

April 18, 2018

Via Electronic Submission: <http://www.nlr.gov>

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

**Re: Representation-Case Procedures; RIN 3142-AA12**

Dear Ms. Rothschild:

The National Grocers Association (NGA) submits the following comments to the National Labor Relations Board (NLRB or the Board) in response to the above-referenced request for information.

**About The National Grocers Association**

NGA is the national trade association representing retail and wholesale grocers that comprise the independent sector of the food distribution industry. An independent retailer is a privately owned or controlled food retail company operating in a variety of formats. Independents are the true “entrepreneurs” of the grocery industry and dedicated to their customers, associates, and communities. Much of NGA’s membership is comprised of family-owned and family-operated small businesses. Nearly half of NGA’s members are single-store operators, and another quarter operate less than five stores. Independent retail and wholesale grocers are an important part of America’s economy. According to the NGA Economic Impact Study, independent grocers are responsible for over 1.5 million U.S. jobs, and independent retail and wholesale grocers and their employees generate almost \$14 billion in state and local taxes and over \$27 billion in federal taxes. Nearly \$130 billion in sales are generated through our industry.

**Comments in Response to the Request for Information**

NGA is pleased to have the opportunity to provide thoughts on behalf of its members on the 2014 Election Rule, which has been in place for three years now. NGA feels strongly that many of the criticisms leveled at the Rule prior to its implementation remain equally valid today, and so unequivocally answers “no” to the Board’s first question – *Should the 2014 Election Rule be retained without change?* – and “yes” to the Board’s third question – *Should the 2014 Election Rule be rescinded?*

However, NGA seeks a more productive conversation and result than the regular and sometimes wild oscillations that regularly occur in other areas of labor policy in this country. Indeed, in

NGA's view, one of the primary problems with labor law in the past few decades is its inconsistency and unpredictability. These seemingly never-ending fluctuations on important labor law issues make for a tremendous headache, particularly for smaller employers and family-run businesses such as those that characterize much of NGA's membership.

For this reason, NGA rigorously opposed the cram-down of the 2014 Election Rule, which seemed heavily to favor one side of the debate.<sup>1</sup> Now, rather than simply swing back the other direction and so begin another cycle of unpredictability, NGA instead urges the Board to cast aside the partisan flip-flopping that has over the years served mainly to exacerbate its politicization, and instead craft and implement a fair and permanent solution on which employers, unions and employees can rely for many years, even decades to come.

Accordingly, NGA will forego a comprehensive rehash of its previous objections to the now-implemented 2014 Election Rule, and focus on a few brief points in response to the Board's second question – *Should the 2014 Election Rule be retained with modifications?* Answering, NGA states that if the Board chooses not to rescind the 2014 Election Rules, then yes, they should be retained but only with modifications.

As noted above, the Board's primary goal should be to settle the election process on as-near a permanent foundation as possible. NGA recognizes and is willing to accept that this may mean that we will not be 100% satisfied with the resulting standard. But a few key improvements might make the failure to rescind palatable and help establish a clear and consistent standard that can stand the test of time. NGA's comments here will focus on two of these.<sup>2</sup>

### **I. The Board's Should Ensure a Fair Process and Adequate Time for a Full and Fair Hearing and Election**

The 2014 Election Rule lacks an element of reasonableness in the timing of elections and is heavily slanted towards the "ambush" standard favored by unions. In this regard, there are two separate issues the Board should consider and improve: (1) the pre-election processes, and (2) the timing of the election itself.

The 2014 Election Rule mandates that any pre-election hearing take place eight days from the service of the election petition. In addition, the employer must prepare, file and serve its Statement of Position no later than noon the day before the pre-election hearing. These stringent timing requirements significantly disadvantage employers, as it leaves a very limited amount of time to analyze, consider, and then determine the issues raised by the petition for election. This problem is further amplified by the fact that the employer is precluded from raising issues or presenting evidence as to those arguments not set forth in the Statement of Position, and post-hearing briefs are generally not allowed. The problem can be great for smaller employers, such as many of those

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<sup>1</sup> In fact, majorities in both houses of Congress voted to overturn the rule, but President Obama vetoed the resolution. "Obama's Fourth Veto Protects Unionization Rules," *USA Today*, March 31, 2015 (<https://www.usatoday.com/story/news/politics/2015/03/31/obama-nlr-unionization-ambush-election/70718822/>)

<sup>2</sup> NGA is a member of the Coalition for a Democratic Workplace, and joins in the CDW's submission and recommendations.

represented NGA, who may not have legal counsel or even designated human resources staff. It also impacts larger employers, as they more often involve complex issues.

These completely restrictive timeframes sacrifice practicality and fairness for speed. There should be an element of reasonableness to the entire process, but instead the rule significantly limits hearings, and in most cases, election issues related to scope of unit, voter eligibility, supervisor status and other questions are now resolved after the election. This can result in substantial confusion as to the scope of the bargaining unit, as well as who can participate in the union campaign.

The unfair timing continues in the election phase. Under the prior rules in place for many years, elections were not set until the Board had an opportunity to consider any request for review filed by the employer. This has resulted in a drastic reduction in the median date from petition to election – from 38 days in 2014 to 23 days in 2017, and in contested cases from 59 days in 2014 to 36 days in 2017.<sup>3</sup> Given that unions have complete control over the filing of a petition for election, it is hardly surprising that the percentage of RC elections won by unions has seen a significant increase as well – in the seven years prior to implementation of the 2014 Election Rule, unions won between 63-68% of elections in RC cases, but in the three years since, the union “win rate” has risen to almost 72% and has not dipped below 70% during that period.<sup>4</sup>

The Board should modify the 2014 Election Rule to address the foregoing timing issues, ensure that each party is fairly treated, and see to it that the employees have adequate time to fully consider the range of issues contemplated by the decision whether or not to unionize. NGA submits that absent agreement between the parties, an employer and its employees should have no less than five to six weeks to consider the issues raised in any election petition.

