



April 18, 2018

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Dear Deputy Executive Secretary Rothschild:

### Introduction

On behalf of its members, the Service Employees International Union (“SEIU”) submits the following response to the National Labor Relations Board’s Request for Information (“RFI”) RIN 3142-AA12 on the 2014 rule regarding representation-case procedures codified in 29 CFR Parts 101 and 102 (“2014 Election Rule”). SEIU represents nearly 2 million members including janitors, nurses, healthcare workers, food service workers, university and college faculty, security officers, and other service workers covered by the National Labor Relations Act (“NLRA” or “the Act”).

SEIU has had an overall positive experience with the 2014 Election Rule and strongly opposes rescinding it. In preparing this response, SEIU sought feedback from workers, organizers, and attorneys familiar with the 2014 Election Rule. This feedback, incorporated below, demonstrates that the 2014 Election Rule made sensible changes to an outdated system in dire need of repair. The 2014 Election Rule modernized procedures to keep pace with technology and the contemporary workforce. It also saved Board resources by shortening pre-election processes, reducing unnecessary litigation, and increasing uniformity in election procedures across regional offices.

Further, the 2014 Election Rule made a difference to workers who sought to better their lives by joining together in a union. By curtailing specious litigation, the new rules safeguard the right of workers to vote in a free and fair election, and reduce the opportunities for employers to engage in coercive conduct against workers who attempt to organize. Workers have also benefited from greater access to information during the election process through updated voter lists, electronic communication, and improved notice procedures.

Dissenting Members Pearce and McFerran are correct that this RFI is premature and unjustified. The 2014 Election Rule was the product of 141 days of public comments and years of careful deliberation.<sup>1</sup> Available data shows that the rules have achieved their stated purpose of streamlining and modernizing the election process. And the 2014 Election Rule has survived all legal challenges. Moreover, there is no evidence to support the fearful predictions that the 2014 Election Rule would result in more petitions being filed and a drastic uptick in union wins. To the contrary, data shows that the number of petitions filed and union win rates have remained largely unchanged.<sup>2</sup> Simply put: there is no reason for soliciting information on the 2014 Election Rule, which was implemented less than three years ago and has worked effectively ever since.

Nonetheless, in light of this RFI and the Board's ostensible desire to change the 2014 Election Rule, SEIU suggests that the agency collect and review data for a longer period of time before evaluating whether any changes are necessary. If any changes are proposed, these modifications should build on the progress made by the current rules and not undermine it.

The comments below discuss (I) our brief answers to the questions presented by the RFI, (II) the successes of the 2014 Election Rule in protecting employee rights under the Act, (III) areas to collect data and strengthen current election procedures, and (IV) our opposition to proposed changes to the 2014 Election Rule that are contrary to the Act.

## **I. Short Answers to Questions Presented in RFI**

### *1. Should the 2014 Election Rule be retained without change?*

The 2014 Election Rule should be retained. We believe that this request for information is premature and suggest the agency collect and review data for a longer period of time before evaluating whether any changes are necessary.

### *2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?*

The 2014 Election Rule should be retained. Any modifications to the rules should be based on a review of data and should serve to strengthen and clarify the 2014 Election Rule.

### *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?*

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<sup>1</sup> NLRB Request for Information on Representation-Case Procedures, RIN 3142-AA12 at 4 (Member Pearce dissenting); 10 (Member McFerran dissenting).

<sup>2</sup> [www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc](http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc) (last visited April 13, 2018).

No, the 2014 Election Rule should not be rescinded, and the Board should not revert to the prior election procedures. To do so would contravene the Board's statutory directive to uphold employees' rights to free and fair union elections.

## **II. The Success of the 2014 Election Rule Is Supported By Data and Worker Testimony**

Worker testimonials demonstrate, and data confirm, that the 2014 Election Rule furthered the Board's goal of resolving representation questions efficiently and fairly in accordance with the Act. Therefore, the 2014 Election Rule should be retained.

