority notes that the Final Rule has been in effect for more than two years. But the fact that two years have transpired since the Final Rule was adopted hardly constitutes a reason for rescinding or modifying it. The Board has a wealth of casehandling information that can be obtained through an analysis of our own records. And because the Board has access to all regional director pre- and post-election decisions, and because parties may request Board review of any action taken by the regional directors, the Board already is aware of the nature of any complaints about how the Final Rule has worked in particular cases. As for reverting to the prior representation rules, the public already had the opportunity to comment on whether they should be maintained or modified.

The majority next points to a change in Board member composition, but by itself, that is not a sufficient reason for rescinding, modifying, or requesting information from the public concerning the Final Rule. The majority also cites a grand total of four cases (out of the many cases) applying the Final Rule, but none provides any reason to invite public comment on the Final Rule, much less for the Board to reconsider it. While the majority also cites congressional efforts to overturn the Final Rule, they did not succeed, and cannot be used to demonstrate that the Final Rule contravenes our governing statute. As the courts have recognized, "It is well-established that 'the view of a later Congress cannot control the interpretation of an earlier enacted statute.'" *Huffman v. OPM*, 263 F.3d 1341, 1354 (Fed. Cir. 2001) (quoting *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996)). Finally, as the majority is forced to concede, every legal challenge to the Final Rule has been struck down by the courts.

In evaluating the appropriateness of the Notice and Request for Information, it is also worth journeying back in time to consider the pronouncements and dire predictions voiced by then-Members Miscimarra and Johnson about the Final Rule when it issued. In considering these matters, the reader need not take my word, for the dissent appears in the Federal Register.

Suffice it to say that the Final Rule's dissenters were so wrong about so much. They did not simply disagree with the Board's judgments, but instead claimed that the Final Rule violated the NLRA, the APA, and the U.S. Constitution.

The Final Rule dissent pronounced that the Rule's amendments contradicted our statute and were otherwise impermissibly arbitrary. 79 FR at 74431. It was wrong on both counts. See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 218 (5th Cir. 2016) (The "rule, on its face, does not violate the National Labor Relations Act or the Administrative Procedure Act[.]"); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171, 220 (D.D.C. 2015) (rejecting claims that the Final Rule contravenes either the NLRA or the Constitution or is arbitrary and capricious or an abuse of the Board's discretion).

The Final Rule dissent pronounced that the Rule's primary purpose and effect was to shorten the time from the filing of petition to the conduct of the election, and that this violated the NLRA and was otherwise arbitrary or capricious. 79 FR at 74430, 74433-74435. It was wrong on all three counts. See *ABC of Texas*, 826 F.3d at 227-228 (noting that the Board properly considered delay in scheduling elections and that the Board also reasoned that the final rule was necessary to further "a variety of additional permissible goals and interests"); *Chamber of Commerce*, 118 F. Supp. 3d at 218-219 (rejecting claim that the Rule promotes speed in holding elections at the expense of all other statutory goals and requirements, and noting that many of the Rule's provisions do not relate to the length of the election cycle).

The Final Rule dissent pronounced that the Rule's granting regional directors discretion to defer litigation of individual eligibility issues at the pre-election hearing was contrary to the statute and was arbitrary and capricious in violation of the APA. 79 FR at 74430, 74436-74438, 74444-74446. The courts rejected those arguments. See *Chamber of Commerce*, 118 F. Supp. 3d at 181, 195-203 ("Granting regional directors the discretion to decline to hear evidence on individual voter eligibility and inclusion issues does not violate the NLRA [and] is not arbitrary and capricious."); *ABC of Texas*, 826 F.3d at 220-223. See also *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 2015 WL 3609116 * 2, *7 (W.D. Tex. 2015).

The Final Rule dissent pronounced that the Rule violated the Act and the Constitution by infringing on protected speech and by providing an insufficient time period for employees to understand the issues before having to vote, thereby compelling them to vote now, understand later. (79 FR at 74430-74431, 74436, 74438). But these claims were also rejected by the courts. See *Chamber of Commerce*, 118 F. Supp. 3d at 181-182, 189, 206-208, 220 ("The elimination of the presumptive pre-election waiting period does not violate the NLRA or the First Amendment" and "[p]laintiffs have failed to show that the Final Rule inhibits . . . debate in any meaningful way."); *ABC of Texas*, 826 F.3d at 220, 226-227 (rejecting claim that "the cumulative effect of the rule change improperly shortens the overall pre-election period in violation of the 'free speech' provision of the Act" or inhibits meaningful debate).