## **II. The Board Should Adopt Provisions Safeguarding Employee Privacy Rights**

In addition to the timing issues, NGA remains very concerned about the Rule’s compulsory disclosure of employees’ personal and confidential information. In this day and age, such non-consensual disclosure constitutes a gross invasion of employees’ privacy. Much of the discussion of this topic focuses on whether the union benefits from receiving such information, but from the employee’s perspective, why should the mere fact that 30% of one’s co-workers may have expressed interest in a union mean that the government may compel her employer to disclose her personal and private information to that union?

Simply put, requiring the employer without consent to provide an employee’s personal phone numbers and email addresses to any other third party, including a union, constitutes an invasion of the employee’s privacy and opens up employees to potential abuse of their personal information. Employee consent, which should be the touchstone of the analysis, seems strangely absent in most discussions, and plays no role under the 2014 Election Rule. This is wrong.

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<sup>3</sup> “Median Days From Petition to Election,” NLRB (<https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election>)

<sup>4</sup> “Representation Petitions – RC,” NLRB (<https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc>)

A glance at recent headlines reveals that Americans today are increasingly concerned, with good reason, about their privacy rights. Facebook CEO Mark Zuckerberg testified before Congress only last week about the many millions of Americans who apparently had their data and information “scraped” from his company, largely as a result of reverse lookup technology in which entities used personal phone numbers and email addresses to locate users and obtain their personal private information and data.

Just last year, the nation was appalled when credit reporting giant Equifax announced that its systems had been breached, compromising the sensitive personal data and information – including names, home addresses and phone numbers – of 143 million Americans.<sup>5</sup> Identity theft protection is now a big business, and the clear trend is for greater protection of privacy and personal information, not less. The bottom line is this – Americans don’t want their information hacked, lost or simply given to others without having a say in the matter.

Despite the unease most Americans feel with others obtaining their personal information, the 2014 Election Rule requires employers to provide, within two days of the decision directing an election or an election agreement, “a list of the 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) of all eligible voters.”<sup>6</sup>

Lost in all the discussion of whether and what personal and private information of an employee the Board should compel an employer to provide to a labor union is the fact that the employee may not want the union to get his or her information. Section 7 protects not only an employee’s rights “to form, join, or assist labor organizations,” but also the right “to refrain from any or all of such activities[.]”<sup>7</sup> And in the midst of a rough and tumble union campaign, it is not unusual for many employees to affirmatively decide they do not wish to have any part in it. This right to refrain is expressly guaranteed by Section 7.

In *Excelsior Underwear*, the Board premised its decision on the supposed fact that “without a list of employee names and addresses, a labor organization ... has no method by which it can be certain of reaching all employees with its arguments in favor of representation[.]”<sup>8</sup> In other words, the contact information assists the union in its organization efforts. But an employee may not wish to assist the union, a right explicitly protected by Section 7. In any event, so long as the name and address of employees eligible to vote has been provided, the union has sufficient information to allow it to reach the employees, and nothing further should be required.<sup>9</sup>

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<sup>5</sup> “Equifax Releases Details on Cybersecurity Incident, Announces Personnel Changes,” Equifax, September 15, 2017 (<https://investor.equifax.com/news-and-events/news/2017/09-15-2017-224018832>).

<sup>6</sup> Rule & Regulations, 102.62(d).

<sup>7</sup> 29 U.S.C. §157.

<sup>8</sup> *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240-41 (1966).

<sup>9</sup> For example, in *Excelsior Underwear* the Board did not require the disclosure of employee telephone numbers.

Because it is within the Board's purview to make this determination, the Board should limit the information to that necessary to ensure that the union has an accurate list of the eligible employees, with at least one means of reaching out to that employee. This is especially true given that there is no indication that unions have any difficulty spreading their message, or reaching and persuading their target audience of employees. As noted above, for many years unions have won close to two-thirds or more of elections. And the proliferation and availability of services such as Facebook, Twitter, Instagram and YouTube, as well as union websites, has greatly reduced the need for physical addresses and phone numbers.

To accomplish this purpose while safeguarding the employee's privacy rights, the Board should not compel the disclosure of more information than the traditional name and address unless an employee affirmatively gives her consent to the provision of such information. The Board would be well advised to put employees in charge of the decision – let them choose whether and how much information the union can have. Such an approach balances the needs of the union while protecting the employee's legitimate privacy rights.

This is especially important for those employees who potentially may be statutory supervisors. As the 2014 Election Rules mandate that challenges to unit composition occur after the election, many, if not most, voter lists will contain private personal information for employees who are not eligible to vote in the election or included within the unit afterward. Compelling the disclosure of the private contact information of such individuals may create unnecessary conflicts, and creates the real potential for abuse. For this and other reasons, the Board should also include any modifications to the 2014 Election Rule stringent requirements as to the protection and destruction of any information provided to the union as part of the electoral process, as well as penalties for the misuse of employee information.

The suggestions offered here put the decision-making back where it belongs – in the hands of the employees.

### **Conclusion**

For the foregoing reasons, and given that the 2014 Election Rule modified long-standing and well-established principles of Board law, the National Grocers Association urges the Board to rescind the 2014 Election Rule. Failing that, the Board should implement the suggestions put forth above.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,



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