### **A. The 2014 Election Rule Successfully Reduced the Time Period Between the Filing of a Petition and the Election**

One of the most significant changes resulting from the 2014 Election Rule is the shortened time period between the filing of a petition and the election. Prior to the 2014 Election Rule, the median time between the filing of a petition and the election was approximately 38 days.<sup>3</sup> However, there was a notable difference between the time for stipulated elections, which occurred within a median of 36-37 days, and contested cases, which occurred within 59-64 days.<sup>4</sup> By contrast, the median number of days between the petition filing and an election in fiscal year 2017 was 22 days for stipulated elections and 36 days for contested elections.<sup>5</sup> Indeed, the data suggest that the 2014 Election Rule nearly halved the median number of days between petition filing and elections in contested cases.

#### *Expeditious Elections Reduce Opportunities for Unlawful Conduct*

The elimination of unnecessary delay during the petition-to-election period is significant for protecting employees' Section 7 rights guaranteed by the Act. Under the old election procedures, employers had ample opportunity to manipulate the election process, greatly delay the election date, and extend the time for employers to commit unfair labor practices and intimidate workers. One study found that the probability of unionization drops by more than two percent for each week of delay between the petition and the vote.<sup>6</sup> Another study revealed a correlation between the delay time between the petition and election and the number of Board complaints issued against an employer.<sup>7</sup> Although intimidation still occurs under current election procedures, there are certainly fewer opportunities for employers to manipulate and delay the election process for the purposes of chilling employee organizing.

The 2014 Election Rule has allowed employees to exercise their right to vote with greater freedom from intimidation than under the old system, and therefore, have made elections more

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<sup>3</sup> [www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election](http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election) (last visited April 15, 2018).

<sup>4</sup> *Id.* (between fiscal years 2008-2013).

<sup>5</sup> *Id.*

<sup>6</sup> Paul Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769, 1777 n. 24 (1983).

<sup>7</sup> [http://laborcenter.berkeley.edu/pdf/2011/NLRB\\_Process\\_June2011.pdf](http://laborcenter.berkeley.edu/pdf/2011/NLRB_Process_June2011.pdf) at 3 (last visited April 13, 2018).

fair. This improvement is reflected in the story of Caress Murray,<sup>8</sup> a certified nursing assistant and 1199SEIU United Healthcare Workers East member. Murray explained that when she and her coworkers decided to organize, the “employer did everything [it] could to stop [them] from forming their union.” The employer used anti-union consultants to scare and threaten employees, and interrogate employees about their union support. However, the shorter time between the filing of the petition and the election reduced the length of time during which the employer could use those tactics to discourage the organizing efforts.

Similarly, Regina Heaney, a hospital registrar and also a member of 1199SEIU, said that the quick turnaround between the filing of the petition and the election for her bargaining unit greatly lessened worker anxiety. During the course of the 16 months between the start of organizing and the filing of the petition, Heaney said that management at the hospital “inundated us with anti-union messages,” monitored pro-union workers, and even fired one pro-union activist. With 16 months to campaign against the union, management did not need more than the short time provided for in the 2014 Election Rule.

The personal experience of one airport worker, who wishes to remain anonymous, demonstrates the sharp difference in worker experiences organizing under the 2014 Election Rule and the prior election procedures. This worker went through elections at the airport where they worked in both 2015, prior to the 2014 Election Rule taking effect, and in 2016, after the new rule was in effect. The 2015 election took place approximately four months after the election petition was filed, and the worker said, “resulted in the terminations of dozens of my co-workers.” During the four-month election period, “the employer pulled out all the stops to keep my [the airport worker’s] co-workers from voting for the union.”

