

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.nlr.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.nlr.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.nlr.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.nlr.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.nlr.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 of 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.

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,

/s/ Craig Becker
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Attachment 1

Report:
**Assessing the Impact of the April 2005 Amendments
To the NLRB Representation Case Procedures**

John-Paul Ferguson
Stanford University
17 April 2018

I was asked by the AFL-CIO to analyze data concerning National Labor Relations Board representation proceedings in relation to the AFL-CIO's submission of information to the Board pursuant to the Board's request for such information published in the Federal Register on December 14, 2017. 82 Fed. Reg. 58783. This report is the product of that analysis.

QUALIFICATIONS

My qualifications are set forth in my CV, which is attached hereto as Exhibit 1.

DATA ANALYZED

In order to produce this report I was given access to data provided to the AFL-CIO by the NLRB pursuant to a Freedom of Information Act request. The AFL-CIO's request is attached hereto as Exhibit 2. The NLRB's response summarizing the data that was produced is attached hereto as Exhibit 3. In most of the analyses described herein, I consider closed cases from the NLRB's NxGen case-tracking database, covering the five-year period from October 2012 to October 2017. This gives 2.5 years of data on either side of the rule change to compare.

SUMMARY OF ANALYSIS

My analysis focused primarily on determining what changes were associated with the Board's adoption of amendments to its representation case procedures that took effect on April 14, 2015. I analyzed the data to determine if the amendments were associated with any changes in the time needed to process representation cases from petition filing to election, the outcome of elections, the number of petitions filed, the number of employees gaining representation through the election process, the percentage of cases requiring the issuance of a decision and direction of election, the overall time from petition to case closing, and several other variables.

In general, I concluded that the amendments are associated with a significant decrease in the time between petition and election and the time between petition and the closing of cases, but that the amendments are not associated with any other significant changes in case processing variables or outcomes.

In addition, I analyzed whether the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), issued on August 26, 2011, was associated with any changes in the size of units in representation proceedings.

METHODOLOGY

I. What it means to have an effect: Election Lag vs. Petitions Filed

The subject of this report is changes and effects associated with the April 2015 amendments of the representation case procedures. In drawing comparisons, I want to be clear about what it might mean for the rule change to “have an effect” on something. Evidence for an effect should satisfy several criteria. First, the effect size should be substantively meaningful, not just statistically significant. Second, the effect should be clearly observable in simple descriptive statistics. Third, the effect should be concentrated temporally around the rule change. These criteria are important for distinguishing between effects that are probably *because* of the rule change, and effects that happen *during* or *alongside* the rule change.

I describe two empirical examples at the start in order to illustrate this distinction. The advantage of doing so is to give the reader a sense of how I evaluate whether a time trend observed in the data can or should be attributed to the rule change. By going into detail on these first two examples, I can compare what real effects and statistical artifacts look like. When I present other analyses, I can refer back to the types of analyses done on these first two.

I.A. Time between filing and election

I define the term “election lag” as the time between when a petition is filed and when the NLRB-supervised election is conducted. I operationalize election lag as the number of days between the petition filing date and the date of the election. (Obviously, this is only defined on cases that resulted in elections.) There are 8,335 cases in the analysis period with information on filing and election dates. Election lags have a skewed distribution: most elections are held within a few weeks or at most a couple months of the petition filing, but a small number take place much longer after petition filing. Consequently, the average election lag tends to be much greater than the median lag. Thus, in Figure 1 I present monthly observations over five years for the median election lag, as well as the interquartile range. The red line in Figure 1 and subsequent figures indicates April 2015, when the rule change was implemented.¹

The advantage of presenting the data this way is that it becomes immediately obvious that there was a major reduction (nearly half) in election lag in the immediate wake of the rule change. The reduction happened quickly and persisted for the rest of the study period. Another thing Figure 1 shows is that there was no underlying time trend in election lag, net of the rule change itself. Median lag hovered under 40 days for 2.5 years before April 14, 2015; it hovered over 20 days for 2.5 years afterward.² This makes it more straightforward to associate the

¹ Because Figure 1 and subsequent figures collapse data to a monthly observation, the point intersecting that red line represents the average from 1 to 30 April 2015, and other months are calculated accordingly. That said, adjusting all the data to consider 30-day increments before or after the rule change produces substantively identical results to those seen here.

² The spike in delay in late 2013 appears to be the product of a single dispute between two unions concerning the right to represent certain healthcare workers in California. Removing those cases from the analysis does not change the pattern of results.

reduction in election lag with the rule's implementation. This is nearly a textbook example of what an "effect" should look like.

1.B. Number of petitions filed

Compare the time to election with the number of petitions filed every month with the NLRB. Both are simple variables. Contrary to election lag, there is no evidence that the rule change affected the number of petitions filed. However, if you do your analysis wrong, you can produce what looks like a significant effect. I think it is useful to go through one such analysis in detail to see what the pitfalls are and to give the reader a sense of what is happening behind the curtain.

Figure 2 shows monthly counts of petitions filed. I again flag April 14, 2015, when the rule was implemented. Looking at these data, no long-term pattern jumps out. The first and most straightforward statistical test of whether the rule change had any effect is a *t*-test of differences in means. We can look at the average number of petitions filed per month after the rule change, compared to before the rule change, and test whether the difference is larger than we would expect by chance. It is marginal. On average, 212 petitions were filed per month before the rule change, 197 per month afterward. The standard errors around these numbers are 5.5 and 5.4 respectively.³ There is a 5.03-percent probability that we could observe this difference in the averages just by chance.

This difference in the before-after data could also just reflect a longer-term trend in these data. We can regress petitions filed on time, to see if there is any simple, linear trend evident in this time series. That is, we can estimate the parameters of the model:

$$Petitions_t = \beta_0 + \beta_1 FilingMonth_t + \epsilon_t$$

There is apparently none. A linear regression of petition counts on filing month yields a coefficient of $-.38$ for filing month, with a standard error of $.22$. The probability that we could get that negative trend by chance, given the underlying variability in the data, is 9.5 percent. The shorthand for this is $(\beta_1 = -.38, p < .095)$. For traditional standards of statistical significance, we would like to see $p < .05$; we are not close here. (Full regression results are available on request.)

Something to notice in figure 2 is that there is marked seasonality in these data. Petitions are more likely to be filed early in the year and especially uncommon in December. It could be that the time trend here is *not* simply linear, that it is swamped by the seasonal swings in petition counts. One way to account for this is to allow each calendar month to have its own effect, and then look for a time trend. That is, we can subtract the mean for December from all of the December observations, the mean for January from all January observations and so on, and then see if there is a time trend in these "de-measured" observations. This is equivalent to regressing counts of petitions on the filing month and indicator variables (equal to 1 or 0) for each month:

³ I round statistics here.

$$Petitions_t = \beta_0 + \beta_1 FilingMonth_t + \beta Month + \epsilon_t$$

(The third term on the right-hand side is in bold to indicate that it is actually a vector of eleven variables. You have to omit one month to compare the others to; I chose January.) If you do this, there is much stronger evidence for a time trend: $\beta_1 = -.50$, $p < .003$. It does seem that monthly petition counts have been falling over time, though the effect is small, about half a petition per month on average. The question then becomes, can we attribute this decline to the rule change?

We can now compare the periods before and after the rule change, taking these monthly idiosyncrasies into account. I do this by including an indicator variable for whether the observation was from before or after the change.

$$Petitions_t = \beta_0 + \beta_1 FilingMonth_t + \beta Month + \beta_2 PostRule + \epsilon_t$$

If I do this, that indicator is not significant ($\beta_2 = -12.01$, $p < .30$), and the apparent downward trend in petitions over time *also* becomes insignificant again ($\beta_1 = -.20$, $p < .53$). Given that the post-rule indicator and the filing month are both time variables, it is not too surprising that neither is significant when included in the same model. They measure very similar things, and it is difficult to attribute variance to either one of them.