The Final Rule dissent pronounced that the Rule ran afoul of the APA because the Board failed to demonstrate a need for the amendments. 79 FR 74431, 74434. Here again, the courts rejected that contention. See, e.g., *Chamber of Commerce*, 118 F. Supp. 3d at 219-220 ("the Board has offered grounds to show that the issues targeted by the Final Rule were sufficiently tangible to warrant action"); *ABC of Texas*, 826 F.3d at 227-229.

The Final Rule dissent pronounced that the Rule's accelerated deadlines and hearing provisions violated employers' due process rights and the NLRA's appropriate hearing requirement. 79 FR at 74431-74442, 74451. Wrong. See *Chamber of Commerce*, 118 F.Supp.3d at 177, 205-206 (due process challenge does "not withstand close inspection" because, among other reasons, it is "predicated on mischaracterizations of what the Final Rule actually provides"); *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 2015 WL 3609116 *2, *5-*7, affd, 826 F.3d at 220, 222-223 ("the rule changes to the pre-election hearing did not exceed the boundaries of the Board's statutory authority").

The Final Rule dissent pronounced that the Rule's provision making Board review of regional director post-election determinations discretionary contravened the Board's duty to oversee the election process and was arbitrary and capricious. 79 FR at 74431, 74449-74451. Wrong again. See *Chamber of Commerce*, 118 F. Supp. 3d at 215-218 (rejecting claims that "the Final Rule's 'elimination of mandatory Board review of post-election disputes . . . contravenes the Board's 'statutory obligation to oversee the election process'" and is arbitrary and capricious).

The Final Rule dissent pronounced that the Rule's voter list provisions were not rationally justified or consistent with the Act, did not adequately address privacy concerns, and imposed unreasonable compliance burdens on employers. 79 FR at 74452, 74455. Wrong on all counts. See *Chamber of Commerce*, 118 F. Supp. 3d at 209-215 ("The Employee Information Disclosure Requirement [in the Rule's voter list provisions] does not violate the NLRA," and "is not arbitrary and capricious;" the Board did not act arbitrarily in concluding that "the [r]equirement ensures fair and free employee choice" and "facilitates the public interest;" and "the Board engaged in a lengthy and thorough analysis of the privacy risks and other concerns raised by the commenters before reaching its conclusion that the Employee Information Disclosure Requirement was warranted."); *ABC of Texas*, 826 F.3d at 223-226 (rejecting claims that the voter list provisions violate the NLRA and conflict with federal laws that protect employee privacy; that the provisions "are arbitrary and capricious under the APA because the rule disregards employees' privacy concerns," and "place an undue, substantial burden on employers"); see also *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 2015 WL 3609116 *2, *8-*11.

Apart from their wrong-headed views concerning the legal merits of the Rule, the Final Rule dissenters made a number of erroneous predictions regarding how the Final Rule would work in practice. But as far-fetched as I found these speculations in 2014, one can now see that these predictions are refuted by the Board's actual experience administering the Final Rule. A quick review of several published agency statistics shows some of their most notable speculations of dysfunction to be completely unfounded.

The Final Rule dissenters speculated that the changes made by the Rule would drive down the Board's historically high rate of elections conducted by agreement of the parties either because the Final Rule does not provide enough time to reach agreement, 79 FR 74442, or because parties can no longer stipulate to mandatory Board review of post-election disputes, 79 FR 74450. They argued, "[e]ven if the percentage of election agreements decreases by a few points, the resulting increase in pre- and post-election litigation will likely negate any reduction

of purported delay due to the Final Rule’s implementation.” 79 FR at 74450. But they were wrong. Following the Final Rule’s implementation, the Board’s election agreement rate has actually increased.³

Additionally, the Final Rule dissenters claimed that the Rule would do little to address those few representation cases that in their view involved too much delay, namely those cases that take more than 56 days to process from petition to election. 79 FR at 74456-57.⁴ But, in fact, the percentage of elections that were conducted more than 56 days from petition has decreased since the Final Rule was adopted.⁵ Moreover, for contested cases—the category which consistently failed to meet the 56-day target—the Final Rule has reduced the median time from petition to election by more than three weeks.⁶

