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April 16, 2018

Via E-Filing (www.nlr.gov)

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

Re: *Request for Information on NLRB Representation-Case Procedures*
[RIN 3142-AA12]

Dear Ms. Rothschild:

This office represents the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (“United Association” or “UA”). On behalf of the United Association and its approximately 340,000 members, the undersigned submits this letter in response to the request for information by the National Labor Relations Board (“NLRB” or “Board”)¹ with respect to the Board’s representation case procedures adopted by the Final Rule dated December 15, 2014 (“2014 Election Rule”).² For the reasons set forth below, the UA supports the current procedures as set forth in the 2014 Election Rule without any further changes.

I. THE BOARD’S STATUTORY DUTY

Section 1 of the National Labor Relations Act (“Act” or “NLRA”) expressly provides that “[e]xperience has proven that protection by law of the right of employees to organize and bargain collectively” protects and promotes commerce “by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and by restoring equality of bargaining power between employers and

¹ 82 Fed. Reg. 58,783 (Dec. 14, 2017) (“Request for Information”).

² 79 Fed. Reg. 74,308 (Dec. 15, 2014) (“2014 Election Rule”).

employees.”³ For that reason, the NLRA embodies the fundamental “policy of the United States” to encourage “the practice and procedure of collective bargaining” and protect “the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”⁴

Given these statutory provisions, the Board has the solemn responsibility of safeguarding the representation process. Section 9 of the Act provides the Board with the authority to determine the appropriate bargaining units for representation elections, as well as to process representation petitions and conduct elections where there are questions of representation.⁵ The Board has recognized that the fundamental purpose of the representation process – from the filing of the petition to the conduct of the election – is to ensure employees have a “free and untrammelled choice” whether they want to be represented by a union.⁶ More importantly, the exercise of that choice must “be recorded accurately, efficiently and speedily.”⁷

II. THE 2014 ELECTION RULE

The Board acknowledged in the 2014 Election Rule that “representation cases should be resolved quickly and fairly.”⁸ Prior to that rulemaking, workers and unions often avoided the NLRB election process and made concessions due to fears of detrimental and unnecessary long delays and potentially costly and unpredictable litigation.⁹ The fear of delay is especially palpable: for example, one study found that a union’s success rate drops from 53 percent if election occurs within 50 days after a petition to 41 percent if election happens 61 to 180 days later.¹⁰ Further, delays in certifying a labor organization as the exclusive bargaining representative can make it more difficult for the parties to negotiate a contract, which is extremely detrimental to both the union and employees it is to represent.¹¹ For this reason, the Board utilized the opportunity presented by the 2014 Election Rule to implement changes to the then-existing

³ 29 U.S.C. § 151.

⁴ *Id.*

⁵ 29 U.S.C. §§ 159(b), 159(c), 159(e).

⁶ *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948).

⁷ *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1948).

⁸ 2014 Final Rule at 74,316.

⁹ See John Logan, et. al., *New Data: NLRB Process Fails to Ensure a Fair Vote* 2-3, University of California, Berkeley Center for Labor Research and Education (2011), available at http://laborcenter.berkeley.edu/pdf/2011/NLRB_Process_June2011.pdf

¹⁰ See Jeffrey M. Hirsch, *NLRB Elections: Ambush or Anticlimax*, 64 Emory Law Journal 1647, 1649 n. 4 (2015) (citations omitted).

¹¹ *Id.* (citation omitted).

representation process that were intended to reduce superfluous delays, enhance uniformity across the NLRB's regions, adopt best practices and take strategic steps in enhancing transparency. The important changes are addressed in the following subsections.

A. The Statement of Position and Outcome Determinative Issue Limitations

The 2014 Election Rule offers common sense revisions applicable to pre-election litigation that are tremendously vital to transparency and efficiency. First, requiring a Statement of Position prior to a pre-election hearing facilitates election agreements and allows the parties to clearly understand what issues are to be contested and address them efficiently.¹² Under 29 C.F.R. § 102.66, parties are largely precluded from addressing issues not raised in a Statement of Position, which, as the Board found, helps “maximize hearing efficiency by eliminating unnecessary litigation, expeditiously resolve questions of representation and make Board procedures more transparent and uniform across regions.”¹³ As the Board points out, the information required in the statements of position is substantially similar to information that had been merely *requested* or *encouraged to be shared* prior to the 2014 rule amendments. Therefore, this process, which can substantially reduce unnecessary litigation and preserve resources of all involved, represents a modest change from the previous rule. Most importantly, the pre-hearing statement of position promotes due process and eliminates trial by ambush, a practice that has long since been rejected in American jurisprudence.