As a last and most “sophisticated” test, we might let the time trend *itself* vary before and after the rule change. That is, rather than just including an indicator for whether an observation is from before or after the change, which is equivalent to letting the intercept of the time trend change but keeping the slopes equal, we can multiplicatively interact the indicator with the time trend, allowing the slopes to vary:

$$Petitions_t = \beta_0 + \beta_1 FilingMonth_t + \beta Month + \beta_2 PostRule + \beta_3 PostRule \times FilingMonth_t + \epsilon_t$$

This allows us to interpret the time trend before the rule change as β_1 , the “bump” (if any) from the rule change as β_2 , and the time trend after the rule change as $\beta_1 + \beta_3$. In this model, there is a statistically significant increase in the immediate wake of the rule change, and the slopes *are* different. Whereas before the rule change $\beta_1 = .74$, $p < .07$, afterward $\beta_1 + \beta_3 = -1.25$, $p < .00$.

I combine all of these results in figure 3. Panels A and B at the top of the figure do not support any impact from the rule change. In A (the simplest linear model), the range of uncertainty around the fitted estimate includes zero. Accounting for the calendar month (panel B) helps reveal a negative temporal trend, and greatly increases the model’s overall explanatory power. Notice that the simple linear model in panel A only explains 4.7 percent of the total variation, while adding in the controls for month in panel B explains 49.4 percent of it. By contrast, adding the indicator for the rule change in panel C does little: the variance explained only rises to 49.5 percent.⁴ Allowing the time trend to differ on either side of the change seems

⁴ Adding an indicator of the rule change to a model of *election lag* that already controls for the time trend and calendar month raises the variance explained from 71 to 91 percent.

more important: the “bump” in April 2015 is marginally significant, the time trends themselves differ, and the variance explained rises to 58.9 percent.

Should we conclude from this that the rule change led to an initial increase in filing rates but then encouraged declines? No. Models like these are sensitive to outliers, and it is possible that the lower counts in 2016 and 2017 entirely account for the estimated difference. Whenever one does a comparison like this, it is important to also do a *placebo* test. Do we find similar results if we treat a *different* month as the break point?

With this in mind, consider Figure 4. This figure reports the estimated coefficients from 37 different models. Each one models the count of petitions filed as a function of the time trend, calendar months, the rule change, and the interaction of the change with the time trend, as in panel D of Figure 3. The difference is that I vary the month of the rule change, ranging from eighteen months before the actual change to eighteen months after. Figure 4 reports the resulting coefficients and standard errors. The placebo test is really important here, because it demonstrates that we can find negative “effects” from placebo rule changes as well, ranging anywhere from twelve months before to six months after the actual change.

What I have done in this section, statistically, is build a mirage. When you have a lot of variables and a lot of choices for the model you might estimate, you can often find statistically significant effects where none exist. Partly this is a function of hypothesis testing itself. If you count findings as significant when the probability of their appearing by chance is 5 percent or less, then up to 5 percent of the time you will “find” a significant result where none actually exists. Other times you can find a correlation that confirms what you were expecting, and fail to see whether other explanations could produce the same result. The “effect” of the rule change on petitions filed presented in panel D of Figure 3 is statistically significant, but it is not substantively large (half a petition per month); it is not visible in simple descriptive analyses (we needed a fixed-effects regression with an interaction term to find it); and it is not temporally concentrated around the theorized cause (break points up to a year before the rule change are also statistically significant).

This is why I always prefer to visualize the underlying data. A large and important effect is likely to jump out in simple analyses, like the plot of the variable over time. This holds when we look at the time between petition filing and elections, as in Figure 1. By contrast, just looking at the data in Figure 2 should make us suspicious of any estimated effects on the number of petitions filed. It just doesn’t pass the reasonableness check.

This section is long, given that my conclusion is that the rule change had no effect on the average monthly number of petitions filed. I think it is important though to explain what I mean when I say there is no effect, and to explain how I test this.

In the rest of this report, I do not go into nearly so much detail for each analysis. Instead I present aggregate results and my opinion of whether there is any evidence of an effect from the rule change. For each variable, I have done the sorts of analyses that I show here in order to form my opinions.

II. Further analyses of the rule change

II.A. Election outcomes

We saw that elections happen in a shorter interval after the rule change. Do the outcomes differ? To study outcomes, I focus on the 8,335 cases in the study interval that have an election date recorded. I count as union won any such case whose closing reason is "Certification of representative"; any other closing reason I count as a union loss. (The vast majority of the remainder are "Certification of result.") I plot the results in Figure 5.

Eyeballing the raw data in Figure 5, the trend looks non-linear, rising before the rule change and possibly declining afterward. Rather than play around with linear regressions (which require a constant trend over time), I also fit a LOWESS, or locally weighted regression line, to the data.⁵ That line agrees with the initial impression: union win rates rise through 2013 and 2014, roughly until the rule change, and decline afterward. Union win rates in elections have been climbing for a generation,⁶ but the rise in the 2.5 years before the rule change seem to have been reversed since.

As always, though, we should ask whether a difference seen *after* the rule change is probably a *result* of the rule change. In this case, it is relevant to consider the starkly low average union win rates in October and November 2016. Cases where the petitions were filed in these months were distinctly less likely to result in union victory. These outlier months may pull the entire estimated trend downward. Accordingly, I also fit a LOWESS curve that excludes October and November 2016; this is the dashed line in Figure 5. That latter curve's trend is statistically indistinguishable from zero after the rule's implementation.

In my opinion, there is no evidence that union win rates declined after the rule change, setting aside the months of October and November 2016.

II.B. Pro-Union vote share

For the average pro-union vote share, I turn to the tally file, which contains records published between late 2010 and early 2017. There are 10,285 unique case numbers in this file, but 11,192 records because some cases have multiple units and elections may have multiple tallies. (Multiple tallies can be recorded for example when there is a recount. More than 90 percent of cases, though, have a single unit and a single tally.) For this analysis, I have kept the last recorded tally for each unit. This yields 10,461 elections. I also focus on elections where there is only one union on the ballot. There are 500 units with more than one union on the ballot, leaving 9,961. Of these, 8,191 were published in the five-year window around the elections rule change.⁷

⁵ Locally weighted regression calculates the slope of the regression line around each observation as a moving average of nearby observations, giving less weight to more distant observations. This allows its slope to vary over the observed data, and is a good exploratory approach to follow before assuming some more restrictive (if computationally simpler) parametric form like linear or quadratic effects.

⁶ I have previously studied union win rates in representation elections going back to the early 1960s. Average win rates declined from over 60 percent in the early 1960s to about 45 percent in 1982. They then began climbing, reaching 55 percent by 1999 (Ferguson, 2009: 66). I extended that analysis using data from the NLRB's CATS and NxGen case-tracking systems, and found that average win rates had climbed above 70 percent by the end of 2016 (Ferguson, 2018: 4).

⁷ There are 406 cases where the vote share, calculated as the votes for Labor Organization 1 divided by the number of valid votes cast, is greater than one. I set these aside when calculating trends, though their exclusion has almost

There are two main ways to calculate vote share: as an average of election results, or as a size-weighted average of election results. The latter is useful for a sense of the share of *all voters* who supported unions, but can mis-estimate the number of cases that unions actually won or lost. I prefer to take the unweighted average of vote shares across establishments, and then separately analyze the effect of size on vote share.

Figure 6 plots average vote shares for the resulting 7,785 cases. 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. The estimated slopes of the trend before and after the rule change cannot be distinguished from one another.

II.C. Employees represented

Having looked at the win rate and the vote share, I then calculate the count of workers who gained representation each month. This is straightforward, since it is just the number of eligible votes in elections counted as union won when generating Figure 5.

