

**RESPONSE OF JACKSON LEWIS P.C.
TO THE NATIONAL LABOR RELATIONS BOARD'S
DECEMBER 14, 2017 REQUEST FOR INFORMATION
REGARDING REPRESENTATION CASE PROCEDURES**

On December 14, 2017, the National Labor Relations Board (“NLRB” or “the Board”) published a request for information to evaluate whether the Board’s final election rule dated December 15, 2014 (“2014 rules” or “current rules”) should be (1) retained without change, (2) retained with modifications, or (3) rescinded, possibly while making changes to the prior election regulations that were in place before the rules’ adoption.

Jackson Lewis P.C., a national law firm practicing before the NLRB since 1958, hereby offers its response to the Board’s solicitation. This response is submitted on behalf of the employer community. For the reasons provided below, we believe the 2014 rules cannot be retained without substantive changes. In large part, the current rules should be rescinded. At the very least, elements of the pre-2014 rules should be reinstated with modifications.

The 2014 rules suffer from an underlying misapprehension of the law and of the Board’s mission. The NLRB was created to administer and enforce the purposes of the National Labor Relations Act (“the Act”) – to support employees in the exercise of their rights under Section 7 – not to calibrate its practices to aid or hinder any interested parties. The rules have also proven to be a solution in search of a problem. The rules purport to limit unnecessary litigation and to streamline the representation process. However, there has been no appreciable impact on the number of representation cases which have resulted in litigation versus stipulated election agreements. Further, the rules have had no meaningful impact on election win rates of labor organizations or employers. While there has been little impact on the election process or results, there has, however, been a significant burden placed on all parties to comply with new rules and a frenzied pace of compliance.

It cannot be doubted that federal labor law is prone to the pull of politics. It is inescapable that the 2014 rules largely adopted organized labor’s prescriptions for “improving” Board processes. However, the NLRB should not conflate its statutory mission with the political objectives of any group. Moreover, and as noted above, no “improvements” have been realized.

Despite its protestations to the contrary, it is evident the Board was affected by criticism that its rules, regulations, and policies somehow benefitted employers in representation cases, thus making it more difficult for unions to organize. This was the driving force behind the 2014 amendments: diminish these perceived “advantages” enjoyed by employers.

A. The 2014 Amendments: “Targeted Solutions” to Specific Problems?

Why did the Board amend its election rules? According to the agency’s own commentary to the final 2014 rules, the NLRB majority characterized their purpose as providing “targeted solutions to discrete, specifically identified problems to enable the Board to better fulfill its duty to protect employees’ rights by fairly, efficiently, and expeditiously resolving

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questions of representation.” 79 FR 74307.

What were the “specifically identified problems” the Board was attempting to solve? The majority cited a desire to promote “fair and accurate voting.” 79 FR 74315. However, the Board addressed this rationale solely by mandating the dissemination of the Board’s boilerplate notices to employees. By preventing the prompt pre-election resolution of significant issues of unit composition and voter eligibility, these rules only hindered fairness and accuracy.

The Board also stated its amendments were intended to provide “transparency and uniformity” allowing “the public to understand the process” and to allow parties to have uniform expectations from region to region. 79 FR 74315. It is difficult to fathom how the amendments improved Board practice in these areas. Rather than “transparency,” the rules impose arbitrary restrictions against resolution of issues important to voters and all parties. If anything, these rules *avoid* transparency and *prevent* timely understanding. Moreover, under the previous rules the time to a pre-election hearing and, indeed, to an election were virtually the same in every region. The procedures for hearings and conducting elections were the same. The 2014 rules provide no more “uniformity” than their predecessors.

The Board commented that the new rule “promotes a more informed electorate by providing an improved process for informing the unit about election procedures, the appropriate unit for bargaining and the voting procedure for individuals who may properly vote subject to challenge.” 79 FR 74317. More informed? The mandated information provided to employees consists of standard NLRB notices, which tell them nothing about the decision they are about to make. The 2014 rules *inhibit* pre-election transparency by discouraging timely resolution of unit composition issues, pre-election. Moreover, the process of voting subject to challenge (especially where an entire job title or titles are at issue) is inescapably confusing to employees. Commonly heard voter concerns include “Do our votes count?” “Will we be in or out?” “Why can’t we know now?” “Why should I bother to vote?” Rather than congratulating itself that deferment of this vital decision solves a problem, the Board should be concerned that it sows bewilderment and mistrust among employees.

