UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Re Request for Information Concerning
Representation-Case Procedures RIN 3142-AA12

# SUBMISSION OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS IN RESPONSE TO REQUEST FOR INFORMATION CONCERNING THE RULES GOVERNING REPRESENTATION CASES

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In response to the National Labor Relations Board's December 14, 2017, request for information about the rules governing the processing of representation petitions, 82 Fed. Reg. 58783, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) provides the following data and analysis.

**SUMMARY**

Considering data now available from almost three years of experience under the amended rules, it is clear that the amendments to the Board's rules governing representation cases that took effect on April 14, 2015, have met their objectives. The amendments modernized the representation case process, made it more transparent and uniform across regions, eliminated unnecessary delays, and provided regional directors with the authority to prevent unnecessary litigation as well as the discretion needed to address unusual circumstances. Experience during the first two and three-quarters years under the amended rules has demonstrated that the amendments expedited the processing of representation petitions without causing *any* of the adverse effects predicted by their critics. There is no proper basis for the Board to revise or rescind the amendments.

The AFL-CIO submitted detailed comments and reply comments in response to the Notice of Proposed Rule-making that preceded adoption of the amendments. We do not reiterate the reasons we articulated at that time why the amendments were firmly grounded in sound labor-relations policy and good administrative practice. Rather, we focus here on evidence of the amendments' actual impact and lack of impact.

In the analysis below, we rely primarily on data produced by the NLRB in response to a Freedom of Information Act request we submitted on December 22, 2017. Attachment 1, Ferguson Report, Exhibit 2. The request sought data from representation cases initiated

subsequent to January 1, 2000. The NLRB replied and produced data responsive to our FOIA request on February 28, 2018. *Id.*, Exhibit 3. We shared the produced data with John-Paul Ferguson, Assistant Professor of Organizational Behavior, Stanford Graduate School of Business. Professor Ferguson is a leading scholar of U.S. labor relations who has worked extensively with NLRB case processing data. *See id.*, Exhibit 1. Professor Ferguson analyzed the data for the five-year period from October 2012 to October 2017, specifically comparing data from the two and one-half years before the amendments took effect on April 14, 2015, with data from the two and one-half years after the amendments took effect.

## ANALYSIS

### I. Empirical Evidence Demonstrates that the Amendments Have Achieved Efficiencies and Have Had No Adverse Effects

#### A. The Amendments Have Achieved Efficiencies

##### 1. The Amendments Reduced the Time Between Petition and Election

The best evidence of the efficiencies produced by the amended rules is the decrease in the time it took the Board to process petitions from filing to election after the amendments took effect. Professor Ferguson found that "there was a major reduction (nearly half) in election lag in the immediate wake of the rule change." Attachment 1, Ferguson Report at 2. The median number of days between petition and election "hovered under 40 days for 2.5 years before April 14, 2015; it hovered over 20 days for 2.5 years afterward." *Id.* "This is nearly a textbook example of what an 'effect' should look like." *Id.*

Professor Ferguson's findings were recently confirmed by the NLRB in response to a congressional inquiry. According to the NLRB's analysis of its own data from the period two and three-quarters years before the amendments took effect and the comparable period after the amendments took effect (July 26, 2012 to April 13, 2015 compared to April 14, 2015 to

December 31, 2017), the median number of days between petition and election fell by approximately 14 days after the amendments took effect. The median ranged from 38 to 39 days before the amendments took effect and from 23 to 24 days after the amendments took effect. Attachment 2, NLRB Reply to Senator Murray, et al., Feb. 15, 2018, Summary Table, line 17.[1]

**2. The Amendments Reduced the Time Between Petition and Case Closing**

Critics predicted that a decrease in pre-election litigation would simply be offset, or worse, by an increase in post-election litigation, *see, e.g.*, 79 Fed. Reg. 74436 (Members Miscimarra and Johnson dissenting), but that has not proven true.

Professor Ferguson found no change in either the number of post-election hearings or their length associated with the rule changes. Attachment 1, Ferguson Report at 10, Fig's 18, 19, 18A, 19A. In fact, the percentage of elections that are followed by post-election hearings is falling steadily and the fall was not slowed by the amendments. *Id.*, Fig's 18, 18A.