While the union win rate has risen over time, the number of workers gaining representation per month has not. As Figure 7 shows, the estimated linear effect of time on workers organized is indistinguishable from zero. Given that Figure 5 showed an increasing win rate, this implies that fewer elections are being held, that the unit size in elections is trending downward, or some combination of the two.

There is a spike in the count of workers gaining representation, though, in the month immediately after the implementation of the rule amendments. Its inclusion does not bias the estimate of the time trend plotted here—that is, setting aside May 2015 when regressing workers gaining representation on time still produces a zero, rather than a negative, trend. But the spike is still worth pointing out. This increase in workers gaining representation seems to be due not to a sudden increase in unit size in the elections that month, but to a sudden increase in the number of elections held that month. While there is no significant trend in the number of elections held per month over time (There were 137 per month on average), there is a significant spike in May 2015, and the average lag between petition filing and election in that month is significantly larger than before or after. Other than this one-time effect, though, there seems to be no impact on the number of workers gaining representation after the elections rule change.

If there is not a significant trend in the number of elections but an increasing union win rate, the fact that there is no significant increase in the number of workers gaining representation monthly would seem to imply that unit size has been decreasing. Figure 8 presents the median unit size over time, with the interquartile range. There is a significant negative trend in those data, but it is not substantively important and not related to the rule change. Median size is declining by just .05 workers per month, or by three workers over the entire five-year period. Notice though that, even in the interquartile range, is considerably more variability on the larger than the smaller side of the median. This strongly suggests that

no impact on the bigger picture. While the average pro-union vote share over the study interval is 62.1 percent if they are included, it is 61.7 percent when they are excluded.

the negative trend in the *average* unit size (which is larger) is driven by a handful of months where larger elections happened, and those months' being clustered before the rule change.

I was also asked to determine if any changes in the mean or median unit size is associated with the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), issued on August 26, 2011. As Figure 9 demonstrates, the decision is not associated with any discernable change in unit size.⁸

II.D. Cases proceeding to election; cases proceeding to withdrawal

Monthly withdrawal rates, measured as the percentage of cases with closing reason recorded as "Withdrawal Adjusted" or "Withdrawal Non-adjusted," also trended downward throughout the study period. Similarly and somewhat necessarily, the rate of petitions proceeding to election climbed throughout the period. See Figure 10. There is no evidence that withdrawal rates began declining faster, or election rates began rising faster, after the rule change than before.

II.E. Case Lag

The length of representation cases, measured as the number of days between initial petition filing and the closing of the case, was lower on average after the rule change: 77 days before, 56 days after ($p < .00$). I visualize case lag in Figure 11 using the median and interquartile range because, as with election lags, the mean here is quite skewed. The effect is substantial and concentrated around the rule implementation. There is no time trend in median case length net of the rule change.⁹

Obviously, we would expect such declines to be concentrated among cases that went to elections. To check this, I split the data into cases that resulted in elections and cases that did not. These are also plotted in Figure 11. Indeed, the decline is largest among cases with elections, but there is also a significant decline in case length among cases that do *not* result in elections. (Proportionately, the decline is comparable.) There is some evidence that the election rule amendments are not just shortening time to election but also wrapping up other cases more quickly.

II.F. Stipulated Elections versus Directed of Election

I operationalize a petition's resulting in a stipulated election agreement by the case having a "stip approved date" recorded. I operationalize directed elections by the case having a "DDE approved date" recorded.

Three quarters of the records have one of these notations recorded. Of the remainder, the vast majority closed by decision and order, withdrawal or dismissal. Of the cases where the

⁸ Figure 9 draws on the combined panel of representation cases I assembled from CATS and NxGen data for an earlier analysis. See Ferguson (2018).

⁹ The *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.

closing reason indicates that there was an election, only .75 percent are missing this information.

Figure 12 plots the monthly share of cases with stipulated, as opposed to directed elections. There is no evident time trend in these data, around the rule change or elsewhere.

II.G. Trends in pre-election hearings

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 of the rule change, as shown in Figures 13 and 14. By contrast, the length of time between petition filings and the opening of a pre-election hearing, where one was held, *did* decline. Figure 15 plots the median lag between a case's petition filing and the opening of a pre-election hearing, with the associated interquartile range.

Figure 15 is a textbook example of why it can be important to pay attention to the median as well as the mean. Means are more sensitive to outliers, and at the upper range of the data there can be some incredibly long delays. Such delays exist before and after the rule change; yet the median delay was only 14 days before the rule change, and it shrank to 11 days after the change. That reduction is substantial, given the original delay length.

While the rate of petitions' resulting in pre-election hearings and the length of those hearings was virtually unchanged by the rule implementation, the proportion of times when briefs were filed after the hearing declined markedly. Figure 16 shows the percentage of cases with pre-election hearings in which post-hearing briefs were subsequently filed. Whereas the rate was near 50 percent on average and climbing before the rule change, it fell to about 20 percent afterward and has hovered around that number. This applies to briefs filed by all parties.

II.H. Pre-election requests for review

Over the study interval, up to 7.6 percent of the petitions filed in a monthly period involved a pre-election request for review; the monthly average was 2.6 percent. These requests were granted 30 percent of the time, on average. There is no evidence of any time trend in these figures.

II.I. Objections after elections

There are four fields in the data that record objections: by employers, petitioners, unions, and "others." I focus here on objection rates where the filing party is identified as one of the first three categories.

I plot the objection rates, by filing party, in Figure 17. It is important to note the different vertical scales in these plots. Objections by employers are by far the most common. Over the study interval, more than 85 percent of elections have employer objection filings recorded. Petitioners filed objections in a third of elections, while union-filed objections appear in just 5 percent.

Evidence of any impact from the elections rule changes here is mixed. In Figure 17 I plot trends from the best-fit regression models atop the raw data, as well as 95-percent confidence intervals and the “null” lines associated with a zero relationship. The employer objection rate rises throughout the interval ($\beta_1=.0008$, $p < .004$), but there is no evidence that the objection rate changed in response to the rule change (i.e., the interaction of the indicator variable for the rule change with the time trend is not significant). On the other hand, there is no significant time trend associated with petitioner objection rates ($\beta_1 = -.0008$, $p < .23$) but the indicator variable on the rule change is significant ($\beta_2 = -.047$, $p < .05$). There is no evidence of any time trend in union objection filings. In short, there is evidence that petitioners’ objections are slightly less common (32 rather than 33 percent) after the rule change, but employer and union filings show no response.

II.J. Trends in post-election hearings

The probability of a case’s having a post-election hearing declined over the study interval, as shown in Figure 18. That decline is uncorrelated with the implementation of the election rule changes, though. Despite some exceptionally long post-election hearings in late 2016, evidenced in Figure 19, the average number of days in a post-election hearing has not tended to rise or fall during the interval.

II.K. Blocking charges and blocked cases

I count a case as blocked when the “blocking case” field is non-empty. The resulting monthly counts are displayed in Figure 20. The count of blocked cases has declined significantly over time, but this does not appear correlated with the implementation of the election rule changes. If anything, there appears to be a significant break point in the average block-charge filing rate about a year *after* the rule was implemented: the counts of blocking charges and blocked cases both decrease significantly from the spring of 2016 onward, though there is no evidence of different time trends before and after that break.

III. Trends specific to different parts of the rule change

Here I record some additional analyses of the data. Several of these are summary statistics for the pre- or post-rule-change period, where a time trend or differences in the time trend are less important. Thus, for these I quote numbers.

III.A. Position statements

The average position statement has an original due date of eight days after the petition’s filing. Of the 2,598 position statements where there is clear information on the filing party (i.e., a submission date is recorded specifically for the employer, petitioner, or union), employers account for 1,954. The original due date for this statement is not always recorded, but it is available for 1,412 of the employer cases. In 352, or 25 percent, of these, the employer submitted the statement later than the original due date, by 18 days on average.