The Final Rule dissent further hypothesized that whatever time-savings might be achieved in processing cases from petition to election, there was a likelihood that “the overall time needed to resolve post-election issues will increase.” 79 FR at 74435. Here again, the dissent was wrong. The Agency’s 100-day closure rate—which by definition takes into account a representation case’s overall processing time—is better than ever. In FY 2017, the second fiscal year following the Final Rule’s implementation, the Agency achieved a historic high of closing 89.9% of its representation cases within 100 days of a petition’s filing. And in FY 2016, the first fiscal year following the Final Rule’s implementation, the Agency’s representation case closure rate of 87.6% outpaced all but one of the six years preceding the Final Rule.⁷

³ See Percentage of Elections Conducted Pursuant to Election Agreements in FY2017, www.nlr.gov/news-outreach/graphs-data/petitions-and-elections (reporting a post-Final Rule election agreement rate of 91.7% in fiscal year (FY) 2017; past versions of this chart reported a post-Final Rule election agreement rate of 91.7% in FY 2016, and pre-Final Rule election agreement rates of 91.1% for both FY 2014 and FY 2013).

⁴ See also 79 FR at 74434 (The dissenters highlighted pre-Final Rule fiscal year 2013 as a period in which 94.3% of elections were conducted within 56 days of the petition as a means of concluding that “by the Board’s own measures, less than 6% of elections were unduly ‘delayed.’”). Of course, as explained in the Final Rule, the Board disagreed that only those cases taking more than 56 days were worthy of attention. 79 FR at 74317.

⁵ See Performance Accountability Reports, FYs 2013 – 2017, www.nlr.gov/reports-guidance/reports (reporting that, pre-Final Rule, the Agency processed 94.3% of its representation cases from petition to election in 56 days in FY 2013 and 95.7% in FY 2014, as compared to post-Final Rule rates of 99.1% in FY 2016 and 98.5% in FY 2017).

⁶ See Median Days from Petition to Election, www.nlr.gov/news-outreach/graphs-data/petitions-and-elections (reporting post-Final Rule median processing times for contested cases as 36 days in FY 2017 and 35 days in FY 2016, as compared to pre-Final Rule median processing times ranging from 59 to 67 days in FYs 2008 to 2014). See also Annual Review of Revised R-Case Rules, www.nlr.gov/news-outreach/news-story/annual-review-revised-r-case-rules (reporting that in the first calendar year following the Final Rule’s implementation, the median time to process contested cases from petition to election fell from 64 to 34 days).

⁷ See Performance Accountability Reports, fiscal years 2013 – 2017, www.nlr.gov/reports-guidance/reports (indicating the following representation case 100-day closure rates: FY 2017 -

All of the foregoing raises the question: if the Final Rule dissent's claims of statutory infirmity have been roundly rejected by the courts, and the predictions that the Final Rule would cause procedural dysfunction have been undercut by agency experience, why is comment being solicited as to whether the Final Rule should be further amended or rescinded? The answer would appear to be all too clear. When the actual facts do not support the current majority's preferred outcome, the new Members join Chairman Miscimarra to look for "alternative facts" to justify rolling back the Agency's progress in the representation-case arena.

It is indeed unfortunate that when historians examine how our Agency functioned during this tumultuous time, they will have no choice but to conclude that the Board abandoned its role as an independent agency and chose to cast aside reasoned deliberation in pursuit of an arbitrary exercise of power.

Accordingly, I dissent.

MEMBER McFERRAN, dissenting.

On April 14, 2015—after thousands of public comments submitted over two periods spanning 141 days, four days of public hearings, and over a hundred, dense *Federal Register* pages of analysis—a comprehensive update of NLRB election rules and procedures took effect. The Election Rule was designed to simplify and modernize the Board's representation process, to establish greater transparency and consistency in administration, and to better provide for the fair and expeditious resolution of representation cases. As stated in the Rule's *Federal Register* preamble:

While retaining the essentials of existing representation case procedures, these amendments remove unnecessary barriers to the fair and expeditious resolution of representation cases. They simplify representation-case procedures, codify best practices, and make them more transparent and uniform across regions. Duplicative and unnecessary litigation is eliminated. Unnecessary delay is reduced. Procedures for Board review are simplified. Rules about documents and communications are modernized in light of changing technology.

