



April 18, 2018

Submitted via [www.regulations.gov](http://www.regulations.gov)

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

Dear Ms. Rothschild:

Jobs for Justice writes in response to the National Labor Relations Board (NLRB or Board) Request For Information (RFI) regarding the representation election regulations located at 29 CFR parts 101 and 102 (the Election Regulations), with a specific focus on amendments to the Board's representation case procedures adopted by the Board's final rule published on December 15, 2014 (the Election Rule or Rule) (RIN 3142-AA12). We strongly support retaining the Election Rule as promulgated by the Board in 2014.

Jobs With Justice is an independent nonprofit organization dedicated to advancing workers' rights and an economy that benefits all Americans. We bring together labor, community, faith and student voices at the national and local levels through a network of coalitions across the country. With research, analysis, organizing and public advocacy, Jobs With Justice creates innovative solutions to the problems working people face today. Jobs With Justice works to ensure that working people have the tools to build their collective power at work as well as in their communities. Jobs With Justice is affiliated with 40 locally autonomous organizations across the country.

American Rights At Work, an organization that merged Jobs With Justice, submitted two sets of comments in 2011 supporting the Election Rule and testified in favor of that rule. Those comments along with a supporting study are attached to this comment.

## **I. The Election Rule Was Necessary To Fulfill the Promise of the NLRA That Workers Have the Right To Organize**

Before the Board enacted the Election Rule, anti-union employers had used NLRB processes to effectively deny many working people the right to organize and form a union, a right guaranteed by the National Labor Relations Act (NLRA) and enforced by the Board.<sup>1</sup> American Rights At Work, along Dr. John Logan, Director and Professor and Director of Labor and Employment Studies at San Francisco State University, examined NLRB data and found that, while the NLRB reports that the median time between the petition and election is 39 days, a significant percentage of elections lasted far longer because

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<sup>1</sup> See National Relations Act §§ 7, 8(a)(1), 10(a), 29 U.S.C. § 157, 158(a)(1), 10(a).

of delays in the hearing process.<sup>2</sup> There is currently no limit on a party's ability to demand a pre-election hearing on a range of issues, including objecting to the eligibility of the employees in the proposed unit or the scope of the unit. In cases where a pre-election hearing was held, the election occurred an average of 124 days after the petition was filed.

These delays had a real-world, deleterious effect on working people's ability to assert their rights under the National Labor Relations Act to act collectively and form a union. American Rights At Work research yielded the following key finding: delayed elections expose workers to more illegal employer campaigning. 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. Controlling for factors like industry, size of the unit, and location, we found a significant causal relationship between the length of election delay (time between the petition filing and the vote) and the number of NLRB complaints issued. The amount of time between the petition filing and election date was the most substantial predictor of NLRB complaint increases.

## **II. The Election Rule Represented a Modest Step Forward for Working People Seeking to Assert Their Right to Organize Collectively**

The amendments to the NLRB's representation election procedures adopted in December 2014 represent modest and common-sense changes in the processing of petitions for representation elections. The amendments streamline the process, reduce or eliminate unnecessary litigation, and make it possible for employees seeking to vote on union representation to cast their votes in a more timely manner.

This streamlining has had several laudable results. First, under the new rules, the median number of days between an election petition being filed and the election being held is 23 days.<sup>3</sup> This compares to a median of 38 days under the old rules.<sup>4</sup> Thus, the amendments have had their desired effect of streamlining the process and allowing employees to vote on a more timely basis.

The election system is working well under the new rules and has not resulted in the parade of horrors trotted out by opponents of the Election Rule when it was under consideration. Employers, employees, unions, and the NLRB's regions are now accustomed to operating under the new rules. Employers and unions reach agreements in 92 percent of the petitions filed – the same percentage as before the amendments were adopted.<sup>5</sup>

Furthermore, many of the amendments simply made the NLRB's rules simpler and easier for employees, union representatives, and employers to understand. And they modernized the NLRB's procedures by requiring electronic filing and other non-controversial, commonplace practices.

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<sup>2</sup> John Logan, Erin Johansson, & Ryan Lamare, *New Data: NLRB Process Fails to Ensure a Fair Vote*, June 29, 2011 (available at <http://laborcenter.berkeley.edu/new-data-nlr-process-fails-to-ensure-a-fair-vote/>).