The airport worker recalled that the employer “knew who the union supporters were and went after them specifically . . . they pulled attendance records and terminated any union supporters they could using [a] confusing and retaliatory points system as a justification.” The worker also remembers that the employer “held meetings . . . where they trashed the union and lied about how much [in] dues they’d have to pay . . . they distributed materials that trashed the union . . . they even went so far as to intentionally promote less qualified people into supervisory positions.” This anonymous worker estimated that approximately 60 of their coworkers were terminated during the election, which “sent fear through everyone at the airport,” including workers in other bargaining units who had not yet filed for elections.

The 2016 election at the airport, which occurred under the 2014 Election Rule, had, as the worker puts it, “a quick time frame between the day we all went down to the labor board and filed for an election and when the actual election happened.” Unsurprisingly, the workers who had experienced the previous election “were scared the same thing would happen . . . but it went so quickly that the employer did not have time to retaliate.” The election date was set quickly, and the workers voted for the union with minimal retaliation from the employer. The worker concludes: “the changes in the election process helped give me and my co-workers the freedom to finally join our union.”

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<sup>8</sup> Worker stories are based on interviews conducted by SEIU attorneys and organizers.

## *Expeditious Elections Conserve Resources*

In addition to reducing opportunities for employers to engage in coercive behavior, the 2014 Election Rule has helped avoid unnecessary litigation. For example, a group of adjunct faculty at the University of New Haven filed a petition for a union election in April 2017. The employer responded with a Statement of Position indicating that it disagreed with the petitioned-for unit. The notice provided by the Statement of Position allowed the faculty to deliberate and agree with the employer on a different bargaining unit on the first day of hearing, thereby avoiding an unnecessary hearing.

The 2014 Election Rule has reduced the number of delayed hearings by adding a for-cause requirement to requests for postponing hearings, and limiting postponements to two days except in extraordinary circumstances. This conserves agency resources by reducing the amount of time it takes to process a case, and limits the incentive to use postponement as a way to gain an advantage. In fiscal year 2015, there were 653 rescheduled hearings.<sup>9</sup> In fiscal year 2016, the first full year of elections under the rule, the number of rescheduled hearings dropped to 366, and there were 390 rescheduled hearings in fiscal year 2017.

The aforementioned story and data illustrate how the 2014 Election Rule has allowed the Board to fulfill its statutory directive to protect employees' right to vote free from interference while conserving limited resources. By contrast, there is no evidence supporting employers' claims that the 2014 Election Rule would result in higher union win rates.<sup>10</sup> The unchanged rate of union wins further undermines employer claims that quicker elections would deprive employers of the ability to present their case against unionization to employees. Thus, the 2014 Election Rule only achieved its intended goal of streamlining election procedures to ensure fair and expeditious resolution of representation cases.

### **B. The Modernization of the *Excelsior* List Requirements Has Resulted in an Informed Electorate**

In addition to streamlining the election process, the 2014 Election Rule expanded worker access to information via updated *Excelsior* list requirements. The modernization of voter list requirements ensure a more fully informed electorate, rectify the imbalance in communication inherent under the old rules, and accommodate changes in technology.

Employers have long been able to routinely communicate with their employees by phone and email. But prior to the 2014 Election Rule, unions typically lacked even the most basic contact information readily available to employers. As adjunct professor Dr. Darrin Murray explained in testimony to the Board as it considered the 2014 Election Rule, by not permitting

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<sup>9</sup> See NLRB response to American Bar Association Committee on Practice and Procedure Under the NLRA, Midwinter Meeting in February 2018. [www.americanbar.org/content/dam/aba/events/labor\\_law/2018/papers/ABA%20Mid-Winter%20Meeting%20Questions%20-%20Answers.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/2018/papers/ABA%20Mid-Winter%20Meeting%20Questions%20-%20Answers.authcheckdam.pdf) (last accessed April 12, 2018).