Mindful of criticism that rule changes were driven by partisan demands for haste in holding elections, the Board insisted that the speed with which an election could be held “is not the sole or principal purpose” of the modified rules. 79 FR 74316. This statement was belied by the virtual “can you top this” competition between regions to set standards for the shortest time to an election, which commenced as soon as the rules became effective. This resulted in varying time targets in different regions – running counter to the Board’s express goal of uniformity.

Supporting its drive for speed, the Board cited the hearing testimony of “one employee” that “significant delay... causes employees to think that there is nothing the government can do to protect them.” *Id.* What is a significant delay? Unstated. Why is a brief period for voter contemplation and/or the resolution of unit and eligibility issues considered an unwarranted “delay”? Is it not a prudent use of time?

More telling is the Board’s adoption of a union organizer’s comment, who said in “[his] experience, most workers want elections faster than current procedures permit regardless of

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where the workers stand on the union.” *Id.* A characterization of employee sentiment by an interested party is hardly an authoritative finding. Further, “most workers” are unlikely to be aware of the significance of resolving unit or eligibility uncertainties. Finally, under the pre-2014 rules, the vast majority of elections were conducted in a median of 38 days from the petition. Is there any reasonable basis to claim employee dissatisfaction with a process that resulted in a federally conducted formal election – on demand and on-site – within less than six weeks?

The Board avoided characterizing the issue as the pursuit of speed – instead calling it the elimination of “unnecessary delay.” *Id.* This comes back to the question of whether a timely determination of unit and eligibility issues – matters fraught with due process implications – should be dismissed as mere “delay.” Sidestepping the issue, the Board vaguely cited the statutory exemption of NLRB Representation cases from the protections of the Administrative Procedure Act due to the need to hold elections expeditiously. *Id.* That hardly constitutes a statutory directive to avoid resolving relevant issues prior to an election. Moreover, the NLRB should not use the APA exemption as shield to protect it from its statutory obligation to conduct hearings.

Chary of criticism that it not executing its statutory mission, the Board stated it “considered the statutory requirement that the pre-election hearing be an ‘appropriate hearing’ and the parties’ constitutional, statutory, and regulatory rights in relation to the hearing.” 79 FR 74317. Incongruously, the Board stated that its new limitations on hearings is “more, not less, ‘appropriate’ to its statutory purpose.” *Id.* The 2014 amendments stand the idea of an “appropriate hearing” on its head.

The Board’s “targeted solutions” solved nothing, but have created problems where there were none before.

B. Board Rules Should Be Employee-Centric

The appropriate philosophy for implementing the will of Congress should be one that stresses the rights of employees to make an informed choice, as well as the rights of all parties to due process. In our view, Board election rules should be informed by the following principles:

- The law gives *employees* the right to determine whether their putative bargaining unit will be represented by a particular labor organization. An essential element of this decision is specific knowledge of which other employees will be included within that bargaining unit. Thus, voting subject to challenge should be avoided wherever possible.
- Employers are responsible for violations of the NLRA through the acts of their managers and supervisors. Supervisors and managers have no statutory right to collective bargaining representation (nor to vote). Employers and employees thus should have a right to a pre-election determination regarding which individuals are “supervisory” under the law, and thus excluded from the unit. Further, prudent employers instruct their supervisors to avoid violations of the Act; however, such direction itself may be unlawful if the individuals are held (after the fact) *not* to be supervisors. Failure to timely make

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such determinations can result in violations of employees' rights, can affect the outcome of an election, and is a cause of litigation disruptive to the workplace.

- The parties to a representation case have the right to take any lawful position regarding the composition of the bargaining unit, subject to case-by-case NLRB analysis. Absent just cause, the NLRB should not refuse to hold hearings, or to prevent parties from presenting evidence in support of their arguments. Resolution of unit issues as well as voter eligibility and other known pre-election concerns should not be deferred to post-election litigation unless agreed upon by the parties.

C. Revising the 2014 Rules

A tempting solution would be simply to rescind the 2014 amendments and restore the *status quo ante*. However, the rules prior to the amendments did not provide any affirmative protection for the key rights articulated above. In the absence of protective regulations, over the decades the Board whittled away at the parties' rights to have their unit composition and voter eligibility issues determined prior to elections – and often, never determined.

Following are suggestions for the new rules to enhance Board execution of its statutory mission. It reviews the current R case procedure in roughly chronological order.

1. Initiation of Petition

a. The “Request for Recognition” – a Requirement that Should Not Be Ignored.