In addition, under the 2014 Election Rule, parties are generally limited to addressing issues that can determine the outcome of an election. Regional Directors may defer the determination of individual eligibility or unit inclusion questions until after an election. This is based upon the recognition that “[d]isputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.”¹⁴ As the Board recognized in its 2014 rulemaking, prior regulations allowed “litigation of any voter eligibility issues that any party wished to litigate, even if the Regional Director was not going to be deciding that question, and even if the particular voter eligibility questions was not necessary to resolving the existence of a question.”¹⁵ By avoiding unnecessary litigation associated with non-outcome determinative issues, the union, employer and the NLRB are all able to save resources.¹⁶

¹² See 29 C.F.R. § 102.63(b), 29 C.F.R. § 102.66(b); 2014 Final Rule at 74,363, 74,393-94.

¹³ 2014 Election Rule at 74,393.

¹⁴ 29 C.F.R. §§ 102.64, 102.66.

¹⁵ 2014 Election Rule at 74,309.

¹⁶ *Id.* at 74,387.

B. The Voter List

Prior to the 2014 Election Rule, to obtain information on potential voters, unions had to rely on the *Excelsior* list of eligible voters and their home addresses. Now, under 29 C.F.R. §§ 102.62(d) and 102.67(l), within two business days of approval of the election agreement or direction of the election, an employer must provide voter eligibility lists that includes names, worker locations, shifts, job classification, home addresses, and available personal email addresses and personal phone numbers (*i.e.*, only if the employer possesses this information).

As the Board observed, the *Excelsior* list was imposed on employers “to maximize the likelihood that the voters will be exposed to the *nonemployer parties’ arguments*,” essentially meaning that unions need to have reasonable access to employees.¹⁷ The 2014 Final Rule correctly recognizes that “only a physical home address no longer serves the primary purpose of the *Excelsior* list” and “[c]ommunications technology and campaign communications have evolved far beyond the face-to-face conversation on the doorstep imagined by the Board in *Excelsior*.”¹⁸ The Board provides ample statistics and other information outlining why access to emails and personal home and cell phone numbers are vital for union communications to workers and does not otherwise raise serious privacy concerns; indeed, in total, the preamble to the 2014 Final Rule dedicates approximately 26 pages to explaining the new voter list requirements.¹⁹

This revised voter list benefits unions and workers. Unions can reach out to employees through less expensive and more swift measures such as phone calls/voice messages, text messages and emails. Employees (potential voters) are able to openly communicate with and ask important representation-related questions of union representatives, while facing little pressure or intrusion that a face-to-face home visit may present.²⁰ The Board also rightly points out that to the extent that an employer has the information, there is currently no legal impediment for the employer to “place calls and text messages to the employees’ home and personal cell phones and send email messages to their employees’ personal email addresses.”²¹ Given that this contact information is available to an employer, it should equally be available to union representatives. Any impediment to such access would unfairly reduce a union’s ability to reach out to an employee to share information, as well as possibly stigmatize union representation before an employee is able to make an informed decision.

In formulating the 2014 Election Rule, the Board recognized that modern technology and recordkeeping improvements meant employers have ready access to such information and thus

¹⁷ 2014 Election Rule at 74,360 (emphasis in original).

¹⁸ *Id.* at 74,337.

¹⁹ *Id.* at 74,335-61.

²⁰ *Id.* at 74,337-40, 74,343-44, 74,350.

²¹ *Id.* at 74,350.

should be able to turn it over in a matter of a couple days.²² To the extent that an employer is legitimately unable to produce the information within the allotted time, the regional director has authority to grant the employer more time.²³

III. JUSTIFICATION FOR REVIEWING THE 2014 ELECTION RULE

As a general matter, the Board's justification for reconsidering the 2014 Election Rule, which has been in effect for less than three years, is questionable. The majority cites "significant issues concerning application of the Election Rule" based upon four (4) cases: *UPS Ground Freight, Inc.*, 365 NLRB No. 113 (2017); *European Import, Inc.*, 365 NLRB No. 41 (2017); *Yale Univ.*, 365 NLRB No. 40 (2017); *Brunswick Bowling Prods., LLC*, 364 NLRB No. 96 (2016).²⁴ These 4 cases share one thing in common: the dissents of Board Member Philip Miscimarra. The dissents are largely a rehash of his opposition to the 2014 Election Rule. Likewise, two courts have upheld the 2014 Final Rule, finding that it does not violate the NLRA, Administrative Procedure Act or U.S. Constitution.²⁵

Finally, the UA wishes to address one of the primary arguments presented in support of reviewing the 2014 Election Rule: namely, the argument that the streamlined process does not provide sufficient time for employers to convince its employees that they should vote against union representation. This issue was presented to the Board when it adopted the final rule in 2014.²⁶ Importantly, the Board addressed the issue at that time by noting that the key is to provide a "meaningful opportunity to speak," not an "unlimited opportunity." The revisions in the Election Rule do not eliminate an employer's ability to voice "views on unionization, both before and after the petition is filed, so long as it refrains from threats, coercion, or objectionable interference."²⁷

As the Board recognizes, before a petition is ever filed, an employer's positions are often well-known to employees because employers "may and often do communicate their general views about unionization to both new hires and existing employees" (e.g., in handbooks and orientation videos).²⁸ After the petition is filed, employers are able to communicate their message quickly and effectively because employers have access to every employee in the proposed bargaining unit

²² *Id.* at 74,353.

