



VIA ELECTRONIC SUBMISSION

April 18, 2018

Ms. Roxanne Rothschild  
Deputy Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570

**Re: Docket ID NLRB-2017-0001, Representation-Case Procedures; RIN 3142-AA12**

Dear Ms. Rothschild:

Associated Builders and Contractors Inc. (ABC) hereby submits the following comments to the National Labor Relations Board (NLRB or the Board) in response to the above-referenced request for information (RFI) published in the *Federal Register* on Dec. 14, 2017, at 82 Fed. Reg. 58783.

**About Associated Builders and Contractors, Inc.**

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC is a member of the Coalition for a Democratic Workplace (CDW), which is filing a more detailed set of comments on the NLRB's request for information. ABC supports CDW's comments and hereby incorporates them by reference. The purpose of ABC's comments is to highlight issues of concern to the construction industry that have arisen under the new election rules, and which merit the Board's rescission of the new representation case procedures in whole or in part.

**Background**

On Dec. 15, 2014, the NLRB issued the Representation-Case Procedures final rule (hereafter the "2014 Election Rule" or simply the "new rule"),<sup>1</sup> which drastically changed the process for NLRB conducted elections in which employees may vote on whether they want to be represented by a union. During the rulemaking process, ABC voiced its strong opposition to the proposed rule<sup>2</sup> during oral testimony before the Board<sup>3</sup> and filed written comments, requesting that the proposed amendments be withdrawn in their

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<sup>1</sup> 79 Fed. Reg. 74308.

<sup>2</sup> 79 Fed. Reg. 74318.

<sup>3</sup> <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-4233/publicmeeting4-10.pdf>

entirety for significant further study.<sup>4</sup> ABC affiliates in Texas subsequently sued for declaratory and injunctive relief against the final rule, but that challenge was rejected by the U.S. Court of Appeals for the Fifth Circuit.<sup>5</sup>

On Dec. 14, 2017, the Board published the above-referenced RFI, seeking public comment on whether the 2014 Election Rule should be kept as is, modified or rescinded entirely.

As in its previous comments, ABC will give particular attention to the issues that appear to have the greatest impact on construction industry workplaces. The Board has long recognized that construction industry employers are “different” in their labor relations from most other industries.<sup>6</sup>

### **Summary of ABC’s Comments in Response to the NLRB’s RFI**

ABC’s position is that the Board should rescind the rule in whole or in significant part, and the Board should return to the election procedures that were in effect and working well prior to the new rule’s adoption.

ABC has surveyed its network of member labor attorneys to learn about their experiences under the new rule. As further discussed below, ABC members have found the new rule’s requirements to be unduly burdensome for employers, unduly intrusive into employee privacy and unduly infringing on the rights of employers and employees to a fair pre-election process. In short, many of the concerns expressed by ABC about the new rule before it went into effect have proved to be true, according to the actual experience of ABC members and others under the new rule since it went into effect in April 2015.

### **Specific Problems Experienced Under the New Rule**

#### **1. The Shortened Pre-election Procedures Have Interfered with the Ability of Employers to Respond to Union Petitions.**

One of ABC’s objections to the new rule, prior to enforcement, was that the rule’s draconian efforts to shorten the pre-election hearing process would have a particularly adverse impact on construction industry employers. Responses to ABC’s member survey indicate that such adverse impact has indeed manifested itself since the effective date of the new rule, in a variety of ways.

