



April 18, 2018

Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: Comments of the National Retail Federation in Response to the NLRB's Request for Information regarding Representation–Case Procedures (RIN: 3142-AA12)

Dear Ms. Rothschild:

The National Retail Federation (“NRF”) submits the following comments regarding the National Labor Relations Board’s (“NLRB”) final rule on elections published in NLRB Rules and Regulations (“NLRB Rule”) §§ 102.60 - 102.72 on December 15, 2014, and implemented on April 14, 2015 (“Election Rules”).

NRF is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation’s largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing \$2.6 trillion to annual GDP, retail is a daily barometer for the nation’s economy. With so many retail employers and retail employees under its umbrella, NRF is very well-positioned to comment on the Board’s Election Rules.

NRF member feedback since the final rule’s implementation has consistently revealed an overwhelming desire to see the Election Rules rescinded, or at a minimum modified, to offer a practical and employee-focused process pursuant to which the NLRB conducts its representation case proceedings. The Election Rules emphasize speed over substance and because of that they

stray significantly from the underlying principles set forth in Section 7 of the NLRA. The election process under the NLRA was designed to offer employees the opportunity to make a thoughtful and informed decision about whether or not to have a labor organization serve as their exclusive representative in an appropriate unit for purposes of collective bargaining. Instead of fulfilling that policy obligation, the Election Rules, and the pace and restrictions they impose on the process, have undermined it. The Election Rules have disregarded basic notions of due process; they have impacted the ability to properly determine the appropriateness of the bargaining unit; and they have imposed obligations that interfere with basic privacy interests of employees.

As a primary point, we believe that the Election Rules should be rescinded and the process that existed prior to their implementation restored. Assuming the NLRB does not wish to perform a complete rescission, we suggest several critical areas where the rules should be modified. Although the Election Rules offer numerous failings that can be identified through this submission, the NRF seeks to focus on those that have proven most significant to its membership. To that end, if the Election Rules are not rescinded in their entirety, we offer five (5) fundamental areas in which we believe the Election Rules should be modified to more accurately capture the fundamentals of the statute they are supposed to implement.

Summary of Comments: During the three years that the Election Rules have been in place, employers and employees have been most frustrated by the following aspects of these rules:

1. The Election Rules impose service requirements for the election petition and other critical documents that do not effectuate basic due process.

NLRB Rules §§ 102.60-102.61.

2. The Election Rules' requirement that an employer submit a Statement of Position, and the imposition of an unreasonably short period of time for its filing, undermine the NLRB's ability to determine an appropriate bargaining unit. NLRB Rule § 102.63.
3. The Election Rules inappropriately avoid determining the supervisory status of employees before the conduct of an election. NLRB Rule § 102.64.
4. The Election Rules do not allow for post-hearing briefs even though there are unreasonably short time requirements for filing the Statement of Position and no mechanisms for pre-hearing discovery. NLRB Rule § 102.66(h).
5. Finally, the Election Rules' expanded requirements around preparing and submitting a voter list are impractical and require employers to disclose personal and private information of its employees without a mechanism to enable the employees to opt out. NLRB Rules §§ 102.62(d) and 102.66(k)(1).

These requirements have made the election process unpredictable and harmed the core purposes of the NLRA by interfering with voter free choice. The NRF recommends rescinding or modifying the Election Rules in the manner suggested below.

- 1. The Election Rules impose service requirements for the election petition and other critical documents that do not effectuate basic due process. NLRB Rules §§ 102.60 - 102.6.**

The Election Rules provide no framework for effectuating proper service of a Representation Case Petition and Notice of Hearing ("Petition and Notice of Hearing") in a way

that ensures the employer in fact receives the petition at the time it is filed. NLRB Rules §§ 102.60 - 102.61. As a result, petitions can be emailed to or otherwise “left” with a lower level supervisor (or in some cases someone with no agency role whatsoever) who is not at work to receive it and/or who is unfamiliar with its legal significance. Given that the Election Rules did away with virtually any flexibility on the part of the NLRB to adjust the date for the hearing for up to fourteen (14) days, ensuring that these legal documents are properly served is crucial to ensuring that the proceedings offer the employer a reasonable opportunity to respond.