Overall, Professor Ferguson found that the median time needed to process cases from the filing of a petition to closing was 77 days before the rule changes and 56 after. Attachment 1, Ferguson Report at 8, Fig's 11, 11A. "The effect is substantial and concentrated around the rule implementation." *Id.* The shortening of time was largest in cases that proceeded to an election, but was not limited to those cases. *Id.* "There is some evidence that the election rule amendments are not just shortening time to election but also wrapping up other cases more quickly." *Id.*

The Board's own reports, using evidence compiled after the amendments had been in effect for one year, also support this conclusion. The Board reported in 2016 that the median

[1] The medians were calculated for two one-year periods before and after April 14, 2015, and for the two 261-day periods July 26, 2012 to April 13, 2013, and April 14, 2017 to December 31, 2017. *Id.*

number of days between petition and final disposition of a case was 50 days in the year prior to the amendments taking effect and 35 in the year after the amendments took effect. NLRB, Annual Review of Revised R-Case Rules, https://www.nlrb.gov/news-outreach/news-story/annual-review-revised-r-case-rules (April 20, 2016).

Thus, the available evidence supports Member Pearce's observation in his dissent to the Request for Information:

> The Agency's 100-day closure rate—which by definition takes into account a representation case's overall processing time—is better than ever. In FY 2017, the second fiscal year following the Final Rule's implementation, the Agency achieved a historic high of closing 89.9% of its representation cases within 100 days of a petition's filing. And in FY 2016, the first fiscal year following the Final Rule's implementation, the Agency's representation case closure rate of 87.6% outpaced all but one of the six years preceding the Final Rule. 82 Fed. Reg. 58787.

The amendments have led to an overall shortening of the time needed to process representation cases.

**3. The Amendments Eliminated Unnecessary Litigation**

One of the central rationales underlying the amendments was that the resolution of disputes concerning the eligibility and inclusion of small numbers of employees was not necessary prior to an election and that such disputes are often mooted by election results. Moreover, while permitting parties to litigate such disputes at pre-election hearings prior to the amendments, regional directors often deferred ruling on the disputes by permitting disputed employees to vote subject to challenge. And even when a regional director ruled on such a dispute, the Board often either did not rule on a resulting request for review until after the election or similarly permitted disputed employees to vote subject to challenge. Finally, even in the rare case where the Board ruled on such a dispute prior to an election, the ruling was not and could not be final given the possibility of judicial review, which cannot even be sought until after

an election (and after a technical refusal to bargain and resulting unfair labor practice finding). The Board predicted that giving regional directors discretion to defer both the litigation and resolution of such disputes until after elections, by permitting disputed employees to vote subject to challenge, would reduce litigation. That prediction has proven true.

In the two and three-quarter years since the amendments took effect, such disputes have been deferred either by agreement or direction in 225 cases. Challenges were filed in 170 of those cases. But those challenges were potentially determinative in only 23 cases. Attachment 2, NLRB to Senator Murray at 5, ¶ 15. Thus, the deferred disputes were mooted by the election results in over 88% of all cases. We do not have a comprehensive list of such cases, but a few examples include *Los Angeles Times Communications LLC*, Case No. 21-RC-210958, and *Fuyao Glass America, Inc.*, Case No. 09-RC-208040.

Of course, employees voted for representation in a significant percentage of those cases and thus the dispute remained relevant, not to voter eligibility, but to inclusion of the disputed employees in the bargaining unit. But even in those cases, it is likely that the parties were able to resolve many of the disputes in bargaining, free of the tactical considerations that were at play pre-election. For example, in *American Addiction Centers*, Case No. 22-RC-177941, six employees were permitted to vote subject to challenge. The employer challenged four voters it claimed were supervisors and the union challenged two voters it claimed were supervisors or confidential employees. A majority of employees voted in favor of representation and the challenges were not potentially determinative and thus were not resolved in the representation case. In subsequent bargaining, the parties agreed that the four employees challenged by the employer should be included in the unit and the two challenged by the union should be excluded.