79 Fed. Reg. 74308 (Dec. 15, 2014).

During the short, two-and-a-half years since the Rule's implementation, there has been nothing to suggest that the Rule is either failing to accomplish these objectives or that it is causing any of the harms predicted by its critics. As Member Pearce catalogs in his dissent, by every available metric the Rule appears to have met the Board's expectations, refuting predictions about the Rule's supposedly harmful consequences. The majority makes no effort to rebut Member Pearce's comprehensive analysis. The preliminary available data thus indicates that the rule is achieving its intended goals—without altering the "playing field" for unions or

89.9%, FY 2016 - 87.6%, FY 2014 - 88.1%; FY 2013 - 87.4%; FY 2012 - 84.5%; FY 2011 - 84.7%; FY 2010 - 86.3%; FY 2009 -84.4%).

employers in the election process.¹ The validity of the Rule, moreover, has been upheld in every court where it has been challenged.² In short, the Rule appears to be a success so far.

Nonetheless, today a new Board majority issues a Request for Information (RFI) seeking public opinion about whether to retain, repeal, or modify the Rule—and signaling its own desire to reopen the Rule. Of course, administrative agencies ought to evaluate the effectiveness of their actions, whether in the context of rulemaking or adjudication, and public input can serve an important role in conducting such evaluations.³ But the nature and timing of this RFI, along with its faulty justifications, suggests that the majority’s interest lies not in acquiring objective data upon which to gauge the early effectiveness of the Rule, but instead in manufacturing a rationale for a subsequent rollback of the Rule in light of the change in the composition of the Board. Because it seems as if the RFI is a mere fig leaf to provide cover for an unjustified attack on a years-long, comprehensive effort to make the Board’s election processes more efficient and effective, I cannot support it. I would remain open, however, to a genuine effort to gather useful information about the Rule’s effectiveness to this point.

I. *The RFI is premature, poorly crafted, and unlikely to solicit meaningful feedback.*

Initially, it seems premature to seek public comment on the Rule a mere two-and-a-half years after the Rule’s implementation.⁴ The Rule has been in place for less time at this point

¹ See NLRB, *Annual Review of Revised R-Case Rules*, available at <https://www.nlr.gov/news-outreach/news-story/annual-review-revised-r-case-rules> (showing, in comparison between pre- and post-Rule representation cases, modest decrease in time elapsed from petition to election, no substantial change in party win-rates, and largely stable number of elections agreed to by stipulation); NLRB, *Graphs and Data, Petitions and Elections*, available at <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections> (showing similar outcomes, based on fiscal-year data on representation cases).

² See *Assoc. Builders and Contractors v. NLRB*, 826 F.3d 215 (5th Cir. 2016) (rejecting multiple facial challenges to Rule); *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015) (same).

³ I have no objection at all to seeking public participation in the Board’s policymaking, as reflected in the Board’s standard practice of inviting amicus briefs in major cases, including those where the Board is reconsidering precedent. Ironically, the new majority has now broken with that practice for no good reason in reversing recent precedent. See, e.g., *UPMC*, 365 NLRB No. 153 (2017) (Member McFerran, dissenting). I hope this unfortunate omission does not signal a permanent change to the Board’s approach in seeking public input in major cases.

⁴ I would be surprised if even the most ardent advocates of regulatory review would support such a short regulatory lookback period. Indeed, Section 610 of the Regulatory Flexibility Act, for example, contemplates that agencies may take up to 10 years—significantly longer than our 2-plus years’ experience with the Rule—before they may adequately assess a rule’s effectiveness. See 5 U.S.C. Sec. 610 (providing that agencies shall develop plan “for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule”).

than the rulemaking process took from beginning to end.⁵ Moreover, as noted, so far the Rule appears to be achieving its stated ends without producing the dire consequences some purported to fear. In short, there does not appear to be any present basis or need for this RFI.