This “almost-everything-goes” approach to delivering a Petition and Notice of Hearing to an employer is difficult to comprehend considering that the legal documents that initiate a legal process are comparable in many respects to a court summons. The NLRB should adopt or substantially adopt service requirements similar to those mandated by Rule 4(h) of the Federal Rules of Civil Procedure (“F.R.C.P.”) pertaining to how legal documents must be served on a corporation, partnership or association. Employers should receive the NLRB petition the same way that they receive other similarly important legal documents, which is through proper service as outlined in Rule 4(h) of the F.R.C.P. This would effectuate due process and ensure that employers receive the filings in a reasonable manner and at a reasonable time. Moreover, since the filing and service of these documents trigger the timeline that ultimately leads to a Representation Case election, that process should not be left to chance because it was emailed to a supervisor’s work email that he/she does not check, or worse, it gets stuck in an employer’s SPAM filter.

- 2. The Election Rules’ requirement that an employer submit a Statement of Position and the imposition of an unreasonably short period of time for its filing undermine the NLRB’s ability to determine an appropriate bargaining unit. NLRB Rule § 102.63.**

Requiring employers to file a Statement of Position within seven (7) days of receiving the notice of petition ostensibly to “narrow” potential hearing issues is not reasonable given the significance the filing has on the determination of the appropriateness of the bargaining unit. Once the NLRB receives a properly filed petition and decides there is “reasonable cause to believe that a question of representation exists,” NLRB Rule § 102.63(a)(1) requires a pre-election hearing be scheduled “for a date 8 days from the date of service of the notice.” Additionally, NLRB Rule § 102.63(b)(1) requires that a Statement of Position be filed with the Regional Director and served on the parties named in the petition by “noon on the business day before the opening of the hearing.”¹

Completing the Statement of Position involves answering a host of crucial legal questions, including the following:

- whether the petitioned-for unit is legally appropriate and if the answer is no, why not;
- the classification of employees that should be included/excluded;
- a complete and accurate list (including names, work locations, shifts, and job classifications) of all individuals in the petitioned-for unit;
- a complete and accurate list of individuals to be included/excluded from the petitioned-for unit;
- the existence of any election bars that would legally preclude an election from being held;
- the proposed date/time/location to hold the election; and

¹ While § 102.63(a)(1) allows the Regional Director to “postpone the hearing for up to 2 business days upon request of a party showing special circumstances,” such requests are rarely granted.

- the name and contact information of the individual serving as the employer's representative.

See *NLRB Statement of Position Form 505* and *NLRB Rule §102.63(b)(1)(i)-(iii)*. Per NLRB Rule § 102.66(d), failing to raise facts or arguments in the Statement of Position means they are precluded from the litigation of election related issues.

An employer's submissions in the Statement of Position set the stage for all aspects of the election, but most importantly, they determine which employees are eligible to vote. Gathering the information and accurately completing the Statement of Position requires analyzing whether the employees in the petitioned-for unit "share a community of interest sufficiently distinct from the interests of the employees excluded from the unit." *PCC Structural, Inc.*, 365 NLRB No. 160, 21 (12/15/2017) (returning to traditional community of interest standard). Conducting such an analysis of shared interests is time consuming and typically requires consulting with legal counsel, verifying that the petition was properly filed, identifying, locating, and analyzing documents pertaining to employees' shared terms and conditions of employment (such as work schedules, supervisory structures, job duties, training, personnel policies, compensation and benefits), analyzing work flow, and interviewing multiple levels of supervisors and managers. If there are employees who should be included in the petitioned-for unit, the employer must also assemble a complete and accurate list of those individuals to be submitted with the Statement of Position. Prior to establishment of the Election Rules, this was all handled at the evidentiary hearing, and we would advocate for a return to that process.