Pre- and post-election litigation over the issue was avoided. In contrast, under the old rules, the parties could have insisted on litigating the issue in a pre-election hearing.

In addition, the amendments permit parties to defer seeking Board review of regional directors' pre-election rulings until after the election. If the parties had been forced to seek review pre-election or waive their rights (as they were prior to the amendments), it is likely that many of the disputes about the eligibility or inclusion of small number of employees described above, as well as many other types of disputes (such as disputes concerning the appropriateness of the unit), would have been the subject of pre-election requests for review and Board consideration even though the disputes would have subsequently been rendered moot by the election results.

**4. The Amendment Eliminated Unnecessary Post-hearing Briefing**

The amendment reduced litigation and delay by giving regional directors discretion not to permit the filing of post-hearing briefs when such briefs would not assist the resolution of remaining disputes. Parties retain the right to present closing argument in lieu of briefs.

Professor Ferguson found that this grant of discretion over briefing was associated with a significant drop in the percentage of cases in which briefs were filed. Prior to the amendments, briefs were filed in 50 percent of cases involving pre-election hearings while after the amendments the rate of brief-filing fell to 20 percent. Attachment 1, Ferguson Report at 9, Fig's 16, 16A. Professor Ferguson's report also demonstrates that this fall in briefing was not the result of a categorical rejection of briefing. Examination of his Figures 16 and 16A reflects considerable month-to-month variation in the rate of brief-filing, demonstrating the exercise of discretion by regional directors in each case, permitting briefing in those cases where they

believe it will benefit the decision-makers and relying on oral argument in those cases where briefing would be of no benefit.

The amendments reduced pre-election litigation and did not increase post-election litigation. The amendments shortened the time between petition and election. Overall, the amendments shortened the time for processing representation petitions. The amendments thus fulfilled one of their central promises. The public has benefited via conservation of agency resources, employers and unions have benefited via less entanglement in litigation, and employees, employers and unions have benefited from more expedited resolutions of potentially disruptive questions concerning representation.

**B. The Amendments May Have Led to a Fall in the Number of Blocking Charges**

Another criticism of the amendments was that the reforms did not address what was alleged to be the primary cause of delay in the processing of representation cases – blocking charges. But, in fact, the amendments did address blocking charges. As a result of the amendments, the Rules now provides:

> Whenever any party to a representation proceeding files an unfair labor practice charge together with a request that it block the processing of the petition to the election, or whenever any party to a representation proceeding requests that its previously filed unfair labor practice charge block the further processing of a petition, the party shall simultaneously file, but not serve on any other party, a written offer of proof in support of the charge. The offer of proof shall provide the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony. The party seeking to block the processing of a petition shall also promptly make available to the regional director the witnesses identified in its offer of proof. If the regional director determines that the party's offer of proof does not describe evidence that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, and thus would require that the processing of the petition be held in abeyance absent special circumstances, the regional director shall continue to process the petition and conduct the election where appropriate. Current § 103.20.

Available data suggests that that amendment may have had an impact on the filing of blocking charges. The Board's own report comparing results for the first year under the amendments to those during the prior year found that the number representation cases blocked by unfair labor practice charges had almost been cut in half. NLRB, Annual Review of Revised R-Case Rules, https://www.nlrb.gov/news-outreach/news-story/annual-review-revised-r-case-rules (April 20, 2016). The Board recently reported to the ABA Committee on Practice and Procedure Under the NLRA that the number of blocking charges has fallen steadily in the wake of the amendments from 240 in fiscal year 2015, to 181 in 2016, and 106 in 2017. www.americanbar.org/content/dam/aba/events/labor_law/2018/papers/ABA%20Mid-Winter%20Meeting%20Questions%20-%20Answers.authcheckdam.pdf. In fact, the number of blocking charges has been falling since before the amendments took effect. Thus, it is not clear that the drop was associated with the rule change, but it is clear that there are now very few cases blocked and the number is steadily falling. Attachment 1, Ferguson Report at 10, Fig's 20, 20A.[2] There is no reason to further revise the blocking charge policy.