First, small construction contractors in particular have had difficulty in learning about the NLRB’s truncated procedures, obtaining counsel and making difficult decisions about complicated legal questions—prior to any hearing taking place—in the newly restricted amount of time for filing statements of position and conducting representation hearings. A majority of respondents to ABC’s survey reported that they or their clients were placed at a disadvantage by the new rules, including increased costs and inability to analyze all of the possible issues. As ABC previously explained in its comments objecting to the new rule, construction contractors must deal with unique legal issues arising under Section 8(f) of the National Labor Relations Act, as well as questions arising under the Board’s “disappearing unit” and

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<sup>4</sup> [http://www.abc.org/Portals/1/Documents/Newsline/2014/ABC\\_NLRB\\_R-Case%20Procedures\\_NPRM\\_040714\\_FINAL.pdf](http://www.abc.org/Portals/1/Documents/Newsline/2014/ABC_NLRB_R-Case%20Procedures_NPRM_040714_FINAL.pdf)

<sup>5</sup> *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. June 10, 2016). The court held that the new rules were permissible, though not required, under a highly deferential standard. The court also confined its legal analysis to what it viewed as a “facial” challenge to the rule, adhering to the very high bar for upholding such pre-enforcement challenges. *Id.* at 220, 226. The court declined to consider how the rule is now being applied in practice. *Id.* Thus, nothing in the court decision precludes the Board from returning to the previous election rules or otherwise modifying the 2014 rule.

<sup>6</sup> *Steiny & Co., Inc.*, 308 NLRB 1323, 1326 (1992).

“expanding unit” doctrines. Construction contractors also confront complicated legal questions regarding single-craft vs. multicraft units, single-site vs. multisite units and joint employer questions under the Board’s currently vacillating standards.

In addition, a significant percentage of respondents to ABC’s member survey reported being denied reasonable requests for extension of time to submit the newly required statement of position or otherwise prepare for a representation hearing under the new rule. As a result, the employers’ ability to respond to the petition was compromised or else additional expense was incurred to meet the unreasonable deadlines.

ABC strongly agrees with the views expressed in former NLRB Chairman Miscimarra’s dissenting opinion in *UPS Ground Freight*,<sup>7</sup> in which he highlighted the obviously detrimental impact of the new election rule on the record created in that case. As described in the opinion, the new rules allowed the Regional Director to engage in a series of abuses of due process, including accelerating procedures during the employer’s busiest time of year, requiring a position statement prior to the day of the hearing, requiring the hearing to be held on the 8<sup>th</sup> day following the petition, denying requested extensions, refusing to carry over the hearing to a necessary second day and allowing inadequate preparation time for oral argument at the conclusion of a complex hearing, while also denying permission to submit any written briefs.

The new election rule should be rescinded in order to prevent similar abuses from occurring.

## **2. Employers Have Been Denied the Right to Present Evidence on Relevant Issues.**

A majority of the respondents to ABC’s member survey reported being denied the right to present relevant evidence at a representation hearing. The most common issue where employers’ proffered evidence was rejected had to do with the question of supervisory status of individual or groups of employees, which is a particularly difficult issue to resolve in many construction workplaces. Because the issue was not resolved prior to the election in reported cases, employers had no guidance regarding their ability to communicate with alleged supervisors, such as working foremen, and the foremen were left in doubt whether they were eligible to vote or whether they were entitled to speak freely on the important question of labor representation.

ABC objected strongly to this aspect of the new rule prior to its effective date, and dissenting NLRB members Miscimarra and Johnson likewise predicted that “[m]any employers will be placed in an untenable situation regarding such individuals based on uncertainty about whether they could speak as agents of the employer or whether their individual actions—though not directed by the employer—could later become grounds for overturning the election.”<sup>8</sup> This prediction has come to pass under the new rule, and should be corrected by rescinding the rule.

## **3. Employers and Employees Have Been Denied the Right to a Minimum Time in Which to Communicate Regarding the Merits of Union Representation.**

One of ABC’s most serious objections to the new election rule prior to its effective date was the elimination of the Board’s longstanding 25-day minimum period between the Regional Directors’ Decision and Direction of Election and the election itself. This minimum time period served two purposes under the previous rules: to allow time for requests for review to be fully considered in the first instance by the Board, prior to the election; and to allow a minimum time period for employees to receive information about the issues on which they are being asked to vote. A majority of respondents to ABC’s

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<sup>7</sup> 365 NLRB No. 113 (July 27, 2017) (Miscimarra dissenting, slip op. at pp. 3-7).