III.B. Delay between scheduled and actual hearing openings

Do pre-election hearings begin when scheduled? Since the rule change, there have been 541 pre-election hearings with scheduled dates. Of these, 529 also list their opening dates. In 507 cases, the hearing began when scheduled. In 16 cases, the hearing opened later than scheduled, while in 3 the hearing actually began earlier than the scheduled date. The gap in one of these cases is 730 days, which is either a massive outlier or simply a data error. Of the remaining 18 cases, the average difference is 13 days, with a range from -8 to 92.

III.D. Receipt of voter lists

The database has fields for the original and current due dates for voter lists as well as the actual date the list was received; however, those first two fields are often empty. While there is a date recorded for when voter lists were received in 4,781 cases, there are only original due dates recorded for 1,434. Whether this implies that, where the original deadline is not recorded, the list was received on time, it is impossible to say from the data alone. Of those 1,434, there is a discrepancy between the original deadline and the date received in 553 cases. However, in only 217 of these is the date received *later* than the original deadline. Thus, the average “lag” is only 5 days, with 95 percent of the lags falling between two weeks early and three weeks late—and 50 percent within *one* day on either side.

III.E. Determinative challenges in elections

Of 9,018 election tally records between October 2012 and October 2017,¹⁰ 3,332 had at least one challenged ballot. Whether the challenge was determinative is recorded in 665 instances, of which 574 are yeses. This is 86 percent of the recorded instances, or 14 percent of all elections with challenges. Neither the rate of cases with challenged ballots, the rate at which determinations are recorded, nor the share of determinative challenges differs significantly on either side of the rule change.

IV. Sub-analysis on RC cases versus all petitions

The above analyses have been calculated on all petitions filed in the five-year study window. It is worth checking whether the pattern of effects or non-effects is an artifact of combining different types of petitions, or whether the same pattern of results appears when just RC cases are considered. I therefore replicated all of the major analyses using just the RC cases, which comprise 81 percent of the sample.

Figures 1A through 20A correspond to figures 1 through 20 (for simplicity, I have not reproduced all 20 figures). Perusal of those figures will show that these patterns are largely driven by, and consistent with, patterns among RC cases. There are some level differences. For

¹⁰ There are of course more tallies than there are elections, because of reruns, runoffs and the like. For looking at challenges the tally, rather than the broader election, seems like the right unit to have in the denominator.

example, RC cases have a higher average union win rate and pro-union vote share than other petition types, as well as lower withdrawal rates. These level differences, though, are consistent over time. There is no sign that the effect of the rule change looks different when just considering RC cases. The same point holds for the additional analyses discussed in section II.

I have only separately plotted RC cases here rather than, say, RD or RM cases. Non-RC petitions are comparatively rare, and show considerably more variability when graphed; but that variability is a function of the small sample size. Correspondingly, there are not significant differences in the patterns when considering these petition types.

References

Ferguson, John-Paul. 2009. Contest, Social Valuation and Change in American Labor-Union Organizing, 1961 to 2004. Unpublished PhD dissertation, Massachusetts Institute of Technology.

Ferguson, John-Paul 2018. Organizing Trends in CATS and NextGen NLRB Data. Technical report prepared for the AFL-CIO, January.

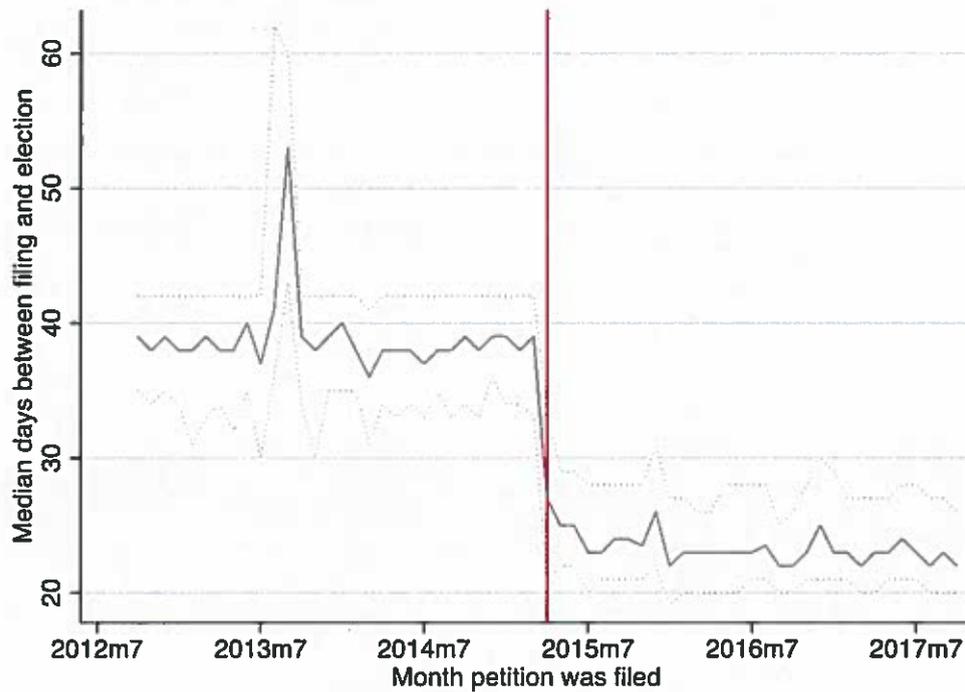


Figure 1: Median days between petition filing and election, October 2012 – October 2017, and interquartile range. The red line indicates the implementation of the election rule changes.

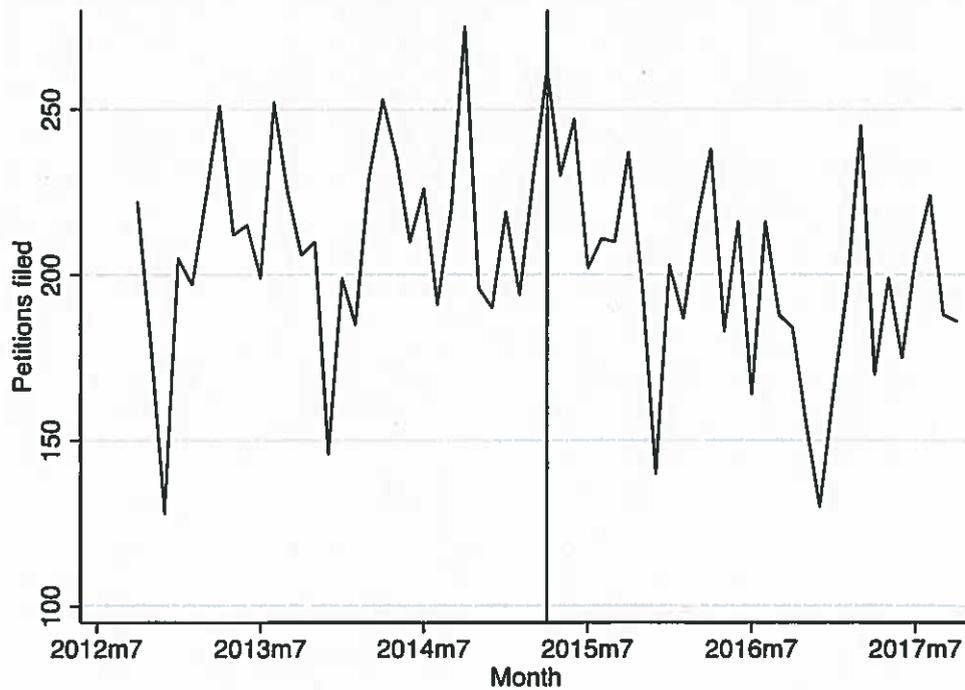


Figure 2: Monthly counts of petitions filed with the NLRB, October 2012 – October 2017. The red line indicates the implementation of the elections rule changes.