²³ 2014 Election Rule at 74,354.

²⁴ Request for Information at 58,784.

²⁵ *Id.* at 58,785-86 (citing *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 218 (5th Cir. 2016; *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171, 220 (D.D.C. 2015)).

²⁶ 2014 Election Rule at 74,319.

²⁷ *Id.* at 74,319-20.

²⁸ 2014 Election Rule at 74,321-22.

“throughout the work day, five days a week, for the entire election period.”²⁹ Further, “the well-documented growth of the labor-relations consulting industry” enhances an employer’s ability to quickly convey a message and otherwise prepare cases.³⁰

All of the Board’s observations are well supported by studies of employer responses to organizing campaigns. For example, one analysis estimates that, during NLRB representation elections, eighty-nine percent (89%) of employers held captive audience meetings, while seventy-five percent (75%) of employers hired a management consultant to assist with their efforts in opposition to the organizing campaign. Another study found that, with respect to representation elections conducted in the Chicago, Illinois area, forty-nine percent (49%) of employers threatened to close or relocate part or all of their operations if their employees voted to be represented by a labor organization, and, thirty percent (30%) of employers fired one or more employees who engaged in union activities as part of an organizing campaign.³¹ That latter study, which was published about a decade prior to the 2014 Election Rule, found that “[t]he most important advantage that the NLRB election process provides employers is the 42-day election period, the targeted length of time before the Board will conduct an election.”³² The authors further noted, “[f]or employers, having enough time before an election is critical for chipping away at the support built by the union (Cooke 1983; Reed 1989; Hunt and White 2001), and 42 days is usually enough time for employers to effectively run their anti-union campaigns.”³³

In making modest revisions to its election process, the Board was able to create a more fair and balanced field for representation elections. This conclusion is most evident in the fact that the 2014 Election Rule has reduced the overall median days from petition to election. In Fiscal Year (“FY”) 2017 overall median days was 23, down from 37-38 between FY 2008 and FY 2014; when looking to contested cases, median days dropped from 59-67 days between FY 2008 through FY 2014 to 36 days in FY 2017.³⁴ Any suggestion that more time is needed for an

²⁹ Chirag Mehta & Nik Theodore, *Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns*, Center for Urban Economic Development, Univ. of Ill. at Chicago, at 22 (Dec. 2005).

³⁰ 2014 Election Rule at 74,326.

³¹ Chirag Mehta & Nik Theodore, at 5.

³² *Id.*

³³ *Id.* The studies cited in the quote are the following: William N. Cooke, *Determinants of the Outcomes of Union Certification Elections*, *Industrial and Labor Relations Review*, 36:3, 402-414 (1983); Thomas F. Reed, *Do Union Organizers Matter? Individual Differences, Campaign Practices and Representation Election Outcomes*, *Industrial and Labor Relations Review*, 43:1, 103-119 (1989); Janet White and Rudolph A. White, *The Effects of Management Practices on Union Election Returns*, *Journal of Labor Research*, VI: 4, 390-403 (2001).

³⁴ National Labor Relations Board, *Median Days from Petition to Election*, <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election> (last visited Feb. 14, 2018).

Roxanne Rothschild, Deputy Executive Secretary
National Labor Relations Board
April 16, 2018
Page 7

employer to be able to communicate with employees about the question concerning representation is a thinly veiled request for the Board to allow more time for an employer to capitalize on its superior and unequal access to the employees, resulting in employees receiving skewed information and messaging . Such a request runs counter to the Board's statutory mandate as set forth in Section 1 of the NLRA.

IV. CONCLUSION

The 2014 Election Rule should remain unchanged. There is no justifiable reason to consider revoking or revising the rules that are currently in place. Thank you for the opportunity to respond to this request for information.

Respectfully submitted,

A handwritten signature in black ink that reads "James R. O'Connell". The signature is written in a cursive style with a large initial "J" and "O".

James R. O'Connell
Keith R. Bolek

cc: Mark McManus, General President
Michael Pleasant, Assistant General President
James Tucker, Director of Organizing