<sup>8</sup> 79 Fed. Reg. at 74438, n.581.

survey have reported that employers have been adversely affected by the new time constraints in terms of their ability to communicate with their workforce during the time between the filing of a petition and the election.

In enacting the new rule, the Board majority expressed “doubt” that employers lack knowledge of union organizing in advance of the filing of a petition. The experience of ABC’s members contradicts the Board’s rationale for the shortened time frames, in that very few surveyed employers appear to have had advance knowledge of union organizing prior to receiving a petition. Even those employers who become aware of some sort of union organizing in advance of a petition typically are not aware of the extent of the organizing, and are often reluctant to talk about unions because of the high risk that unfair labor practice charges will be filed.

ABC’s concerns about the impact of the new rule on the minimum period necessary for a fair election have been confirmed in such cases as *European Imports Inc.*<sup>9</sup> In that case, former Chairman Miscimarra again highlighted the negative impact of the new rule’s provisions, as applied, on employee free choice in instances where the final election notice afforded many employees as few as three days’ notice that they were eligible voters.

Half of ABC’s survey respondents report being pressured by regional Board officials to stipulate to election timeframes well below the previous 25-day minimum, prejudicing the ability of the employers to communicate fully with their employees on issues of vital importance to their future. Under the new rule, unions have no incentive to reach a reasonable election agreement, and many Regional Directors refuse to approve stipulations that exceed arbitrarily imposed time targets. A number of regional NLRB officials also have adopted an improper presumption in the construction industry that a mail ballot should be ordered instead of job site voting in any multisite unit, increasing the chances of union coercion and voter fraud.

#### **4. The Expanded Voter Eligibility Lists Have Proved to be Burdensome to Create and Inappropriately Infringe on the Privacy Rights of Employees.**

ABC further challenged the new rule’s shortened time frame and expansion of the information required to be produced to unions in the voter eligibility lists. As ABC noted prior to the rule’s implementation, the two-day requirement to produce the voter eligibility list imposes a particularly heavy burden on construction industry employers, who are bound by unique voter eligibility rules that allow laid-off employees meeting criteria specified by the Board to vote in NLRB elections.<sup>10</sup> ABC’s survey responses show that, as predicted, construction employers have struggled to comply with the burdensome two-day production requirement.<sup>11</sup>

Even worse, the expanded disclosure requirements for the new voter eligibility lists under the election rule impose new and unnecessary invasions of privacy and related burdens on both construction employers and employees. In particular, the new requirement that employers disclose employee email addresses and phone numbers ignores recent email “hack attacks” that have become part of union

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<sup>9</sup> 365 NLRB No. 41, slip op. at pp. 1-4. (Feb. 23, 2017) (Chairman Miscimarra, dissenting).

<sup>10</sup> *Steiny & Co., Inc.*, 308 NLRB 1323, 1326 (1992).

<sup>11</sup> The burdens imposed on employers since implementation of the voter list provisions of the new rule are further highlighted by the Regional Director’s decision in *The Danbury Hospital*, Case No. 01-RC-153086 (Oct. 2015). There, the Regional Director set aside an election after concluding that the employer had failed to search “every available” database to uncover personal contact information for the voting list, even in the absence of any evidence of bad faith by the employer or actual prejudice to the union.

corporate campaigns in the construction industry. Ninety percent of ABC's survey respondents report complaints by employees about the infringement of their privacy rights under the new rule.

**Conclusion**

For the reasons stated above and in other comments submitted by the business community, the Board should rescind the 2014 Election Rule in whole or in significant part, and should reinstate the previous rule.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck". The signature is written in a cursive style with a large initial "B".

Ben Brubeck  
Vice President of Regulatory, Labor and State Affairs