**C. The Amendments Did Not Result in Any of the Predicted Adverse Consequences**

Prior to the adoption of the amendments, critics made a set of predictions about their adverse consequences. But empirical evidence now conclusively demonstrates that those consequences have not occurred.

[2] In general, Professor Ferguson found that "[t]he mean case length has a negative time trend, which reflects a smaller share of outlier, long-running cases over time. However, this downward trend began before the rule change and is not correlated with it." Attachment 1, Ferguson Report at 8 n. 9.

### 1. The Amendments Have Not Deprived Any Party of Adequate Time to Campaign

Using a variety of pejorative adjectives, critics alleged that the amended rules would result in “ambush” or “quickie” elections. Some employers asserted that they would not have adequate time to campaign against representation after the filing of petitions and that they seldom knew about organizing drives pre-petition. But the best evidence of whether the amendments actually prejudiced any party’s ability to campaign is the outcome of elections before and after the amendments took effect. That evidence clearly debunks this criticism of the amendments. The amendments have expedited the processing of representation cases, but have not altered their outcomes. No category of party, not employers, unions, or individual petitioners, has been systematically prejudiced or advantaged by the amendments.

Professor Ferguson found no evidence that unions’ win rates increased after the amendments. Attachment 1, Ferguson Report at 6, Fig’s 5 and 5A. Looking more specifically at the pro-union vote share in elections, he also found no change correlated with the rule change. *Id*. at 7. “Unions’ vote shares in the cases that went to election rose, on average, over the entire interval considered. By late 2017, unions won about 63 percent of the vote. This effect over time is substantively important and statistically significant, but it is uncorrelated with the rule change.” *Id*.

The NLRB itself found overall results to be essentially unchanged. In its report about the first year of experience under the amendments, the Board stated that the rate at which employees voted for representation actually fell by a percentage point overall and in RC cases compared to the prior year. NLRB, Annual Review of Revised R-Case Rules, https://www.nlrb.gov/news-outreach/news-story/annual-review-revised-r-case-rules (April 20, 2016).

The Board should be skeptical of assertions that either the union win rate or the pro-union vote share increased as a result of the amendments because there has been a long-term increase in both and the rate of that increase did not change as a result of the amendments. *See* Attachment 1, Ferguson Report at 6-7 n. 6, Fig's 6 and 6A. Thus, a simple comparison of either variable for a few years before and a few years after the amendments took effect demonstrates nothing about the impact of the amendments as it may simply reflect longer-term trends.

Critics might contend that, although the outcome of elections remained unchanged, that is only because the expectation of greater success led unions to file petitions in situations where they would not have done so previously, *i.e.*, to file more petitions. If that were the case, however, the number of petitions would have risen, resulting in more employees voting for representation. But that contention is also refuted by the data.

Professor Ferguson found that the average number of petitions filed per month has actually declined since the amendments took effect, Attachment 1, Ferguson Report at 3-5, Fig's 2, 2A, although he concludes there is no statistically significant change associated with the amendments. *Id*. Considering the ultimate outcome variable, the number of employees gaining representation, Professor Ferguson also found no change associated with the amendments. *Id*. at 7-8, Fig's 7, 7A.

Again, the Board response to congressional inquiry confirms this fact. The Board reported that the number of petitions filed in each of the two one-year periods and the one nine-month period before the amendments took effect ranged from 1,848 to 2,619 while in the comparable periods after the amendments took effect the number ranged from 1,586 to 2,546. Attachment 2, NLRB to Senator Murray, Summary Table, line 1. That is consistent with data published by the Board comparing filings during the first year under the amendments to those

during the prior year. NLRB, Annual Review of Revised R-Case Rules, https://www.nlrb.gov/news-outreach/news-story/annual-review-revised-r-case-rules (April 20, 2016). Similarly, the number of elections held ranged from 1,169 to 1,713 in the two and three-quarter years before the amendments took effect and from 1,101 to 1,724 since the amendments took effect. Attachment 2, NLRB to Senator Murray, Summary Table, line 2.