<sup>10</sup> [www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc](http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc) (last visited April 13, 2018).

pro-union workers the same access to worker contact information, the old election rules limited pro-union workers from exercising “the same access to free speech” as employers.<sup>11</sup>

Under the new rule, however, workers receive more complete contact information for eligible voters earlier on in the election process. This makes it easier for workers, like Jason Grunebaum, to talk to their colleagues about forming a union. Grunebaum, a senior lecturer at the University of Chicago, filed a petition for a union election with his co-workers in October 2015. Grunebaum found that the *Excelsior* lists were “not perfect” but still crucial for “engaging voters about what it could mean for us to form a union.” Having access to email addresses and cell phone numbers “allowed [Grunebaum and other faculty] to have the kind of communication with our colleagues that should be allowed, protected, and encouraged under the law so that voters can make informed decisions.” Grunebaum also highlighted the significance of using cell phones for a “decentralized workforce” like contingent faculty. Without modern *Excelsior* lists, Grunebaum asserted that many workers would not have had access to important information “when it came to questions about potential retaliation.” Furthermore, colleague-to-colleague conversations allowed Grunebaum and his colleagues to counter “toxic propaganda” used by the employer to “sow a subtext of doubt and fear” among employees prior to the election.

It is worth noting that even under the current election procedures, employers still retain a large advantage by being able to hold captive audience meetings. *See, e.g., Frito-Lay, Inc.*, 341 NLRB 65 (2004) (management permitted to install management or other anti-union employees in truck cabs for all day “ride-alongs” with driver-employees during election period). Nonetheless, the modest changes implemented by the 2014 Election Rule have helped level the playing field and ensure that voters are more informed prior to casting their ballots.

### **III. Any Changes to the 2014 Election Rule Should Seek to Strengthen and Clarify Existing Procedures**

The 2014 Election Rule implemented modest, common-sense reforms to further employee rights under the Act. Therefore, *no* part of the 2014 Election Rule should be rescinded. As mentioned above, SEIU believes that this request for information is premature as the current election procedures have been in place for less than three years. Accordingly, we respectfully urge the Board to refrain from altering the rule until the effects of the 2014 Election Rule have been fully realized. However, to the extent that the Board considers making any updates to the election procedures, those changes should go further in protecting employee rights.

#### **A. The Board Should Avoid Unnecessary Delay in the Resolution of Post-Election Disputes**

The evidence clearly shows that the 2014 Election Rule did not limit pre-election litigation only to increase post-election litigation. Rather, the 2014 Election Rule reduced litigation as many issues can be mooted out by election results. Nonetheless, the current

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<sup>11</sup> *In re: Notice of Proposed Rulemaking, Representation Case Procedures*, Testimony of Darrin Murray, 400:11-13 (April 11, 2014).

procedures, like the old procedures, do not provide clear timelines for the resolution of post-election disputes.

In one example, non-tenure track faculty at Goucher College had their votes counted in December of 2014, prior to the 2014 Election Rule. Faculty did not learn the results of their election due to a determinative number of challenged ballots. A post-election hearing on challenges occurred in January 2015. The hearing officer issued a report shortly thereafter, and the employer filed exceptions to the report. The union and employer submitted all briefing on exceptions to the report by February 2015. A year-and-a-half later, on August 11, 2016, the Board issued a decision regarding the post-election challenges. The Goucher faculty unit was finally certified on August 26, 2016, almost two years after casting their ballots. Such delays in resolving post-election matters deprive workers of knowing the outcome of their elections and stall employee organizing.

Prolonged post-election processes can also impact the processing of refusal-to-bargain charges, rendering certification meaningless. For example, at Northwestern University, non-tenure-track faculty had a union election pursuant to a stipulated agreement in the summer of 2016. The election resulted in determinative challenges. The hearing officer issued a report, after which exceptions were filed. The Regional Director ruled on the exceptions and certification was issued in May 2017. The employer filed a request for review of the Regional Director's determinations in June 2017. The union then filed a refusal-to-bargain charge which has not yet been investigated or processed almost a year later.

In short, the 2014 Election Rule made important reforms that shortened pre-election litigation without increasing in post-election litigation. It should therefore not be rescinded. Nonetheless, improvements are still needed to the post-election timeline.

