

April 17, 2018

Via E-Filing

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

**Re: Request for Information Concerning The National Labor Relations Board's
Representation Case Procedures (December 14, 2017)**

Dear Ms. Rothschild:

I. Introduction

The New York State Nurses Association (“NYSNA” or the “Association”) is the largest union and professional association for registered professional nurses in New York State, with a membership of approximately 40,000 registered nurses. As an organization, NYSNA and its members are committed to ensuring safe hospital staffing, preventing hospital closures, defending professional wages and benefits, and striving for a just healthcare system that cares for all.

NYSNA has filed representation petitions for elections with the National Labor Relations Board (“Board” or “NLRB”) both prior to and subsequent to the amendments of the Board’s representation case procedures adopted by the Board’s final rule published on December 15, 2014 (The “2014 Election Rule” or “Final Rule”)¹. NYSNA has reviewed the Board’s information request and asks the Board not to rescind or modify the 2014 Election Rule.

¹ “NLRB Representation—Case Procedures,” 79 Fed. Reg. 74,308 (Dec. 15, 2014)

Re: Request for Information Concerning The National Labor Relations Board's Representation Case Procedures (December 14, 2017)

II. Unnecessary Litigation Has Been Reduced and the Time Required for the Board to Process Representation Petitions Has Been Shortened

It has long been the position of the Board that one of the policy interests underlying the Act concerns the expeditious resolution of questions concerning representation.² To that end, the 2014 Election Rule has furthered the policy interests of the Act by reducing the likelihood of unnecessary litigation and allowing the Board to process representation petitions in a shorter time frame.

Much of these effects can be attributed to the 2014 Election Rule's requirement that Employers must complete a statement of position form. A form which requires Employers to identify, prior to the pre-election hearing, all issues that they intend to raise at the pre-election hearing.³ Prior to the implementation of this requirement, NYSNA encountered situations where employers would refuse to disclose the legal issues that they intended to litigate prior to commencement of the pre-election hearing. Moreover, these same employers would use this "hide the ball" strategy in hopes of exerting leverage on NYSNA at the pre-election hearing to agree to their preferred unit description and election date. More often than not, these Employers would seek a unit description that expanded the types of job classifications which were eligible to vote and might include additional offsite facilities regardless of whether there was a justifiable legal basis for their demand. In response, NYSNA, on certain occasions would be forced to litigate some of the Employer's meritless contentions which resulted in a lengthy delay in the processing of petitions.⁴

Since the adoption of the 2014 Election Rule's statement of position requirement, NYSNA has filed eight (8) representation petitions and seven (7) of those petitions have led to stipulated

² *Northeastern University*, 261 NLRB 1001, 1002 (1982), enforced, 707 F.2d 15 (1st Cir. 1983).

³ 29 CFR 102.63(2)(b)(i)-(iii).

⁴ In one particular instance, an Employer insisted on litigating a meritless claim which ultimately stretched the time between the filing of a petition and the date of election to seventy-two (72) days.

Re: Request for Information Concerning The National Labor Relations Board's Representation Case Procedures (December 14, 2017)

election agreements.⁵ Following the implementation of the 2014 Election Rule, the average length of time between the filing of a petition and the approval of a stipulated election agreement for NYSNA has been around 9-10 days. Additionally, the length of time between the filing of the representation case petition and the actual election has reduced significantly. Of the seven (7) Board elections that have been conducted since the implementation of the Final Rule, the average length of time between the filing of the petition and the actual election has been twenty-six (26) days. Prior to the Final Rule's implementation in 2013-2015, the average length of time for NYSNA between the filing of the petition and the actual election was around forty-nine (49) days.⁶

Thus, the 2014 Election Rule, consistent with the objectives of the Act, has reduced the amount of irrelevant litigation and the amount of time that the Board takes to process a representation petition.

III. Employers that wished to do so have mounted vigorous campaigns that have effectively conveyed the same types of information using the same methods as was the case prior to the amendments.

Nothing in the 2014 Election Rule has stopped Employers from mounting vigorous anti-union campaigns if they so choose. Since the implementation of the Final Rule, NYSNA organizers have observed several Employers engage traditional anti-union campaign tactics which include hiring anti-union labor consultants, the distribution of anti-union letters in hopes to stimulate dialogue between supervisors and employees about unionization, and captive audience meetings. In particular, one employer found a way to adjust the work schedule so that registered nurses were forced to endure four to five rounds of meetings with anti-union consultants on work time in the weeks preceding a NLRB election. In another instance, an Employer used employee portal e-mails to distribute anti-union literature on a weekly basis. All

⁵ Since the adoption of the amendments, one of the election petitions filed by NYSNA led to a voluntary recognition agreement.