§9(c)(A) of the Act requires that a petitioning body, prior to invoking NLRB R case process, must request recognition by the employer and that such employer must decline recognition. This is a statutory mandate, expressly included in the Board's 2014 rule at §102.61(a)(8). In short, it requires that a union make a request for recognition and that such demand be denied either overtly or constructively *as a condition precedent* to the processing of an NLRB petition. Despite the plain wording of the Act and of the rule, the Board ignores it; even a circuit court now ignores it as well. Bellagio, LLC v. NLRB, 863 F.3d 839 (D.C. Cir. 2017). The gravamen of these rulings is that the regulatory and statutory obligation for a demand for recognition is nothing more than an inconvenience, one that can be disregarded.

Put plainly, this is unacceptable. No federal statute should simply be ignored. The Board should not promulgate rules that heed the statute, but then disregard them in practice. It may well be that the intent behind the statutory obligation has receded in practical relevance, but it is still in the Act, and the 2014 rules paid lip service to it. The choices are plain: either the Act must be amended or §102.61(a)(8) must be enforced.

Because it reflects an obligation of the Act, this section should be retained and strengthened. A petitioner should be required to make its request for voluntary recognition – and to state whether that is a request for a majority or minority unit. The employer should have at least several business days for the opportunity to respond. The benefit to the NLRB's

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representation case process is that it gives the employer the lawful option of voluntary recognition, and potentially conserves Board resources.

Note also that retention of this requirement will actually serve one of the Board's stated goals behind its 2014 revisions (see below).

b. Service of Petition Upon Employer

As stated above, a hallmark of the 2014 rule is the Board's fixation on avoidance of "delay." One commonly accepted perception at the time was that employers were able to delay the processing of petitions by claiming that they were not served with papers in a timely manner. In response, the Board mandated that the petitioner itself directly serve the employer not only with the petition, but also with several other boilerplate pages of forms, notices, and procedures.

The rules should continue to oblige the petitioner to serve the employer with a copy of the petition. This may be consistent with the obligation of §9(c)(A): if the petitioner must statutorily make a demand for recognition, requiring service of the petition could satisfy both obligations (the NLRB has long held that the petition form may be the functional equivalent of a request for recognition letter).

Timing: Note also that simultaneous service of the petition by the petitioner upon the employer and upon the Region should not suffice. If the petitioner must indicate that the employer rejected its demand for recognition (or at the very least, failed to respond), *some* minimal period of time must pass allowing for such events to occur.

c. Service: Eliminate the Potential Comedy of Errors

How must the petitioner serve the Employer? The rules have too many options for service. The Board prefers the speed of e-service, but when a petitioner is serving an employer e-service can be problematic. Some common problems include the following:

- The appropriate manager's email address is unknown
- The petitioner-designated manager retired
- The employer was acquired by another company
- The email is sent to someone at a related company who is unaware of the significance
- The corporate email address is an infrequently reviewed mail drop
- The manager may be on leave
- The addressee does not regularly review his or her email

In order to be safe, service should be effectuated only by service on an appropriate person at the office with adequate proof of service. A certificate of service completed by the petitioner should be required by the Board.

2. Service of Papers Upon the Employer by the Board

To state the obvious, the Board must be required to serve the Employer as is currently mandated. The content and extent of various notices and forms will be discussed *infra*.

Under the 2014 rules, service of papers by the Region upon the employer is the starting point for a number of due dates, the soonest being the two-day obligation for posting/distribution of the Notice of Petition. Current rules state that “service” is effectuated upon deposit of the materials with any number of delivery services. Again, the Board favors e-service, but allows that sending material by “snail mail” will suffice. Clearly, a two-day deadline to post a notice that has been sent by U.S. Mail has a very strong likelihood of impossibility. Under any new revisions, if any time target is triggered by service on the employer, physical copies should be served either by e-service (with confirmation) or by overnight courier with proof of delivery.

3. Notice of Petition

The current rules require that the employer post and distribute a region-generated notice advising employees that a petition has been filed. This requirement creates needless work for regional office personnel, and mandates immediate action on the part of the employer, but fails to accomplish any measurable furtherance of the purposes of the Act.

Part of the employer’s burden of compliance is the determination of which petitioned-for employees, if any, it “customarily” communicates with electronically. This may include formal HR files and it may include a first line supervisor’s desk drawer notes. Compliance takes time – and two days is very little time.

