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VIA EMAIL

National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: Request for Information Concerning 29 CFR Parts 101 and 102

RIN 3142-AA12

To Whom It May Concern:

This letter is submitted in response to the request for information (“RFI”) issued by the National Labor Relations Board (the “Board”) regarding the December, 2014 amendments to the Board's representation case procedures (the “2014 Election Rule”). This letter offers two comments, and a discussion of a recent case revealing at least one aspect of the failings of the 2014 Election Rule. To answer the specific questions articulated in the RFI:

1. The 2014 Election Rule should be changed.
2. The 2014 Election Rule should be not be retained. The 2014 Election Rule at its core reflects and implements an undo emphasis on improperly quick elections to the detriment of all other considerations. Moreover, the 2014 Election Rule implemented an undue invasion of employees' privacy by requiring that employees' private contact information be turned over to third parties.
3. The 2014 Election Rule should be rescinded, and prior election procedures should be reinstated -- but the Board should alter its policies to eliminate the ability for unions to substantially delay decertification elections by manipulation of the “blocking charge” policy.

First, the 2014 Election Rule is marked, above all else, by a series of changes to the Board's procedures to ensure that union representation elections occur on a wholly inappropriately short timeline. This letter will not detail the numerous ways the 2014 Election Rule changed prior Board procedures to, at every step, emphasize speed to election over all other considerations. Simply put, this is inappropriate and unfair.

It is inappropriate to adopt a goal of speedy elections above all other considerations because of the reality of how representation elections occur. In all but the most rare cases, unions and their organizing committees work for as long as possible in a surreptitious manner, organizing as many employees without the employer becoming aware of the campaign. It is a fact that in the course of this covert activity, it is routine for union organizers to exaggerate, promise and rely on simple falsehoods. Then, having achieved some self-identified critical mass, the union files for an election, and seeks to become an entrenched representative before anyone can effectively respond to the union's long-term campaign with countervailing information.

The 2014 Election Rule is thus unfair, because it intentionally facilitates this common union tactic. By doing so, the Board not only enables union representation based on employees' receipt of less than full information; the Board actually encourages that result.

We recognize that unions and their advocates claim a need for speed in union elections, above all else, by relying on anecdotal stories of employers who retaliate against union proponents. Respectfully, such anecdotal evidence is far more often relayed than actually observed. Moreover, it is fundamentally bad policy to punish law-abiding employers (and their employees, who are forced to make decisions based on incomplete information) in response to unlawful conduct – conduct that the Board has the full ability to remedy. Notwithstanding complaints about the Board's processes and remedies, the Board has more than adequate remedial authority to sanction employers that violate the Act in the context of the union election process. Relying on the occasional story of an employer that acted improperly is no reason to penalize all employers in America, and their employees.

Second, the 2014 Electoral Rule should be revised to delete the requirements that employers furnish unions with personal cell phone numbers, personal email addresses, or similar contact information for targeted employees. No employer or employer's representative has gone through an election since the adoption of the 2014 Election Rule without encountering numerous employees outraged that their personal contact information has been turned over to individuals they did not authorize. In today's America, many employees jealously guard their private cell phone numbers, or personal email accounts. They turn that information over to their employer only when necessary, and typically to enable communications that the employees recognize are important. Employees jealously guard the privacy of this information. The Board has not just authorized but, indeed, mandated a blatant invasion of privacy in the most ordinary sense of the term – by facilitating intrusions into the employee's personal life when the individual simply wants to be let alone. Many employees cannot believe that their private contact information has been turned over to third parties on the order of the federal government. Such an overreach should be reversed at the earliest possible opportunity.

Third, we believe it is important that the Board dramatically revise the ability of unions to manipulate the “blocking charge” policy to prevent employees from exercising their rights to remove a union representative in a timely fashion. A recent case arising from Region 19 demonstrates the ease with which a union can manipulate the process to frustrate employee-voters.