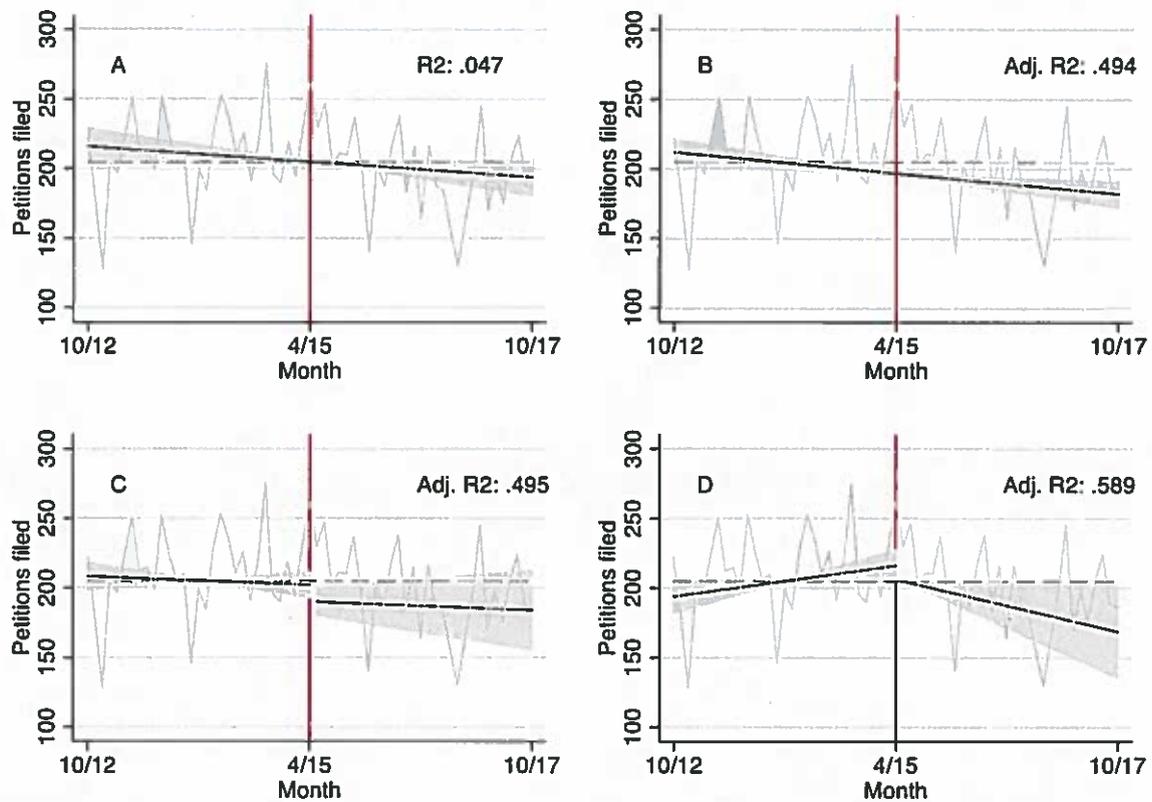


Figure 3: Estimating effects of the election rule changes on counts of petitions filed, with regression models. All plots show the raw data from figure 2 and superimpose estimated time trends (black solid lines), the uncertainty around those estimates (gray shading), and the zero-trend line (gray dashed line). Models report R^2 , the proportion of variance explained; I present the adjusted R^2 for models with more than one independent variable. Panel A presents a linear regression of petition counts on time. Panel B includes indicator variables for calendar months. Panel C includes an indicator variable for the rule change in April 2015. Panel D interacts that rule change with the linear time trend. The red lines indicate the implementation of the elections rule changes.

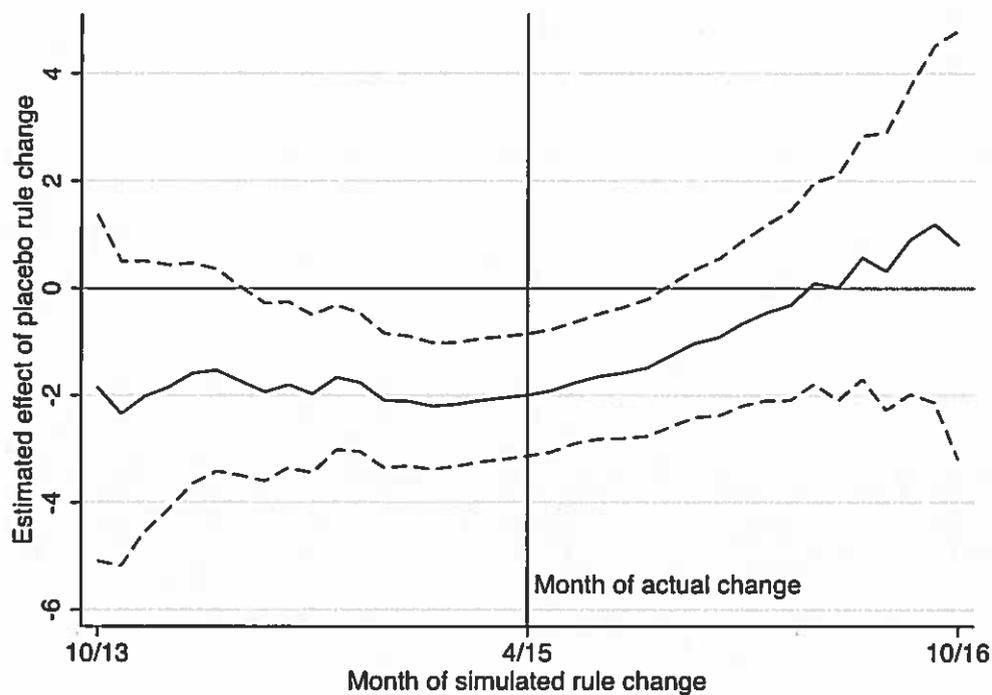


Figure 4: Placebo test for impact of the election rule changes on number of petitions filed per month. The red line indicates the implementation of the elections rule changes. The value of the solid and dashed lines where they cross the red line are the estimated coefficient and 95-percent confidence interval of the interaction between the rule change and the time trend of the model estimated in panel D of Figure 3. That is, the negative value here represents the negative slope of the post-change time trend in that earlier figure. I then fit 36 more models, varying the month that I used as the cutoff, ranging from 18 months before the actual rule change to 18 months after. Such models “detect” negative effects from the cutoff over roughly half of the time period. This should make us extremely skeptical that the effect found in figure 3 represents a real impact of the rule change.