## **B. Parties Should Have Adequate Opportunity to be Heard in Cases**

Rule 102.67 permits the Board to grant a request for review and issue a decision at the same time, even in the absence of briefing. This both prevents the parties to a case from adequately briefing an issue on review, and allows the Board to make decisions on an incomplete record, effectively setting labor-management relations in the dark. However, in considering any changes to protect the due process rights of the parties, the Board should also avoid unnecessary delays in review.

By granting a request for review while simultaneously issuing a decision, the Board risks setting broad policy without hearing arguments from both sides. The Board's recent decision in *PCC Structurals*, which was issued on the same day as review was granted, illustrates this problem. *Id.*, 365 NLRB No. 160, slip op. at 1 (2017). In *PCC Structurals*, the Board reversed significant Board precedent regarding community of interest standards without giving parties an adequate opportunity to brief the issues. *PCC Structurals*, 365 NLRB No. 160, slip op. at 16 (2017) (Pearce, M., dissenting). Because the case was decided only on petitions for review, the certified Union had "virtually no input." *Id.*

Thus, the Board should ensure all parties and affected employers and unions have an opportunity to weigh in, such that representation proceedings are not bogged down in

incomplete, potentially invalid, and unresponsive Board decisions. The Board should consider giving parties notice of a request for review and an opportunity to fully brief the issues before issuing a decision. However, as stated above, any revision to address this issue should not be done in a way that creates unnecessary delay in review.

#### **IV. SEIU Opposes Certain Proposals That Limit Employee Rights Under the NLRA**

In comments submitted to the 2014 Election Rule, some parties proposed changes that would violate employees' rights and waste agency resources. Assuming some of these proposals will be raised again, SEIU urges the Board to not adopt such proposals.

##### **A. The Board Should Not Impose a Mandatory Waiting Period Between the Petition and Election**

SEIU opposes any proposal to set a 30-day minimum between the filing of the petition and the election. Mandating a 30-day window would not serve to effectuate the purposes of the Act, and would impair workers' ability to properly vote and participate in a Board election process.

Darrin Murray, the adjunct professor who testified before the Board in favor of the 2014 Election Rule, opposes a mandated waiting period between the filing of a petition and the election. According to Murray, "a protracted time period [between the petition and election] is only going to allow an employer to create subtle threats, spread confusion and disinformation, and otherwise manipulate the process."

Before the 2014 Election Rule was enacted, during election campaigns more than 75 percent of employers "engaged in active anti-union tactics, including some combination of discharges for union activity; captive audience meetings; supervisor one-on-ones; wage increases; promises of improvements in wages, benefits, or working conditions; anti-union committees; and letters."<sup>12</sup> And employers frequently commit unfair labor practices during this critical time period, meaning that "the longer the delay between the filing of the petition and election date, the more likely it is that the NLRB will issue complaints charging employers with illegal activity."<sup>13</sup> Indeed, the data on election-related unfair labor practice complaints reveals there is "a considerable causal relationship between the length of election delay and the number of NLRB complaints issued."<sup>14</sup> Because the purpose of the Board's election procedures is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing," the Board should not implement a policy

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<sup>12</sup> Bronfenbrenner, K. L. (2001). Employer behavior in certification elections and first-contract campaigns: Implications for labor law reform [Electronic version]. In S. Friedman, R. Hurd, R. Oswald, & R. Seeber (Eds.), *Restoring the promise of American labor law* (pp. 75-89). Ithaca N.Y.: ILR Press. <http://digitalcommons.ilr.cornell.edu/articles/18>

<sup>13</sup> John Logan, Erin Johansson and Ryan Lamare, *New Data: NLRB Process Fails to Ensure a Fair Vote*, UC Berkeley Labor Center (June 29, 2011), <http://laborcenter.berkeley.edu/new-data-nlr-process-fails-to-ensure-a-fair-vote/>

<sup>14</sup> *Id.*



that is likely to result in employee coercion.<sup>15</sup> There is therefore no need to require at least 30 days for the employer to engage in such anti-union, and often unlawful, activities.