In short, while the amendments have created efficiencies in the process, the amendments have not deprived any party of adequate time to campaign as reflected in both election outcomes and the number of petitions.

**2. The Amendments Have Not Deprived Any Party of an Opportunity to Fully Litigate Any Material Issue Actually in Dispute**

Critics argued that the amendments would deprive employers of the ability to litigate concerning disputes over the eligibility or inclusion of particular employees. Of course, that claim was erroneous on the face of the amendments. The amendments simply gave regional directors greater discretion to defer both the taking of evidence concerning and the resolution of such disputes until after elections.

In fact, even prior to the amendments taking effect, the Board and regional directors deferred resolution of such disputes until after elections by permitting employees to vote subject to challenge, even over the objection of a party, and the frequency of such deferral did not increase significantly after the amendment took effect. During the two and three-quarters years prior to the amendments taking effect, regional directors or the Board directed some employees to vote subject to challenge over the objection of a party in 22 cases while in the comparable period after the amendments took effect they did so in 23 cases. Attachment 2, NLRB to Senator Murray at 4, ¶13. And in no case, either before or after the amendments took effect, was any

party barred by the rules from litigating over such a dispute so long as it remained material to the question concerning representation before the Board.

Parties have not been deprived of any opportunity to litigate genuine issues material to the proceedings.

### 3. The Amendments Have Not Increased Litigation

Another criticism of the amendments was that they would force or induce employers to litigate concerning more issues or leave the parties inadequate time to resolve issues prior to the pre-election hearing, resulting in more litigation and fewer agreements resolving pre-election disputes. *See, e.g.*, 79 FR 74442, 74450 (Members Miscimarra and Johnson dissenting). The empirical evidence demonstrates that this criticism was misplaced.

Professor Ferguson found that there was no change in the ratio of cases resulting in stipulations versus decisions and directions of election associated with the rule change. “There is no evidence of a time trend in these data, around the rule change or elsewhere.” Attachment 1, Ferguson Report at 9, Fig’s 12, 12A.

The Board’s own comparison of data from the first two and three-fourths years before and after the amendments took effect also shows no change in the percentages of elections held pursuant to stipulations. Attachment 2, NLRB to Senator Murray, Summary Table, line 4. The percentage of elections held pursuant to stipulation ranged from 91 to 93% before the amendments took effect and from 92 to 93% after the amendments took effect. *Id*. These findings are supported by the Board’s report on experience under the amendments after one year which showed the election agreement rate unchanged compared to the prior year. NLRB, Annual Review of Revised R-Case Rules, https://www.nlrb.gov/news-outreach/news-story/annual-review-revised-r-case-rules (April 20, 2016).

Correspondingly, neither the number of pre-election hearings nor their length increased after the amendments took effect. Professor Ferguson found, "Neither the probability of a case's having a pre-election hearing nor the average length of those hearings changed over time or in the wake or the rule change." Attachment 1, Ferguson Report at 9. According to the data supplied by the Board pursuant to congressional request, the number of pre-election hearings ranged from 142 to 240 in the two and three-quarters years before the amendments took effect and from 122 to 223 in the comparable period after the amendments took effect. Attachment 2, NLRB to Senator Murray, Summary Table, line 7. Both the mean and median number of days of hearing also remained unchanged. *Id*., lines 8 and 9.

Specifically, the amendments appear to have encouraged the parties to agree to defer disputes over the eligibility or inclusion of employees until after elections. In cases that resulted in election agreements, parties agreed to defer such disputes by permitting disputed employees to vote subject to challenge in 74 cases during the two and three-fourths years prior to the amendments taking effect and in 198 cases during the comparable period after the amendments took effect. Attachment 2, NLRB to Senator Murray at 3-4, ¶ 12.

The amendments did not reduce stipulations or increase litigation.

**4. The Amendments Did Not Lead to Any Abuse of Eligibility Lists**

Critics also suggested that unions would abuse the additional information that the amendments required be included in the eligibility list to harass or invade the privacy of potential voters or to interfere with employers' operations. Again, experience has demonstrated that has not happened.