In December, 2016, a group of employees of the Franciscan Medical Group (the “Employer”) filed a petition to decertify their union, SEIU Healthcare 1199NW (the “Union”). 19-RD-190582. This was a unit of just over one hundred clerical and administrative employees working in several different medical clinics in and south of Seattle, Washington. The Union would not agree to any election agreement, and a pre-election hearing took place on January 9, 2017. Before a decision and direction of election could issue, the Union began a campaign of filing numerous frivolous unfair labor practice charges. Examples of these charges include:

- That the Employer, complying with a provision in the just-expired collective bargaining agreement regarding when and where Union representatives could be granted access to the clinic facilities, violated the Union’s rights by limiting access to the clinics to the procedures specified in the collective bargaining agreement. The Union based these allegations on false claims that the Employer had allowed access to patient care areas and other private spaces beyond what was specified in the collective bargaining agreement.
- That individual supervisors, whose job involves coordinating the different work units at each of the Employer’s clinics, and sometimes filling in for employees on breaks, were engaged in surveillance by visiting those clinics or sitting in for those employees.
- That various long-standing Employer policies¹ conflicted with employees’ Section 7 rights. The Union made this claim notwithstanding that these policies existed, unchanged, when the Union was initially elected to represent this unit a few years before.
- Several charges challenged isolated statements made by Employer in communications to its employees.

The Union eventually filed 17 different unfair labor practice charges; while the Employer is unaware as to what “evidence” the Union submitted supporting its demand that the charges “block” the election, the Region later advised that the Union had submitted evidence which, if believed, was a basis for several of the charges to “block” the election. The Employer knew that these charges and the others filed by the Union were baseless at best, or frivolous at worst. The Employer also knew, however, that disproving the false evidence offered by the Union would

¹ This charge, and the actions leading to the resolution of that charge described herein, all pre-dated the Board’s decision in *The Boeing Company*, 365 NLRB No. 154 (December 14, 2017).

take many months, if not years, to go through an investigation, trial and review by the Board. The Employer also knew that doing so would only delay the decertification election, and have no other effect on the Employer (none of the charges carried the slightest risk of any financial remedy). The Employer therefore made a conscious decision to reach an early settlement of these cases, so that the election would not be delayed; the Employer communicated this decision to Region 19 early on and sought to engage in an early settlement.

Instead, Region 19 insisted on going through an investigation of all of the Union's charges. Even though the Employer made clear it was prepared to enter into typical Board settlement agreements predicated on the charges as filed, the Region nonetheless insisted on going through a full investigatory process. Then, the Union was able to prolong the process even further, by filing serial amendments to the charges, typically spaced 30 to 60 days apart, all of which were also investigated. It was not until July, 2017 that the Region engaged in serious settlement discussions over those charges, which resulted in a settlement agreement in August, 2017. In response to Union objections, the settlement agreement was revised in September.

Notwithstanding those changes, the Union's stalling did not cease. The Union objected to the settlement agreement, even though the settlement agreement fully resolved, under existing Board standards, every surviving allegation made by the Union. The Regional Director did not overrule the Union's objection to the settlement until October, 2017. At that point, the Union appealed the Regional Director's settlement approval to the Office of Appeals. The Office of Appeals did not overrule those objections until December, 2017. Because the Union had been filing charges over an extended period, a second settlement addressing an additional two charges went through the same process including review by, and the ultimate denial of the Union's objections by, the Office of Appeals in January, 2018.

All this time, the Union and the Employer had been negotiating for a successor collective bargaining agreement. As part of the final settlement of that collective bargaining agreement, the Union withdrew all its frivolous unfair labor practice charges (not coincidentally, timed to virtually coincide with the expiration of the posting period resulting from the settlements of the unfair labor practices).

The employees were, finally, able to vote on their long delayed decertification petition. Just yesterday, April 17, 2018, by a vote of 64 to 36, the employees voted to decertify the Union.

This letter obviously summarizes the process that was required for the resolution of many baseless ULPs filed by the Union. The Union would undoubtedly claim that there was a good faith basis for their charges. This letter cannot possibly attempt to conclusively determine the merits of any of those allegations -- but that is not the point. From the earliest determination that some of these charges would be determined to be blocking, the Employer was ready to enter into settlements that would have fully remedied any alleged violations; but by the continued

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invocation, if not manipulation, of the Board's procedures, the Union was able to delay this decertification for well over a year.

The Employer suggests no recriminations over the process, other than to observe that by virtue of the Board's blocking charge procedures, the employees' desires regarding continued representation were frustrated for well over a year. If the goal of the 2014 Election Rule was for speedy representation procedures, the process is broken. The Board should repair its procedures so that employees are able to exercise their rights in a reasonable time. As suggested at the beginning of this letter, the demand that representation elections take place within a month or less is unreasonable. Equally unreasonable is allowing unions to manipulate Board procedures so as to delay decertification elections for more than a year.

The 2014 Election Rule should be rescinded, and the Board's procedures revised to address these concerns.

Sincerely,



Timothy J. O'Connell

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