Nevertheless, as stated, I am not opposed to genuine efforts to meaningfully evaluate the Rule's performance to date. But I believe that any useful request for information would have to seek comprehensive information on the precise effects of the specific changes made by the Rule.⁶ In my view, such detailed information is essential to facilitating meaningful analysis of the Rule's effectiveness, and to determining whether this or any future request for information is warranted. In fact, precisely because agencies benefit most from receiving specific rather than generalized feedback, an agency's typical request for information (unlike this RFI) *follows* the agency's assessment and identification of what particular information would be useful in evaluating a rule's effectiveness.⁷ Indeed, other agencies' requests for information have often posed specific questions reflecting their own considered analysis of what aspects of rulemaking might require further inquiry and are geared toward the acquisition of concrete facts from the public.⁸

The majority's request is not framed to solicit detailed data, or even informed feedback. The broad questions it poses, absent any empirical context, amount to little more than an open-

⁵ The Board's original notice of proposed rulemaking was published on June 22, 2011. The final rule upheld by the courts was published on December 15, 2014, with an effective date of April 14, 2015.

⁶ For example, to assess the success of some of the Rule's intended new efficiencies, it would be useful to have quantitative data on: motions for extensions and motions to file a document out-of-time; missed deadlines; motions for stays of election or other extraordinary relief; eligibility issues deferred until after the election, and whether such issues were mooted by the election results. This type of data would be valuable not only to decision makers at the Agency, but also to the public in determining how to evaluate and comment on the effectiveness of the Rule.

⁷ The majority states that it is the Board's duty to periodically review its rules. Without a doubt, the Board must monitor its rules to be sure that they are meeting their goals and to help the Board better effectuate the statute. But choosing to reopen the Election Rule now is highly dubious. The Board has many longstanding rules—addressing issues from industry jurisdiction to health care bargaining units—which have never been reviewed after promulgation. Yet the majority chooses the newly-minted Election Rule, among all others, for attention—with no explanation for its choice. Given the resources required of both the agency and interested parties when the Board revisits a rule, the Board's periodic review should reflect the exercise of reasoned judgment. In this case, the majority has failed to identify any reasonable basis for seeking public input on the Election Rule at this time. Nor has the majority made any effort to obtain or analyze easily available data that conceivably could support issuing an RFI.

⁸ See, e.g., Dept. of the Treasury, *Proprietary Trading and Certain Interests in and Relationships With Covered Funds (Volcker Rule)*; *Request for Public Input*, 82 Fed. Reg. 36692, Aug 7, 2017 (enumerating lengthy list of specific, data-oriented questions); Dept. of Labor, Employee Benefits Security Admin., *Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions*, 82 Fed. Reg. 31278, July 6, 2017 (same).

ended “raise-your-hand-if-you-don’t-like-the-Rule” straw poll. That is hardly a sound approach to gathering meaningful feedback.

The irony, of course, is that, if the majority were sincerely interested in beginning to assess the Rule’s effectiveness, the best initial source of empirical, objective data lies *within* the Agency itself. The Board’s regional offices process and oversee the litigation of every single election petition filed under the Rule. All the majority needs to do is ask the Board’s General Counsel to prepare a comprehensive report highlighting all relevant factual elements of the processing of election petitions over the past 2-plus years.⁹ If the resulting data were to suggest that, after such a short time on the books, the Rule is in need of refinement, or that additional public input could enhance the Board’s understanding of the Rule’s functioning, the Board might then craft tailored questions designed to elicit meaningful, constructive feedback.

Unfortunately, in addition to framing a vague, unfounded inquiry that is unlikely to solicit useful information, the majority’s request also establishes an unnecessarily rushed comment process that is likely to frustrate those interested parties who might actually hope to provide meaningful input. To the extent members of the public wish to provide informed feedback on the Rule, they will need information. In the absence of a comprehensive analysis from the General Counsel, outside parties are likely to seek relevant data on the Rule’s functioning through a Freedom of Information Act (FOIA) request. The public’s acquisition and analysis of such data through the FOIA process will involve the assembly and submission of FOIA requests, which in turn may require the agency to survey and compile extensive data for each such request. Thereafter parties will have to take stock of any data acquired through FOIA before being in a position to give informed feedback on the Rule. This process could take far more than the 60 days provided for comment by the RFI. Indeed, during the 2014 rulemaking process leading up to the Election Rule, the Chamber of Commerce, well into the 60-day comment period, sought an extension to give it more time to both request and analyze FOIA data. While it was ultimately determined that the comment period should not be extended under the circumstances at the time, the Chamber’s effort highlights the relevance of FOIA data and the time-intensiveness of parties’ analysis of such data. My colleagues’ failure to allot time to account for the parties’ information-gathering process only confirms that the RFI is not designed