Further complicating the process is the NLRB's "raise it or waive it" requirement in NLRB Rule § 102.66(d). This means that important arguments regarding appropriate unit issues are waived and not considered regardless of their impact on holding a fair election if the

employer fails to timely raise them. The short time frame and “raise it or waive it” requirement make no sense for a number of reasons. First, to avoid waiver, employers either abandon salient legal arguments or alternatively resort to raising every available legal challenge in their Statement of Position. Neither outcome is consistent, however, with the NLRB’s ostensible purpose for imposing the Statement of Position requirement – i.e., identification of the salient issues for the Regional Director at the pre-election stage. Moreover, these outcomes burden the likelihood of reaching a stipulated election agreement because the employer, union, and Regional Director have so little time to isolate and attempt to resolve pre-election issues before the hearing. No one can reasonably argue the purposes of the NLRA are being effectuated by these results.

It should also be noted that the time frame for filing the Statement of Position is not tied by rule to the actual date of the evidentiary hearing if that date is postponed. As a result, there are cases in which Regional Directors have agreed to extend the date for the hearing but have not extended the date for filing the Statement of Position. Under all circumstances, the deadline for filing the Statement of Position should be tied by rule to the date of the actual hearing, not the date set by the NLRB in the Notice of Hearing that accompanies the election.

For the reasons stated above, NRF believes the Statement of Position requirement should be abolished.²

3. The Election Rules inappropriately avoid determining the supervisory status of employees before the conduct of an election. NLRB Rule § 102.64.

² We note that some other commenters have suggested the requirement for submitting a Statement of Position more appropriately lies with the labor organization that files the petition. For the reasons we have already stated, we do not believe any Statement of Position is necessary. However, in the event the NLRB were to retain such a requirement, we would support requiring the Petitioner to file a Statement of Position instead of the employer. After all, it is the Petitioner that has defined the bargaining unit in the first place, and, as such, the Petitioner should bear the burden to provide the factual and legal justification in support of its position.

The prohibition on litigating supervisory issues at a pre-election hearing as covered by NLRB Rule § 102.64 should be removed. Section 2(3) of the NLRA makes supervisors a part of management and excludes them from voting in representation elections. Congress' intent behind the supervisory exclusion was to recognize that employers have a right to count on the support of their supervisors during labor/management disputes. Under the old election rules, the supervisory status of potential voters was litigated and resolved before the election occurred. This served several purposes. First, those who were determined to be supervisors knew before the election took place whether they were eligible to vote. Second, prior to the election, everyone knew the identity of the statutory supervisors, and that generally offered assurances that they would not be present in the polling area during the election. All of this changed for the worse under NLRB Rule § 102.64 which provided that "disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be resolved before an election is conducted."

Precluding a decision on this critical issue before an election has undermined the intent of Congress behind the supervisory exclusion and resulted in individuals and their employers being unsure about voter eligibility status during the election. The frustrating result for retailers and other employers is they are left to guess about an individual's supervisory status. The consequence for guessing wrong can be severe because purported supervisors do not know whether to vote or whether their doing so would constitute objectionable conduct or an unfair labor practice. Such uncertainty harms the core purposes of the NLRA.

The Election Rules should return to require that supervisory status and other voter eligibility issues be resolved at the pre-election hearing. For years the issue had been easily resolved during the pre-election Representation Case hearing. This would promote employee

free-choice and allow for fair and predictable elections where individuals know ahead of time whether their vote will count in the election.