<sup>3</sup> See NLRB, *Median Days from Petition to Election FY '08-FY '17*, available at <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election>.

<sup>4</sup> See *id.*

<sup>5</sup> Compare NLRB, *Annual Review of Revised R-Case Rules*, April 2016, available at <https://www.nlr.gov/news-outreach/news-story/annual-review-revised-r-case-rules>, with NLRB, *Percentage of Elections Conducted Pursuant to Election Agreements in FY '17*, available at <https://www.epi.org/publication/epi-comment-on-the-national-labor-relations-boards-updated-election-rule/>.

### III. Employers Retain The Ability to Present Their Views to their Employees

Nothing in the amendments prevents employers from communicating with employees regarding unionization. They can, and do, mount vigorous anti-union campaigns just as they did before the amendments were adopted.

Indeed, as American Rights At Work noted in its 2011 comments, employers often communicate anti-union views starting at their new hire orientation. Such communications continue periodically throughout employees' tenure with a company. Anti-union companies that get wind of a union organizing campaign do not wait for a formal petition to step up anti-union activities. According to University of Oregon professor Gordon Lafer, consultants counsel employers to "conduct an aggressive, intimidating offensive as soon as any workers begin discussing unionization."<sup>6</sup> They warn supervisors to watch out for any discussion of unions, employees meeting or talking in out-of-the-way places, or even the occurrence of new social bonds. In addition, anti-union manuals encourage employers to forcefully campaign to prevent employees from signing enough cards to trigger an election; campaign suggestions include supervisor one-on-one meetings with subordinates, anti-union posters and letters, and mandatory captive audience meetings.<sup>7</sup> Employers create an intimidating anti-union atmosphere so that, "employees are scared into silence before any election can be scheduled."<sup>8</sup>

These activities are effective in getting anti-union corporations' message out. Employees who are not represented by unions or engaged in efforts to form unions are generally aware of their employer's opinion of unions. In *What Workers Want*, Harvard University professor Richard Freeman and University of Wisconsin professor Joel Rogers surveyed non-union employees on whether they thought their coworkers would support forming a union, and if so, why they have not already done so.<sup>9</sup> "Management resistance" to unions was the single largest explanation employees gave for why a union election had not been called in a workplace supportive of unions. In a 2007 analysis of surveys of non-union employees, Professor Freeman concluded that while workers want unions "now more than ever," they are also "cognizant of management hostility to collective action through unions."<sup>10</sup>

Indeed, since the NLRB adopted the Election Rule, there have been several hard-fought anti-union election campaigns, and no one could reasonably argue that employers were unable to get

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<sup>6</sup> Gordon Lafer, *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections*, July 2007, available at <http://www.jwj.org/wp-content/uploads/2014/04/NeitherFreeNorFairExecutiveSummary.pdf>.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Freeman, Richard B., and Joel Rogers. 1999 and 2006. *What Workers Want*. Ithaca, NY: ILR Press, an imprint of Cornell University Press. Page 86.

<sup>10</sup> Freeman, Richard B. 2007. *Do Workers Still Want Unions? More than Ever*. Economic Policy Institute, briefing paper #182, February 22.

their anti-union message out.<sup>11</sup> Anti-union employers therefore do not need any help from the Board to ensure that their employees know where they stand on unionization drives.

#### **IV. Conclusion**

The evidence shows that before the Board enacted the Election Rule, unscrupulous employers used the Board's election procedures in order to try to prevent their employees from asserting their right to act collectively and form a union. The Election Rule took modest steps to prevent such a misuse of Board procedures, and it has achieved some of those goals by decreasing the median time between petition and election. And it has done so without burdening employers' ability to make their views on unionization known to their employees. There is therefore no legitimate reason to overrule the Election Rule.

Thank you for the opportunity to submit comments in response to the Board's Request for Information.

Sincerely,  
Sarita Gupta  
Executive Director  
Jobs With Justice

Attachments

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<sup>11</sup> See, e.g., Josh Eidelson, In S.C., Boeing goes all out to defeat Wednesday's vote on union, *Chicago Tribune*, Feb. 14, 2017; Mike Elk, Nissan attacked for one of "nastiest anti-union campaigns" in modern US history, *The Guardian*, Aug. 1, 2017.