⁹ The majority makes the odd suggestion that the RFI—a measure directed to the general public—is somehow also the most effective way to obtain information from the General Counsel. This is nonsensical. The General Counsel supervises the Board’s representation proceedings under a delegation of authority from the Board, and the Board is obviously able to direct the General Counsel to provide whatever relevant information it requests, without issuing an RFI or initiating a rulemaking.

In any event, although I was not a participant in the earlier rulemaking process, it is clear from the Notice of Proposed Rulemaking that the Board based its proposals on a thorough, pre-rulemaking analysis of relevant data and agency experience that enabled it to seek public comment on specific, carefully-crafted policy proposals. In short, the Board did its homework before seeking public participation. The majority’s current effort is utterly lacking the same foundation. The majority curiously seems to view this as an *attribute*, rather than a manifest departure from the norms of rulemaking under the Administrative Procedure Act.

to solicit and yield well-informed responses that might genuinely assist the Board's evaluation of the Rule.

II. *The RFI is a transparent effort to manufacture a justification for revising the Rule.*

As emphasized, I fully support the notion that the Board should take care to ensure that its rules and regulations are serving their intended purposes. I would welcome a genuine opportunity to receive and review meaningful information on the Rule's performance at an appropriate time. But this hurried effort to solicit a "show of hands" of public opinion without the benefit of meaningful data (or even thoughtfully framed points of inquiry) bears none of the hallmarks of a genuine effort at regulatory review.¹⁰ Gathering useful information is demonstrably not the purpose of this RFI. Instead, this RFI is a transparent effort to manufacture a justification for reopening the Rule. No legitimate justification exists.

The Supreme Court has made clear that, when an agency is considering modifying or rescinding a valid existing rule, it must treat the governing rule as the status quo and must provide "good reasons" to justify a departure from it. See *Federal Communications Commission v. Fox Television*, 556 U.S. 502, 515 (2009). Obviously, determining whether there are "good reasons" for departing from an existing policy requires an agency to have a reasonable understanding of the policy and how it is functioning. Only with such an understanding can the agency recognize whether there is a good basis for taking a new approach and explain why. *Id.* at 515-516. Indeed, even when an agency is only beginning to explore possible revisions to an existing rule, the principles of reasoned decision-making demand a deliberative approach, informed by the agency's own experience administering the existing rule.¹¹

¹⁰ The majority suggests that my view that the rule has been a success thus far is just one "opinion," and that they are merely soliciting a wider range of opinions from the public to better assess the Rule. But the fact that public opinion on the Rule may be divided—as it was during and after the rulemaking process—is not a reason for the Board to revisit the Rule. Canvassing public opinion might make sense if it were done in a manner that first gathered and considered evidence on the Rule's functioning, and framed any questions in a way that actually requested useful substantive feedback on the agency's own analysis.

But the open-ended solicitation we have here, without the benefit of data or analysis, is not a productive way to enlist public opinion. As the dissenters to the Election Rule observed, including Chairman Miscimarra, the rulemaking was of "immense scope and highly technical nature," and it generated "an unprecedented number of comments, espousing widely divergent views." 79 Fed. Reg. 74430, 74459. It is accurate to say that the Rule is both comprehensive and technical, and that the public holds polarized views thereon. Yet now the majority broadly seeks public opinion on the fate of the Rule without offering any data or analysis of its own to provide a foundation for the public's assessment. Ultimately, they provide no persuasive explanation of how soliciting public input in the absence of any agency analysis or proposals—input that, as noted, is tantamount to a "thumbs up or thumbs down" movie review—will provide a foundation for an effective rulemaking process.