Furthermore, §102.63 admonishes that an employer’s failure to post the notice within two days of it being furnished electronically by the Board may be grounds for objectionable conduct in post-election proceedings. Thus, §102.63 creates a rule that serves no discernable purpose yet creates busywork for employers but also establishes what could be serious liability for failure to accurately comply. This rule should simply be revoked.

4. Timing and Notice of Hearing

Under the current rule, the regional director schedules the hearing for the eighth day following the filing of the petition. The prior standard was ten days. Anecdotal evidence from Board personnel reveals that the eight-day time line is in some cases a burden on Board office staff, exacerbated by the policy that petitions be docketed and notices be drafted virtually immediately upon receipt. Again, anecdotally, there appears to be a significant increase in errors by Board offices – incorrect form letters used, misdated communications, wrong addresses, mistyped unit descriptions, date miscalculations, missing mandatory documents, even wrong names of parties – and so forth, which are perhaps ascribable to rushed processes.

Given the other burdens that come with the region’s initial contact with the employer (the Statement of Position, *et al*), an employer has very little time to complete the mandated tasks. We advocate a return to a standard of ten days will adequately relieve pressure on employers and

ease burdens on regional offices.

a. Board Review of Filed Petitions Is Too Lax

To the extent there is any appetite to add a rule, a rule should be added that expressly requires a region to review the incoming petition for completeness, and to strengthen the obligation of reviewing the showing of interest. Often, petitions are filed which lack required information: addresses omitted, requested election details incomplete, unsigned documents, and no entry regarding the number of employees in the putative unit.

The Board has a responsibility to check the petition and has the authority to reject nonconforming documents. The absence of any estimated number of unit members is especially disturbing. How can the region assess the showing of interest if the petitioner fails to state the number of employees in the unit?

5. Statement of Position

Completion of a Statement of Position is a time-consuming process for an employer. However, to the extent that it mandates a prehearing explanation of the employer's position on the unit, voter eligibility, and election details, the Statement is not inappropriate. It is recommended that it be retained for submission no later than the day prior to the hearing. The suggested new hearing date, 10 days from petition filing, will give the employer more time.

There are certain elements of the Statement of Position that should be revoked.

a. Commerce Questionnaire

As part of the employer's Statement of Position, it must state whether it will contest whether the NLRB has jurisdiction over the company. Clearly, that is an issue for litigation the employer must timely reveal. However, the Statement of Position form exceeds this requirement by mandating completion of the Commerce Questionnaire. The Questionnaire includes a number of invasive inquiries regarding corporate structure, ownership, related entities, and a puzzling array of questions regarding the minutiae of interstate commerce. Moreover, completion of the form is not required by the rules. Under the current rules "[t]he employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce..." § 102.63(b)(1)(i). There is no description of, nor limitation upon, "the requested information." The Questionnaire is never identified by name anywhere in the rules.

Given that almost none of the Commerce Questionnaire's invasive inquiries are required to establish jurisdiction, the obligation of its inclusion with the Statement of Position should be eliminated, and the vague "requested information" line of § 102.63(b)(1)(i) should be deleted.

b. Employee Information

The current Statement of Position rule requires the employer to provide a list of all

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individuals in the proposed unit, including full names, work locations, shifts, and job classifications. The employer must also include lists of employees whom it contends should be excluded from, or included with, the unit and why. Suffice it to say that regardless of the size or sophistication of an employer, correct assembly of these documents is inordinately time-consuming. Moreover, employees' rights to confidentiality should require, at the least, some ruling from the agency before such data is released.

There is no discovery in R case practice – provision of the identities of employees, including employees who may not even be sought by the petitioner, is a mandated disclosure of private data which is not supported by the Act. This requirement of §102.63(b)(1)(iii) should be revoked.

6. Hearings: Reopen the Doors!

The Act calls for the Board to conduct a hearing on any relevant issues. Specifically, §9(c)(1) states that the Board will hold a hearing “if the Board has reasonable cause to believe that a question of representation affecting commerce exists.” And, “[i]f the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election...”

The term “question concerning representation” is not defined by the statute. The 2014 rules took advantage of this historical ambiguity by redrafting §102.64(a) of the Rules and Regulations, which now states in part, as follows:

The purpose of a hearing conducted under Section 9(a) of the Act is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining....
Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. ...