In response to an inquiry from the ranking members of the Senate Health, Education, Labor, and Pensions and House Education and Workforce Committees and other members of

Congress, concerning "the number of charges, objections, or complaints of any kind concerning a labor organization's misuse of any form of list of employees provided pursuant to the NLRB's election procedures" during the period since the amendments took effect, the NLRB replied:

> We conducted a document search of our electronic case file records for charges, complaints, or objections to the conduct of election that contained language referring to "misuse" or "abuse" of voter lists. In addition, we also inquired among the 26 Regional Offices to see if they recalled any such cases. No charges, objections, or complaints relating to misuse of the list of voters have been received by any office since April 15, 2015.

Attachment 2, NLRB to Senator Murray at 6-7.

There simply is no evidence of any form of abuse of the augmented eligibility lists.

The criticism of the amendments was based on predictions of adverse consequences that have not materialized.

## II. The Cited Cases Suggest No Reason to Alter the Amendments

The Request for Information cites four cases as raising "significant issues concerning application of the Election Rule." 82 Fed. Reg. 58784. We agree those cases may raise issues of "application." But they do not suggest any need for revision of the rules themselves.

*Yale University*, 365 NLRB No. 40 (2017), concerned the University's request for expedited consideration of its pre-election request for review or, in the alternative, for a stay of an election pending consideration of the request. Acting Chairman Miscimarra dissented from the denial of the motion on the grounds that the questions of whether the individuals at issue were covered employees and whether the petitioned-for departmental units were appropriate merited consideration pre-election. But the amended rules do not preclude pre-election consideration of such issues. *See* Current §102.67(c). And the amended rules provide for both expedited consideration and a stay "upon a clear showing that it is necessary under the particular circumstances of the case." See Current §102.67(j)(2).

Moreover, the grounds for pre-election Board review advanced by Acting Chairman Miscimarra do not suggest any reason to alter that standard. First, he states "that moving forward with the elections here disregards the fundamental fact that important election-related questions will likely require many months and possibly years to resolve." *Yale University*, 365 NLRB No. 40 at 2. But that is the case whether the questions are address pre- or post-election and the questions cannot be fully resolved, via judicial review, until after the election in any case as explained above. Second, Acting Chairman Miscimarra states that the amendments made post-election Board review optional and thus "the Board may *never* pass on the election-related questions raised here." *Id.* But the Board had discretion to deny review of a pre-election request for review raising precisely the type of employee status and union determination questions at issue in *Yale University* prior to the amendments. Finally, Acting Chairman Miscimarra states that a grant of review absent a stay of the election will result in "increased delays . . . in the Board's *overall* representation process" as litigation simply shifts from before to after elections. *Id*. But experience under the amendments has proven that fear to be wholly unmerited as explained above.

In *European Imports, Inc*., 365 NLRB No. 41 (2017), the parties agreed to include employees constituting 17% of the unit at the pre-election hearing, but did not resolve all issues, specifically leaving unresolved the election date. The timing of the issuance of the Decision and Direction of Election together with the chosen election date permitted Acting Chairman Miscimarra to assert that the employees added to the unit might have had as little as three-days notice that they would be voting in the election. But that concern has nothing to do with the amendments because the same period between official notice of an election, via posting of a Board notice, and election could have occurred under the old rules. That is because, in the final

rule issued in 2014, the Board rejected the proposal in the NPRM to reduce the minimum notice period from three to two days. 79 Fed. Reg. 74308, 74406. Moreover, the amendments augmented the notice requirements both by making the previously optional initial notice of election mandatory and by requiring that the final notice of election not only be physically posted but also distributed by email and electronically posted when the employer customarily so communicates with its employees. *Id.*

In any case, it is unlikely that any employees received only a few days notice as suggested by Acting Chairman Miscimarra given that both the employer and the union knew the employees might be voting and thus probably informed them of that possibility while campaigning for their votes. Moreover, the employer, which raised the matter with the Board, was free to give more than the minimum notice required by Current § 102.67(k). Finally, such a concern can be considered by regional directors in setting the election date under Current § 102.67(b), and the Board can guide the exercise of that discretion via rulings on requests for review. *European Imports* suggests no need to revise the amendments.