- 4. The Election Rules do not allow for post-hearing briefs even though there are unreasonably short time requirements for filing the Statement of Position and no mechanisms for pre-hearing discovery. NLRB Rule § 102.66(h).**

Once a hearing is conducted, the parties should be permitted to submit post-hearing briefs. Under the previous election rules, employers were permitted to submit post-hearing briefs and there was a twenty-five (25) day waiting period between the issuance of the Decision and Direction of Election and the scheduling of the election. Now, NLRB Rule § 102.65(e)(3) states that filing motions for reconsideration or rehearing shall not “stay the effectiveness of any action taken or directed to be taken” by the Regional Director or hearing officer. NLRB Rule § 102.66(h) states that “post-hearing briefs shall be filed only upon special permission of the Regional Director.” Given the short time frame for completing the Statement of Position and the lack of pre-hearing discovery, the parties should have a right to submit post-hearing briefs in order to ensure that the salient legal arguments are fully considered.

- 5. The Election Rules have expanded requirements around preparing and submitting a voter list that make it impractical and that require employers to disclose personal and private information of its employees without a mechanism to enable the employees to opt out. NLRB Rules §102.62(d) and §102.66(k)(1).**

The rules surrounding the preparation and submission of a voter list should be rescinded, and a mechanism should be put into place to require an employer to secure the consent of employees prior to being required to submit personal information to a petitioning labor organization. NLRB Rules §§ 102.62(d) and 102.66(k)(1) require the employer to provide the NLRB and petitioning unions “a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available

home and personal cellular (“cell”) telephone numbers).” This is a very broad expansion of the scope of information previously required to be produced and creates the possibility of abuse and an invasion of privacy that cannot be justified under any rationale. For instance, previously, there was no requirement that an employer disclose personal email addresses and private cell phone numbers of employees. Following the implementation of the Election Rules, employers are forced to release employees’ private and personal information to a third-party labor organization without the employee’s consent or any ability to opt out of such disclosure. Understandably, this has led to employee frustration and resentment.

Despite employees’ heightened concerns regarding privacy in the current era of technology, it is common for labor organizations to utilize software and other tools to send hundreds or even thousands of unsolicited text messages and emails and to make phone calls to employees who are eligible to vote in an election. The mandated disclosure of email addresses increases the risk of identity theft and malware intrusions, which the government should be taking active measures to prevent. Notwithstanding these realities, there exists no mechanism under the Election Rules to allow employees to opt out of having their personal and private contact information shared with the petitioning labor organization.

The traditional *Excelsior* list already provided the most reliable method of contacting employees – i.e., their home address. Expanding the voter list has not advanced the purposes of the NLRA in any meaningful way. With websites and popular social media platforms such as Facebook, Twitter, Snapchat, YouTube, Google Chat, Yahoo, and Messenger, union organizers have plenty of ways to communicate during an organizing campaign without requiring employees’ personal cell numbers and email addresses.

A second major issue with the Election Rules' voter list requirement is the fact that with its expansive production requirement, employers are routinely challenged to produce an accurate list. To date, there has been no meaningful guidance from the NLRB regarding what it means for contact information to be "available" to the employer. As many members have discovered, there is typically not one centralized database where all of the contact information of employees is stored. Oftentimes, a retailer has an official roster of contact information, but supervisors and managers may have personal contact information of the employees that make up chat groups, private email lists, and the like. The problem is that under the current vague standard, failing to produce all of the information, even if that omission was in good faith, amounts to objectionable conduct warranting setting aside an election.

Therefore, the Election Rules' expanded voter list requirements and the drastically shorter timeframe for producing the voter list should be rescinded. In addition, it would be appropriate for the NLRB to build into the system a mechanism pursuant to which employees are given the opportunity to opt out of production of their private, personal contact information. This would respect the privacy rights of employees and promote free choice.

Conclusion: The NRF opposed the Board's changes to its election rules in both 2011 and 2014 and urges the Board to consider the above information in its assessment of the Election Rules. The impact of the Election Rules demonstrates that they have had the effect of subordinating the basic rights of employees to the interests of labor organizations seeking to represent them and violating employers' due process rights.

Sincerely,



David French
Senior Vice President
Government Relations