¹¹ See, e.g., Dept. of Labor, Wage and Hour Div., *Request for Information on the Family and Medical Leave Act of 1993*, 71 Fed. Reg. 69504, 69505-06, Dec. 1, 2006 ("[T]he subject matter areas [of this RFI] are derived from comments at ... stakeholder meetings and also from (1)

If this RFI asked the public specific, well-crafted questions geared toward a neutral assessment of the Rule's functioning—and was based on a foundation of internal evidence or experience suggesting there was a problem with the Rule's implementation thus far—there would be far less basis to doubt the majority's reasons for revisiting it.¹² Indeed, the majority's reticence to focus this inquiry on the agency's own data—the most straightforward source of information about how the Rule is working—is puzzling. The majority's failure to take this basic step suggests that they would rather not let objective facts get in the way of an effort to find some basis to justify reopening the Rule. Hence the majority instead poses the vague questions in this RFI, which belie any “good reasons” for revisiting the Rule.

Further, in the preamble to this RFI the majority has failed to identify, much less establish, any “good reasons” to revisit or to consider reopening the Rule at this time. The majority summarily cites congressional votes, hearings, and proposed (but never-passed) legislation as reasons to issue this RFI. Although such congressional actions might raise concern over a rule's actual effectiveness in other circumstances, here—where criticism was leveled in the absence of any meaningful experience under the Rule—they seem to signify little more than partisan opposition to the Rule.¹³ Reasoned decision-making is not a matter of partisanship.

rulings of the Supreme Court of the United States and other federal courts over the past twelve years; (2) the Department's experience in administering the law; and (3) public input presented in numerous Congressional hearings and public comments filed with the Office of Management and Budget ... in connection with three annual reports to Congress regarding the Costs and Benefits of Federal regulations in 2001, 2002, 2004. ... During this process, the Department has heard a variety of concerns expressed about the FMLA.”); cf. Dept. of Labor, Wage and Hour Div., *Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 82 Fed. Reg. 34616, July 26, 2017 (rule enjoined by court, and Department faced with legal questions concerning its analysis and justification for aspects of rule).

¹² Indeed, if it were properly founded in objective data indicating significant problems with the rule in its implementation, I might well join such an effort to assess the effectiveness of the Rule, as I subscribe to the view that timely, informed public input can be vital to making good public policy. In contrast, my colleagues in the majority seem to take the view that soliciting the views of the public is good only when it furthers their predetermined purposes. In a recent Board decision where public input would have had a far greater likelihood of aiding the Board's decision-making process, they nonetheless dismissed the possibility that such input might be useful in order to more hastily issue a decision reversing Board precedent. See *UPMC*, 365 NLRB No. 153 (2017). In that case, the public's own experiential data and legal and policy arguments would have had immediate relevance; yet the Board took the drastic step of reversing precedent without the benefit of such. It seems clear that they seek public input here, however heedlessly, so that they can point to negative public feedback about the rule as an (inadequate) procedural precursor to justify reopening the rulemaking process under the APA; whereas in *UPMC* the adjudicative reversal of precedent did not require the same procedural formality, and thus they took a more expedient route to accomplish their goal in that case.

¹³ Similarly, the unfounded criticism of the Rule as it was adopted, both among its legal challengers and the Board members who dissented from the Rule, is not a sound basis for this

The majority also asserts that “numerous” cases litigated before the Board have raised “significant” issues concerning its application. Of course, many issues concerning the proper interpretation and application of the Rule can and should be resolved in adjudication, where they arise. In fact, the four recent cases the majority cites involved case-specific applications of the Rule that offer little if any insight into how well the Rule is working overall.¹⁴ More broadly, as stated, all legal challenges to the Rule have been soundly rejected by the courts.

Last, although not mentioned by the majority, no one has petitioned the Board to revisit the Rule or for new rulemaking on the Board’s election processes. Perhaps the absence of such a petition is attributable to all of the circumstances described above. Perhaps it is explained by the common-sense notion that the Agency’s and the public’s limited experience with the Rule would make such a petition glaringly premature. See 5 U.S.C. §553(e).¹⁵

RFI. As the United States District Court for the District of Columbia made clear in rejecting a challenge to the Rule: “[The Rule’s challengers’] dramatic pronouncements are predicated on mischaracterizations of what the Final Rule actually provides and the disregard of provisions that contradict plaintiffs’ narrative. And the claims that the regulation contravenes the NLRA are largely based upon statutory language or legislative history that has been excerpted or paraphrased in a misleading fashion. Ultimately, the statutory and constitutional challenges do not withstand close inspection.” *Chamber of Commerce v. NLRB*, supra, 118 F. Supp. 3d at 177. That court further pointed out that rhetoric like “quickie election,” employed by the Rule’s challengers and borrowed from the Board members who dissented from the Rule, were part of a vague, conclusory, and argumentative set of attacks. *Id.* at 189.