*UPS Ground Freight, Inc.*, 365 NLRB No. 113 (2017), involved a number of objections to procedural rulings during the pre-election proceedings. But, like *Yale University* and *European Imports*, the disputes concerned the application of the amendments not the terms of the amendments. In *UPS Ground*, the employer requested a two-day extension of time to file its position statement and a two-day delay of the opening of the hearing and was granted one day in each instance; the employer requested an adjournment during the first and only day of the hearing and the request was denied; the employer requested leave to file a post-hearing brief and the request was denied; and the employer objected to not having sufficient time to prepare for closing arguments. *Id.* at 5-6. The Board denied a request for review of these procedural

rulings and Member Miscimarra dissented. *Id*. at 1 n. 1 and 5-6. Whether or not any of these rulings were erroneous or an abuse of discretion in the specific context of that case, it is undisputable that none of them were *mandated* by the amendments. Indeed, many of the matters ruled on are not even addressed in the amendments. Rather, they are matters uniformly left to the discretion of hearing officers, trial judges, and other officials supervising hearings. Hearing officers and regional directors retain discretion over each of the deadlines at issue, and the Board retains authority to correct abuses of that discretion via a request for review.

*Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2916), was a unanimous Board decision that, like the three cases discussed above, did not raise any question about the wisdom of the amendments, but rather started an entirely normal process of construction of the amendments, specifically construction of the provision permitting a regional director to "direct the receipt of evidence concerning any issue . . . as to which the director determines that record evidence is necessary." Current § 102.66(b). In that case, the Board held that a union faced with a decertification petition should be precluded from raising a contract bar if it failed to timely file a statement of position. Notably, in *Brunswick Bowling*, the union failed to request an extension of time and provided no explanation of its failure to file on time. Nevertheless, the majority found that the Regional Director did not err in considering the contract bar issues because it was raised on the face of the petition and fell within the class of issues regional directors can consider if they determine that "record evidence is necessary." Current § 102.66(b). Member Miscimarra concurred in the holding. He dissented only from the conclusion that the Regional Director should not have permitted the incumbent union to raise the issue – a conclusion not necessary to the Board's holding.

There is nothing to suggest that any aspect of these four particular cases is illustrative of a pattern in application of the amended rules. Moreover, the process of construction of those rules that has now begun and is illustrated by these four cases should be allowed to continue rather than being unnecessarily truncated by rescission or revision of the amendments.

## III. The Amendments Vest Regional Directors and the Board with Sufficient Discretion to Accommodate Special Circumstances, Particularly the Need for Additional Time

The amendments, like the prior rules, vest considerable discretion over the processing of representation petitions in regional directors as well as in the Board. Many of the criticisms of the amendments have been and will continue to be addressed through the prudent exercise of that discretion. As Judge Jackson found in dismissing the Chamber of Commerce's challenge to the amendments, "the Final Rule does not necessarily lead to the outcomes to which plaintiffs object, because it accords the Board's regional directors considerable discretion to apply its provisions in a manner that is appropriate to individual circumstances." *Chamber of Commerce of the United States v. NLRB*, 118 F.Supp.3d 171, 190 (D.D.C. 2015). Specifically, "the new regulations accord regional directors the discretion to grant an extension to an employer who needs additional time." *Id*. at 206.

Existing evidence demonstrates that regional directors have exercised discretion to accommodate special circumstances. While the Board's data is incomplete, there is no evidence that regional directors or the Board have systematically abused their discretion or even systematically acted unwisely in exercising their discretion in a manner that should be corrected by revising the rules.

The Board has not compiled evidence concerning requests for continuances or additional time either as grounds for the request for information at issue here or subsequently. Our FOIA request asked for data concerning how regional directors and the Board have exercised their

discretion in ruling on requests for continuances of hearing dates, requests for extensions of time to file and serve position statements, requests to preclude a party from raising or contesting any issue based on a failure to timely raise the issue in a position statement or response, and requests for a stay of an election or other extraordinary relief. Attachment 1, Ferguson Report, Exhibit 2, paras 14-20. In each case, the Board responded, "the Agency does not statistically track this information." *Id.*, Exhibit 3.