In addition to facilitating worker choice, the 2014 Election Rule has also streamlined the election process and conserved Board resources. Prior to the Rule's enactment, the median number of days from the filing of the petition to the election had never fallen below 55.5; in the two years since the Rule's enactment, the median number of days in fiscal year 2016 was 35, and in fiscal year 2017 it was 36.<sup>16</sup> Adding a mandatory 30-day waiting period would only take away from the historic improvements made under the 2014 Election Rule.

Finally, a 30-day time period is paternalistic. A protracted election period serves only to disrespect a worker's agency, competence, and ability to make decisions for themselves. Workers are intelligent, capable, knowledgeable of their own working environment, and competent to make the right decision for themselves based on the facts presented. Mandating a longer time period reflects an assumption that they lack the sophistication to make an informed decision on the merits of a union.

#### **B. SEIU Opposes Proposals That Seek to Prohibit Petitioners from Withdrawing Petitions Prior to an Election**

SEIU also opposes any proposal prohibiting petitioners from withdrawing a petition prior to an election. Not infrequently, petitions are filed with the requisite showing of interest, but then withdrawn prior to the election. There could be many reasons why a petitioner withdraws a petition before the election, but often it is because the petitioner realizes that employees are no longer interested in representation because of changed circumstances, employer unfair labor practices, or other factors. This proposal aims to force the petitioner to go through an election anyway so the employer will gain the benefit of barring the petitioner from filing a petition again for one year. This proposal would hurt employees by unnecessarily limiting their opportunity to obtain representation.

In addition to infringing on employees' rights, this proposal would constitute a terrible waste of agency resources, as more funds would be necessary to carry out such a policy. There were 610 petitions withdrawn prior to an election in 2016, and 493 withdrawn in 2017.<sup>17</sup> If the Board forced an election in all these cases rather than allowing the withdrawal, there would be hundreds of unnecessary elections. The Board does not have enough resources to run elections for petitioners who do not want them.

Finally, the Board already has a policy that adequately addresses a situation where a labor organization withdraws a petition. *See Sears, Roebuck & Co.*, 107 NLRB 716 (1954); CHM sec. 11112.1(a) (establishing a six-month prejudice to petitioner union filing another petition where the union is the sole labor organization involved in the election, and the request to withdraw the

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<sup>15</sup> National Labor Relations Act, 29 U.S.C. § 151.

<sup>16</sup> *Median Days From Petition to Election*, National Labor Relations Board, <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election> (last visited March 9, 2018).

<sup>17</sup> [www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-re](https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-re) (last visited April 13, 2018).

petition is made after the Regional Director has approved of an election agreement or the close of a hearing, but before the election has taken place).

### C. The Board Should Preserve the Blocking Charge Rule

Another area of Board law potentially at issue if the 2014 Election Rule is modified is the Board's policy on "blocking charges," unfair labor practice charges that cause an election to be held in abeyance pending resolution of the charges.<sup>18</sup> We address this issue here in light of the Board's recent decision in which Chairman Kaplan and Member Emanuel expressed their interest in changing this longstanding policy. *See Covanta Essex Co.*, No. 22-RD-199469 (Jan. 30, 2018) (Order denying review). Because the Board's current blocking charge doctrine is fundamentally sound, SEIU would oppose any changes thereto.