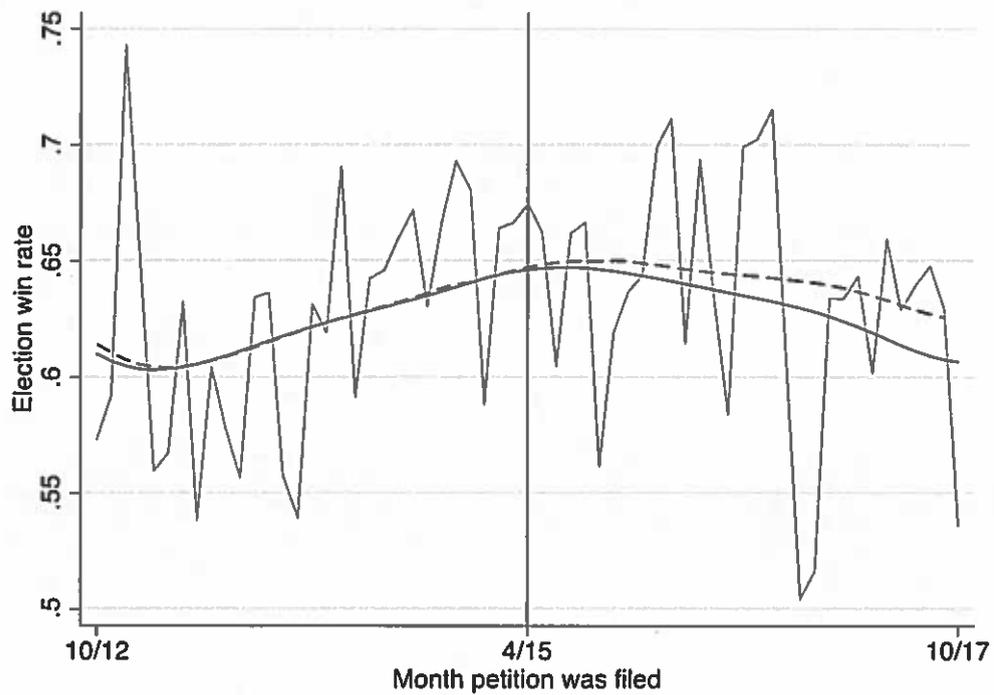


Figure 5: Average monthly union win rates in NLRB-supervised representation elections, October 2012 – October 2017. The red line marks the implementation of the election rule changes. The solid black line is a LOWESS curve; see the text for details. The dashed black line is also a LOWESS curve, estimated while excluding petitions filed in October and November 2016 from the analysis. The post-rule time trend of the dashed line is indistinguishable from zero.

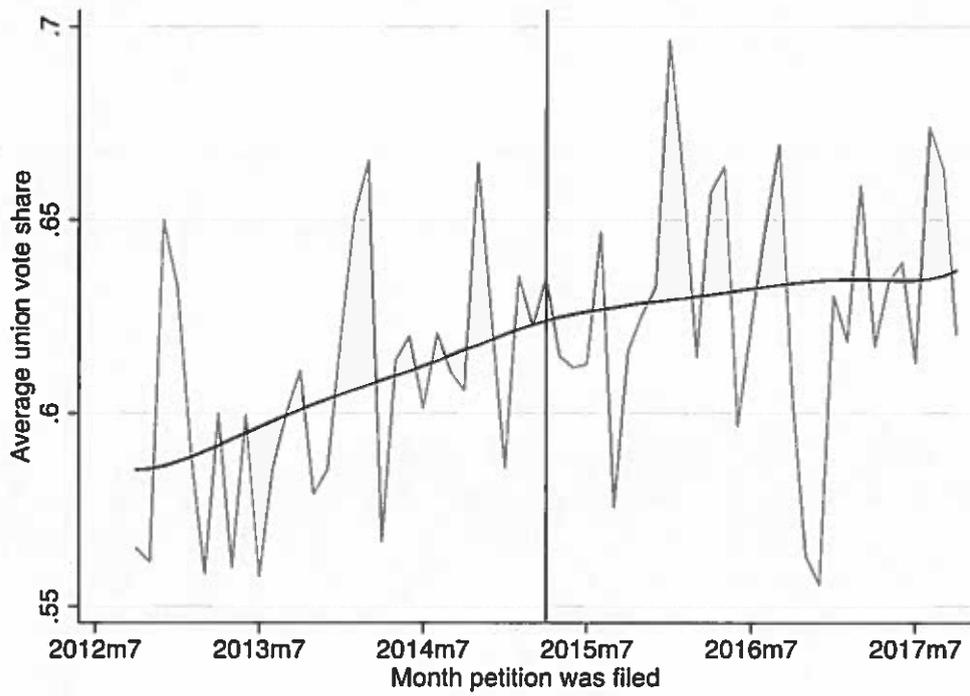


Figure 6: Average union vote share in representation elections, October 2012 – October 2017. Red line indicates implementation of the election rule changes. Differences in the positive time trend before and after the rule change are not statistically significant.

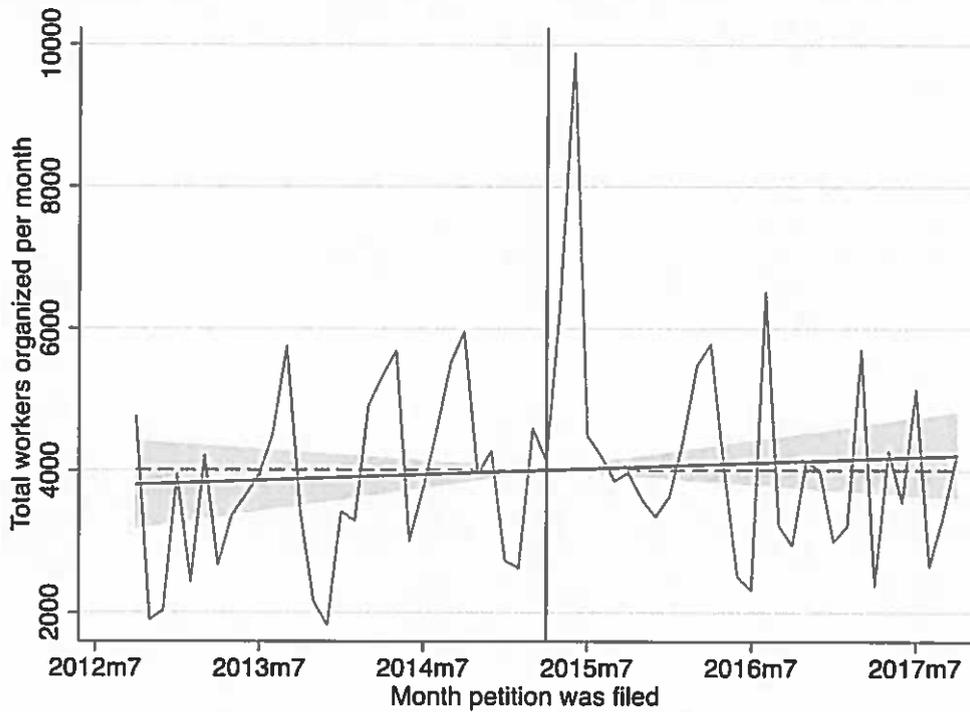


Figure 7: Total workers gaining representation per month, October 2012 – October 2017. Red line indicates implementation of the election rule changes. The spike in workers gaining representation in May 2015 obviously merits further investigation, but it does not alter the fact that the estimated time trend for workers added during this period (black line) is not statistically distinguishable from zero (grey dashed line).

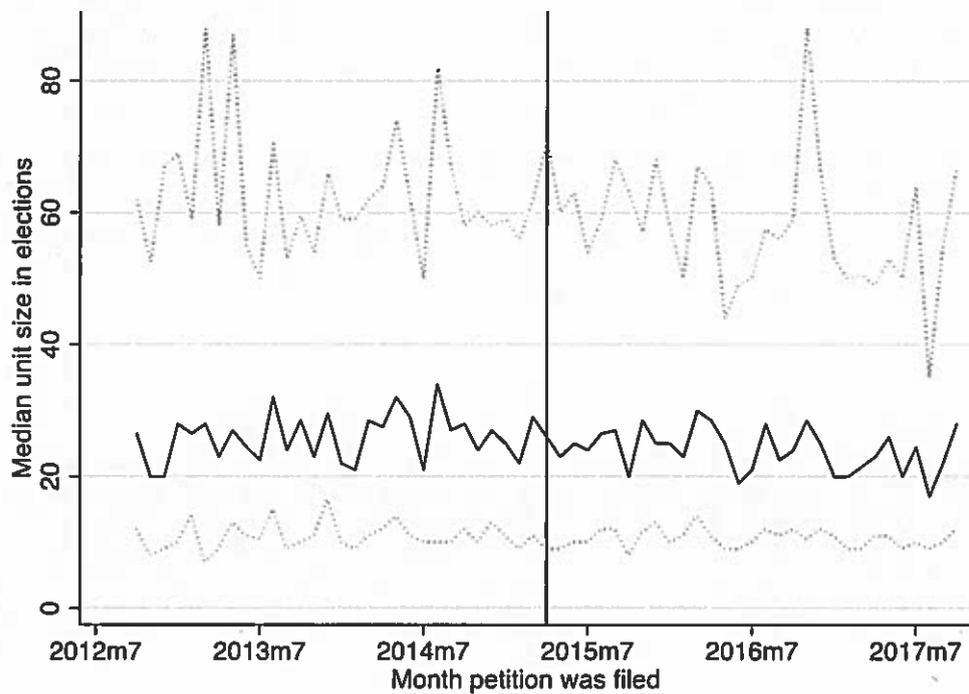


Figure 8: Median unit size in elections with interquartile range, October 2012 – October 2017. The red line represents the implementation of the election rule changes. There is a statistically significant downward trend in the median unit size, but it is substantively trivial (a reduction of just .05 workers per month) and unrelated to the rule change.