In addition, the ranking members of the Senate and House oversight committees requested data on requests for continuances before and after the amendments took effect. The Board responded on April 13, 2018, stating, "Because of the varying circumstances under which continuances are requested and granted, the Agency cannot produce data in a way that would comprehensively respond to your request." NLRB to Senator Murray, et al., April 13, 2018, at 2.

While the Board could not supply comprehensive evidence revealing how regional directors are exercising their discretion in response to our FOIA request or the congressional request, the data that was supplied makes clear both that regional directors are exercising discretion to accommodate unusual circumstances and that the Board's data concerning these matters is both limited and flawed. The Board was unable to supply data concerning requests for an extension of time to file and serve position statements, but instead supplied data on when the statement was originally due and when it was filed. Attachment 1, Ferguson Report, Exhibit 3. Professor Ferguson found that the original due date was not always supplied, but that it was recorded in 1,412 of the 1,954 cases in which employers filed such statements. Attachment 1, Ferguson Report at 10. In 352 of those cases or 25%, the position statement was filed after the original due date, with an average delay of 18 days. *Id.* While this data is incomplete and the Board is unable to determine whether the late filing was authorized pursuant to a motion for an

extension, it is highly likely that virtually all of this very significant variance from the original due dates of position statements was authorized by regional directors because there are almost no reported cases in which the Board or a regional director has been asked to limit the issues a party can raise or bar a party's presentation of evidence based on the party's failure to timely file a position statement. The data produced by the Board concerning the scheduled opening date for pre-election hearings and the actual opening date and for the original due date for the voter list and the actual filing date, reveal similar limitations in the Board's data and similar indications that regional directors are exercising discretion to grant extension under appropriate circumstances. Attachment 1, Ferguson Report at 10-11.

The Board informed Members of Congress that over 1,000 orders have issued rescheduling pre-election hearings since the amendments took effect. NLRB to Senator Murray, April 13, 2018, at 2. Only 44 orders issued denying requests for postponements. *Id*. Moreover, employers only made 197 motions to postpone hearing during the same time period. *Id*.

Despite its obvious limitations and flaws, in combination, this data clearly suggests that regional directors are exercising their discretion to grant extensions of the standard times for the service and filing of position statements, the opening of pre-election hearings, and the service and filing of eligibility lists under "special" and "extraordinary" circumstances.[3] In contrast, there is no evidence that would suggest the rules need to be amended to address any systematic abuse of discretion by regional directors or the Board or to otherwise alter the standards for extending deadlines.

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[3] A finding of "special circumstances" is needed for a short extension of time to file a position statement and corresponding short delay of the opening of the hearing and of "extraordinary circumstances" for a longer extension and delay. *See* Current §102.63(a)(1) and (b)(1). Extensions of time to file and serve the eligibility list may be granted under "extraordinary circumstances." *See* Current § 102.62(d).

## IV. The Board Should Not Revise or Rescind the Amendments Based on Predictions that Have Now Been Refuted

The Board should not rescind or revise the amendments for purely ideological or partisan reasons. The Board should not be guided by allegations concerning what the impact of the amendments would be, but rather by the empirical evidence of what the impact of the amendments has actually been.

In her dissent to the issuance of the Request for Information, Member McFerran wrote that the majority's failure to itself analyze the actual impact of the amendments suggests "that they would rather not let objective facts get in the way of an effort to find some basis to justify reopening the Rule." 82 Fed. Reg. 58789. Now that the Board has gathered the facts in response to our Freedom of Information Act request and a congressional request, and we have analyzed those facts and other publicly available data on the actual impact of the amendments here, if the Board nevertheless rescinds or revises the amendments, it will have demonstrated that Member McFerran was prescient in her prediction of the preordained outcome of this inquiry.

## CONCLUSION

For all of the above-stated reasons, the AFL-CIO requests that the Board make no changes to the amended rules.

Respectfully submitted,

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