¹⁴ If any conclusion can be gleaned from these four cases, it is that they were processed in just the manner contemplated by the Rule: fostering efficiency while preserving the fairness of the proceedings. For example, in *UPS Ground Freight*, 365 NLRB No. 113 (2017), the employer complained about the conduct and timing of a pre-election hearing, but it did not establish any prejudice to its ability to fully make its arguments. In other words, the procedures under the Rule were prompt and resulted in no unfairness. In *Yale University*, 365 NLRB No. 40 (2017), and *European Imports*, 365 NLRB No. 41 (2017), the Board refused to stay an election, but allowed parties to preserve their pre-election claims—thus leaving the substantive legal claims intact, while making the process more efficient by deferring resolution until after the election, at which time the election results may have mooted those claims. In *Brunswick Bowling*, 364 NLRB No. 96 (2016), the Board emphasized the importance of position statements, which were intended under the Rule to narrow the issues for pre-election hearings, but also noted that a party’s failure to file one did not affect a regional director’s independent statutory duties with respect to representation petitions.

In any event, a better measure of the Rule’s early effectiveness, which I advocate for below, would be a thorough internal Agency review of all the cases processed under the Rule, including those that have *not* come before the Board.

¹⁵ Indeed, another argument to defer any examination of the Rule’s effectiveness until a later date is that a longer timeframe would yield a larger body of cases that presumably would provide more representative and meaningful insights into its performance.

The only remaining asserted justification for considering revisiting the Rule at this early stage is the majority's express reliance on the change in the composition of the Board.¹⁶ This certainly is not a "good reason" for revisiting a past administrative action, particularly in the context of rulemaking. See generally *Motor Vehicles Manufacturers v. State Farm*, 463 U.S. 29 (1983). Yet, I fear this is the origin of the RFI, and regrettably so. The Board has long and consistently rejected motions to reconsider its decisions based on a change in the composition of the Board. See, e.g., *Brown & Root Power & Mfg.*, 2014 WL 4302554 (Aug. 29, 2014); *Visiting Nurse Health System, Inc.*, 338 NLRB 1074 (2003); *Wagner Iron Works*, 108 NLRB 1236 (1954). We should continue to exercise such restraint with respect to the Rule, unless and until a day comes when we discover or are presented with a legitimate basis for taking action. Today, however, is manifestly not that day.

As a result, it should come as no surprise to the majority if a court called upon to review any changes ultimately made to the Rule looks back skeptically at the origins of the rulemaking effort. The RFI is easily viewed as simply a scrim through which the majority is attempting to project a distorted view of the Rule's current functioning and thereby justify a partisan effort to roll it back. Cf. *United Steelworkers v. Pendergrass*, 819 F.2d 1263, 1268 (3d Cir. 1987) ("Some of the questions [in an ANPRM] could hardly have been posed with the serious intention of obtaining meaningful information, since the answers are self-evident."). Such opportunism is wholly inconsistent with the principles of reasoned Agency decision-making. It is equally inconsistent with our shared commitment to administer the Act in a manner designed to fairly and faithfully serve Congressional policy and to protect the legitimate interests of the employees, unions, and employers covered by the Act. Whatever one thinks of the Rule, the Agency, its staff, and the public deserve better.

VI. Conclusion

The Board invites interested parties to submit responses during the public response period and welcomes pertinent information regarding the above questions.

Roxanne Rothschild
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National Labor Relations Board

¹⁶ I reject the majority's implied suggestion that *my* joining the Board since the Rule was enacted somehow supports today's effort to revisit the Rule. I begin with the proposition that the Rule, promulgated under notice-and-comment and upheld by the courts, is governing law—whether or not particular Board members disagreed with its adoption or would have disagreed, had they been on the Board at the time. As explained, I would support revisiting the Rule only if there were some reasoned basis to do so.