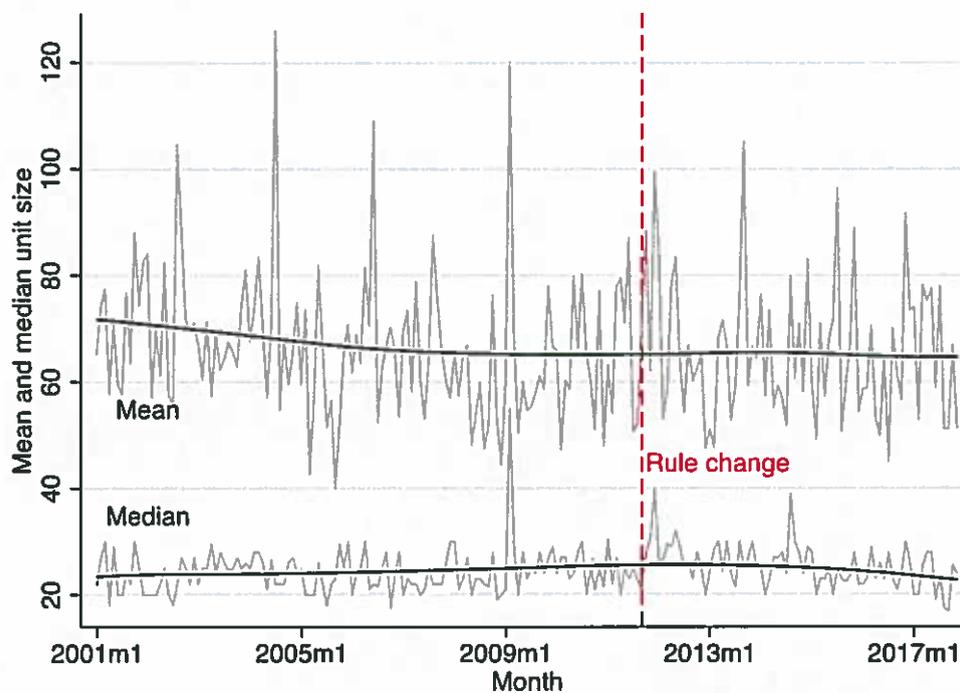


Figure 9: Mean and median unit size with LOWESS fitted curves, 2001 – 2017. This figure combines information from representation cases in the NLRB’s CATS and NxGen case-tracking systems. The rule change flagged in red pertains to the Board’s decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), issued on August 26, 2011. There is no change in either mean or median unit size in the wake of this promulgation.

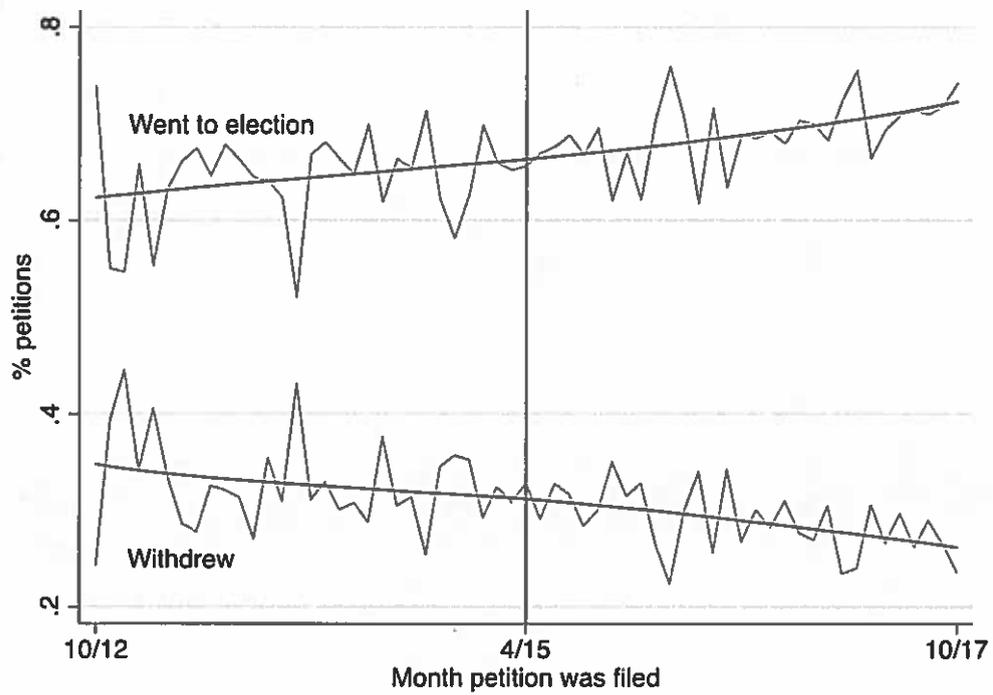


Figure 10: Rate of monthly petition filings that result in election or withdrawal, October 2012 – October 2017. The raw data are in gray. Black lines are LOWESS curves; red line indicates implementation of the elections rule changes. LOWESS curves are non-linear but in this case the local trend is constant over nearly the entire range.

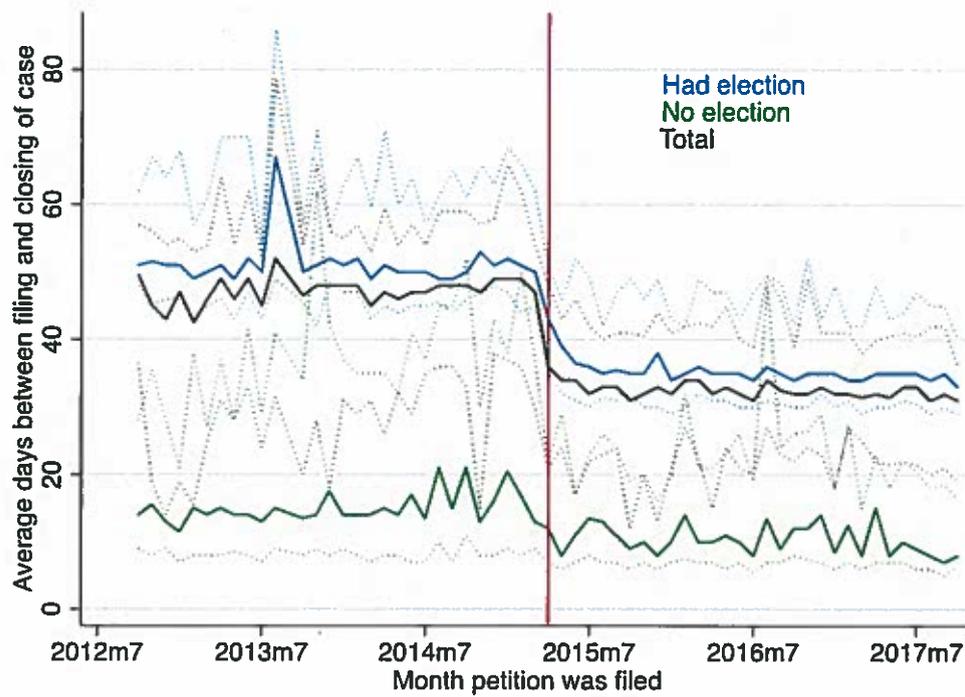


Figure 11: Median case lengths in days; dotted lines show interquartile ranges. The red line marks the implementation of the election rule changes. Most of the decline in case length in the wake of the election rule occurred among cases that held elections, but the length of other cases also declined. This difference is statistically significant.