Although this rule *admits* that the appropriateness of the unit is inherent to existence of a question concerning representation, Board regions routinely refuse to hold pre-election hearings if the number of prospective voters at issue is less than 20 percent of the unit sought. This *de facto* rule exists despite the fact that the Board expressly rejected inclusion of its own initially proposed 20 percent threshold from the final version of the 2014 rules. 79 FR 74388. The Board had earlier reasoned that a 20 percent rule “represents a reasonable balance of the public's and parties' interest in prompt resolution of questions concerning representation and employees' interest in knowing precisely who will be in the unit should they choose to be represented.” 79 FR 74384.

Parties and employees are left with the conundrum of the Board acknowledging the importance of employees “knowing precisely” the unit upon they are voting on, the Board rejecting a rule that would deny a pre-election determination based purely on numbers, and yet the continuing application of that non-existent rule.

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The NLRB's view of unit litigation has evolved since the 2014 rules were promulgated. In *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017), the Board rejected the self-imposed constraints found in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011). In *PCC* the Board held it was the intent of Congress "that whenever unit appropriateness is questioned, the Board would conduct a meaningful evaluation." 365 NLRB slip op. at 3. Further, that decision noted §9(b) of the Act requires that the Board "shall decide in each case" the composition of the unit "in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act..." *Id.*

It follows that employees' vital interest in knowing the scope and identity of members of the unit – an interest acknowledged by the Board – requires a pre-election determination of the voting unit and its members in order to assure employees "the fullest freedom" of their rights.

7. Briefs

The new rules effectively eliminate post-hearing briefs, except in rare cases. This prohibition inhibits the parties' ability to present their cases. Following a typical testimonial and document-intensive hearing, an *ad hoc* oral argument is unlikely to fully capture the detail and nuance of a party's case. The rule should not impede a party's opportunity to be heard. The current rule should be amended to permit a party to file a brief within seven days, if it so requests.

C. Requests for Review

The innovation of allowing parties to wait until after an election to file a request for review is helpful and should be retained. However, if a party files a request for review prior to the vote, the 2014 rules note that in only extraordinary cases will ballots be impounded. However, counting the ballots prior to a Board decision on a request for review can too easily result in confusion, extensive litigation, and risks of unfair labor practices. Further, where it results in nullification of the apparent election result, it undermines the credibility of the Board and the Act among employees. Impounding ballots is a simple and no-risk way to avoid troublesome results.

D. Election Scheduling

Board rules have never specified a timetable to an election date. Much depends on whether there is a hearing or an election agreement. Prior to the 2014 rules, the practice (developed as a policy by the General Counsel) was to hold a stipulated election within 42 days of the date of petition.

The new rules directed regions to hold elections as soon as practicable. The 2014 rules also eliminated 25-day delay mandated by the prior rules for elections directed by regional director decision following a hearing in order to allow the parties to file a request for review and to allow the possibility of a Board ruling before the vote. The result of these changes was a race to the bottom in terms of speed to an election. The 42-day standard became a *de facto* 23-day median, which of course includes many cases in which elections were held in considerably fewer

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than 23 days.

The purposes of the Act are better served by the principles articulated above that employees should have full knowledge of all the details regarding the unit, and an adequate opportunity to understand the facts regarding their election choice in order to make an informed judgment. Speed is not the goal – a fair, free and informed choice is.

If the Board is to issue a rule articulating a time target for elections in stipulated cases, it should be no less than 35 days from approval of an election agreement, and to restore the 25-day rule following a decision and direction of election to allow for the possibility of a pre-election request for review and a Board ruling on any such request.

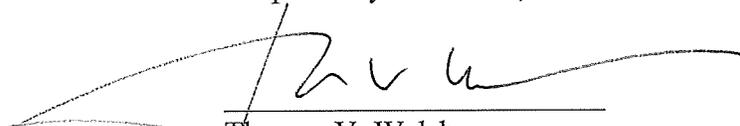
E. The Eligibility List

As noted above in reference to the requirement for the employee lists in the Statement of Position, preparation of employee lists is very time-consuming. The eligibility list is even more so, as it includes more detail – much of which is invasive of employee privacy. Further, the current eligibility list practice makes the employer responsible to divulge information it may have anecdotally or informally maintained by supervisors on an *ad hoc* basis. The final eligibility list should be similar to the former *Excelsior list* practice, with the addition of job classifications and work locations. The current mandate that this list be provided within two days is unnecessary and creates excessive work. The speed with which it must be produced leads to errors for which an employer is responsible. The rule should return to at least the seven days required under the prior practice.

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The Board is to be lauded for expressing its desire to take a second look at the 2014 rules. This is an opportunity for the NLRB to adjust its rules to further serve the purposes of the Act.

Respectfully submitted,



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