The basic purpose of the blocking charge doctrine – "to protect the free choice of employees in the election process"<sup>19</sup> – is as important now as when the Board adopted it more than 80 years ago. As the Fifth Circuit in *Bishop v. NLRB* observed in summarizing the blocking charge doctrine's history:

The NLRB has employed its "blocking charge" rule since 1937 . . . to dismiss decertification petitions during the pendency of unfair labor practice proceedings or while the effects of prior unfair labor practices remain undissipated. The reasons for this rule do not long elude comprehension . . . "It would be particularly anomalous, and disruptive of industrial peace, to allow the employer's unfair labor practices to dissipate the union's strength, and then to require a new election which would not be likely to demonstrate the employees' true, undistorted desires, since employee dissatisfaction with the union in such cases is in all likelihood prompted by the situation resulting from the unfair labor practices."<sup>20</sup>

Put more succinctly, "[i]f the employer has in fact committed unfair labor practices and has thereby succeeded in undermining union sentiment, it would surely controvert the spirit of the Act to allow the employer to profit by his own wrongdoing."<sup>21</sup>

Hypotheticals illustrating the harm foreseen in *Bishop* come readily to mind. Say an employer violates the Act by terminating during a decertification campaign a handful of employees who are known to actively support the union. In response, the union files an unfair labor practice over the unlawful terminations and, while the unfair labor practice winds its way through the Board's processes, the terminations cause fear within the bargaining unit and a corresponding diminution in support for the union. Notwithstanding the pendency of the unfair

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<sup>18</sup> We note that the 2014 Election Rule added to Section 103.20 an offer or proof requirement to accompany any request for a blocking charge. After the 2014 Election Rule took effect, the number of blocked elections dropped from 194 to 107. <https://www.nlr.gov/news-outreach/news-story/annual-review-revised-r-case-rules> (last visited April 18, 2018). This decline in blocked elections underscores that the current process is working, and elections are being blocked only where appropriate.

<sup>19</sup> *United States Coal and Coke Company*, 3 NLRB 398 (1937).

<sup>20</sup> *Bishop v. NLRB*, 502 F.2d 1024, 1028 (5th Cir. 1974) (citing *NLRB v. Big Three Industries, Inc.*, 497 F.2d 43, 51-52 (5th Cir. 1974)) (alterations and citations omitted).

<sup>21</sup> *Id.* at 1029.

labor practice seeking to remedy the employer's unlawful terminations, the Board carries out the decertification election under these tainted circumstances and – in some part because the unlawful terminations served to diminish support for the union – the union loses the election.

After that chain of events, the unfair labor practice charges filed over the wrongful terminations of union supporters would be processed through regular Board procedures and the federal courts, which could take years. During the unfair labor practices pendency, the union would remain the exclusive bargaining representative. But the union would essentially be serving as the exclusive bargaining representative at sufferance, because it would be known among the bargaining unit members that the union had lost the decertification election. If the union did eventually prevail in its unfair labor practice, such that the Board found that the employer's unlawful assistance made the election illegitimate by improperly influencing bargaining unit members, how could the union be made whole, given that a majority of the voting employees would have affirmatively cast a vote against the union in the tainted election? In a rerun election, the union would not start from a clean slate, but rather would have to persuade some "No" voters to *flip* their vote, a much harder task. Thus, the employer would have "profit[ed] by his own wrongdoing."<sup>22</sup>

The Board cannot actually remedy an unfair labor practice if it cannot restore the injured party to the same situation that would have existed had the unfair labor practice not occurred. If the Board's blocking charge doctrine were changed such that a union would no longer have the ability to postpone an election when an employer terminates a vocal union supporter prior to an election or commits some other election-related unfair labor practice, a Board order requiring that the employer post a notice and pay back pay would not remedy an election loss.

## Conclusion

In conclusion, the 2014 Election Rule achieved its stated goals of modernizing the election process, reducing delays, and avoiding unnecessary hearings. Rescinding the 2014 Election Rule would be a large step backwards, and would waste the valuable time and thoughtful analysis that resulted in proven improvements to the Board's election system. While it is too soon to reconsider the rule, to the extent the Board is considering further reform, it should build upon the progress already made by protecting employees' rights to fair and timely elections.

Respectfully Submitted,



Nicole G. Berner  
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<sup>22</sup> *Id.*