⁶ This conclusion was derived from performing a comparative analysis of RC Petitions filed by NYSNA and processed by the NLRB in the years of 2013, 2014, 2015, 2016, and 2017.

Re: Request for Information Concerning The National Labor Relations Board's Representation Case Procedures (December 14, 2017)

of this shows that the Final Rule and its deadlines have had no real effect on an Employer's ability to campaign against a Union because Employers have maintained unlimited access to employees.

IV. Employees Have Been Better Able To Exercise Their Right To Petition And To Make A Free Choice Of Whether To Be Represented.

The 2014 Election Rule has provided a modernized update to the voter eligibility list, which in turn, has furthered the ability of workers to exercise their right to petition and to make a free choice of whether to be represented. Under the amended rules, employers are required to provide unions with voter eligibility lists which include "available personal e-mail addresses, and available home and personal cellular telephone numbers" ("the Employee Information Disclosure Requirement").⁷ This change has brought the representation case procedures up to date with the way workers of the present era receive information.

In *Excelsior Underwear, Inc.*, a matter decided in the mid-1960s, the Board held that that a fair and free election requires employers to disclose the names and addresses of employees eligible to vote in that election. To justify its holding the Board reasoned that:

[A]n employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed."⁸

In today's society, the withholding of information such as personal telephone numbers and e-mail addresses is analogous to withholding home addresses in the era of *Excelsior*. This premise was acknowledged by the Board when it initially promulgated the Employee Information Disclosure Requirement. The Board, in reviewing statistics which demonstrated that that 90% of Americans owned a handheld mobile phone as of 2014 and that 29% of cell phone

⁷ 29 C.F.R. 102.67(l).

⁸ *Excelsior Underwear Inc.*, 156 NLRB 1236, 1240 (1966).

Re: Request for Information Concerning The National Labor Relations Board's Representation Case Procedures (December 14, 2017)

owners viewed their cell phone as “something they can’t imagine living without”, acknowledged that communications technology has replaced the U.S. mail system and face-to-face communication as the primary means for connecting people.⁹ Moreover, well before the adoption of the 2014 Election Rule, Employers have been cognizant that employing communications technology to deliver an anti-union message to its employees can be highly effective in discouraging union activity.¹⁰

These conclusions are particularly relevant as relates to registered nurses. Both prior to and subsequent to the issuance of the 2014 Election Rule, NYSNA organizers found that mailing addresses supplied by employers have not been the most effective means of communicating with registered nurses. This is because registered nurses work an alternate work schedule which requires them to work less days during the week in exchange for working twelve hour shifts. Consequently, a nurse may stay with a relative or friend during the days or nights in which he/she actually works while maintaining a permanent residence that is far from where he/she actually works. In these circumstances, telephone or e-mail communications may be the only way to reach a nurse outside of work time.

Opponents of the 2014 Election Rule’s voter eligibility list requirements claim that the requirement to disclose personal phone numbers and e-mail addresses contravene both the Act and federal privacy laws. Both of these claims are without merit. First, there is nothing in the Act which specifically prohibits such disclosures.¹¹ Second, opponents of this rule of have failed to identify any federal law which restricts the disclosure of employee information to unions or demonstrate a competing interest that effectively outweighs the strong interest in encouraging an

⁹ 79 Fed. Reg. at 74,335-340 (internal citations omitted).

¹⁰ *Virginia Concrete Corp.*, 338 NLRB 1182, 1182 (2003) (employer sent “Vote No” message to “mobile data units” in employees' trucks in the final 24 hours before an election); See also *Research Foundation of the State University of New York at Buffalo*, 355 NLRB 950 (2010) (“Employer sent a series of e-mails explaining to employees the Employer’s position on unionization.”).

¹¹ *Chamber of Commerce*, 118 F. Supp. 3d 171, 209 (2015) (holding that “the fact that the NLRA does not specifically authorize the Board to mandate [available personal email addresses, and available home and personal cellular telephone numbers] does not mean that the statute prohibits it.”);

**Re: Request for Information Concerning The National Labor Relations Board's
Representation Case Procedures (December 14, 2017)**

informed employee electorate.¹² Thus, the Final Rule should be preserved as it represents a modernized approach of furthering the interests of Act by promoting a fully informed electorate.

V. Conclusion

For the reasons set forth above, NYSNA urges the Board to retain the 2014 Election Rule without change. The current rules have been a step forward in furthering the objectives of the Act. Thank you for your consideration.

Respectfully submitted,

Dated: April 17, 2018



Bernard E. Mason, Esq.
Associate Counsel, Legal Department
New York State Nurses Association

¹² See *ABC Inc. of Texas*, 826 F.3d 215, 224 (2016).