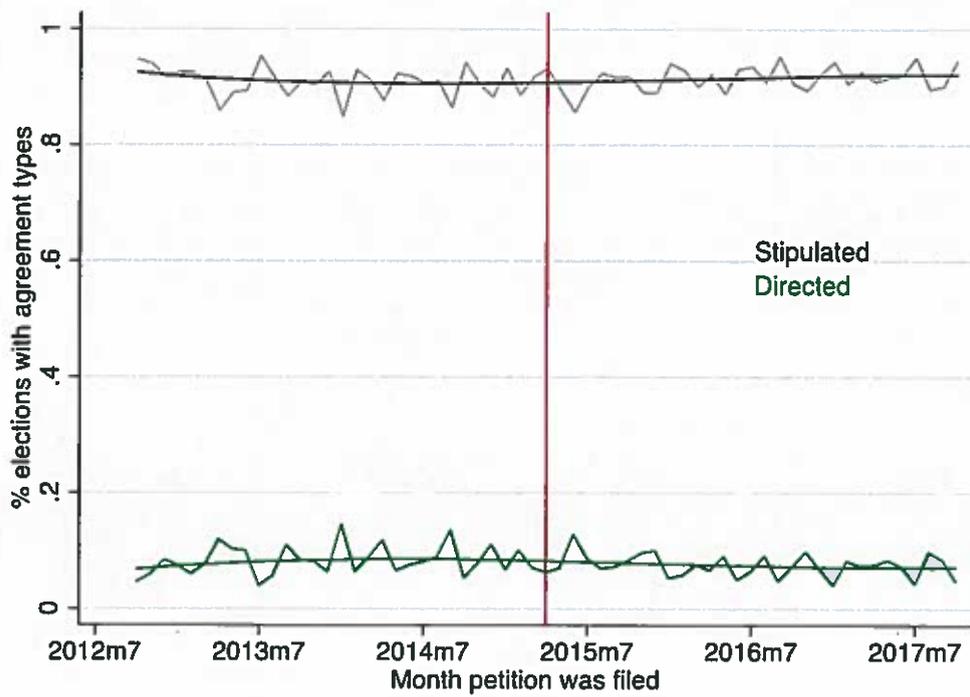


Figure 12: Rate of stipulated and directed elections in monthly filings, October 2012 – October 2017. The red line marks the implementation of the election rule changes.

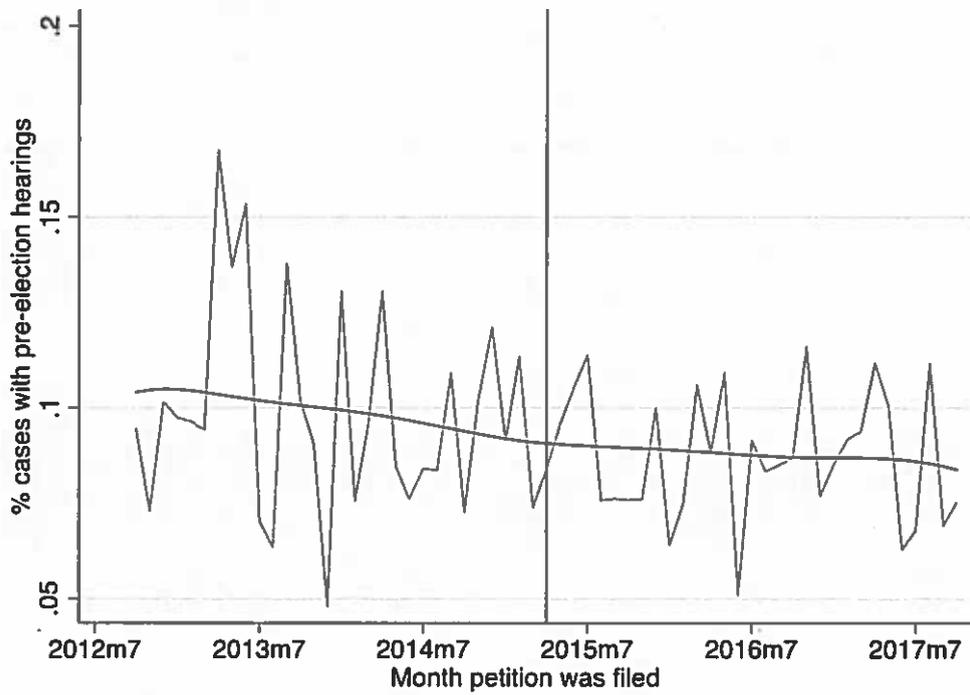


Figure 13: Average rate of monthly filings leading to pre-election hearings, October 2012 – October 2017. The plotted time trend is indistinguishable from zero. The red line marks the implementation of the election rule changes.

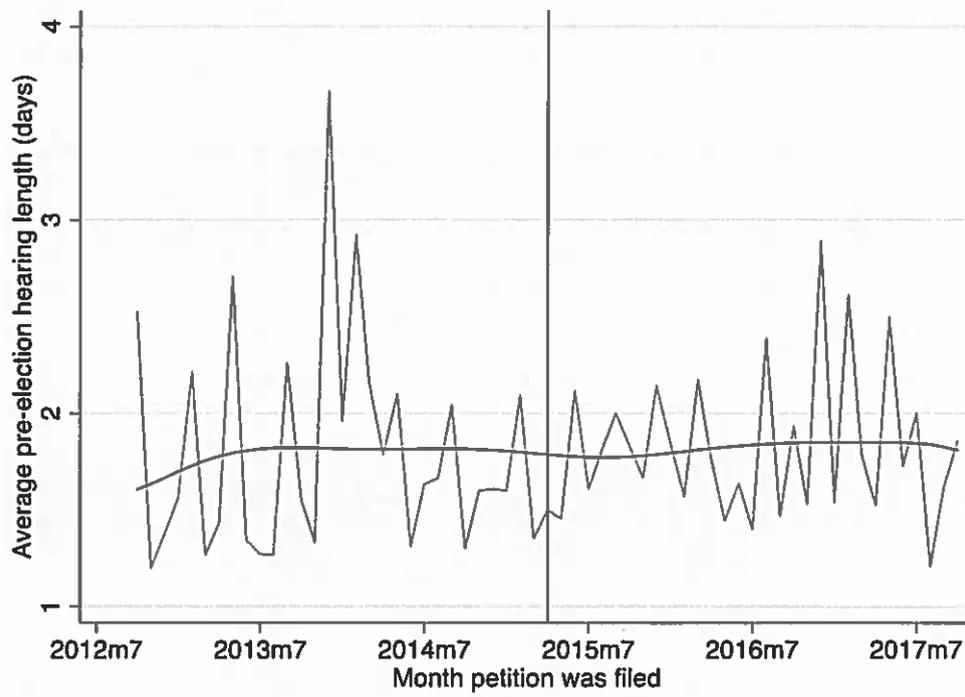


Figure 14: Average length of pre-election hearings, in days, October 2012 – October 2017. The red line marks the implementation of the election rule changes.

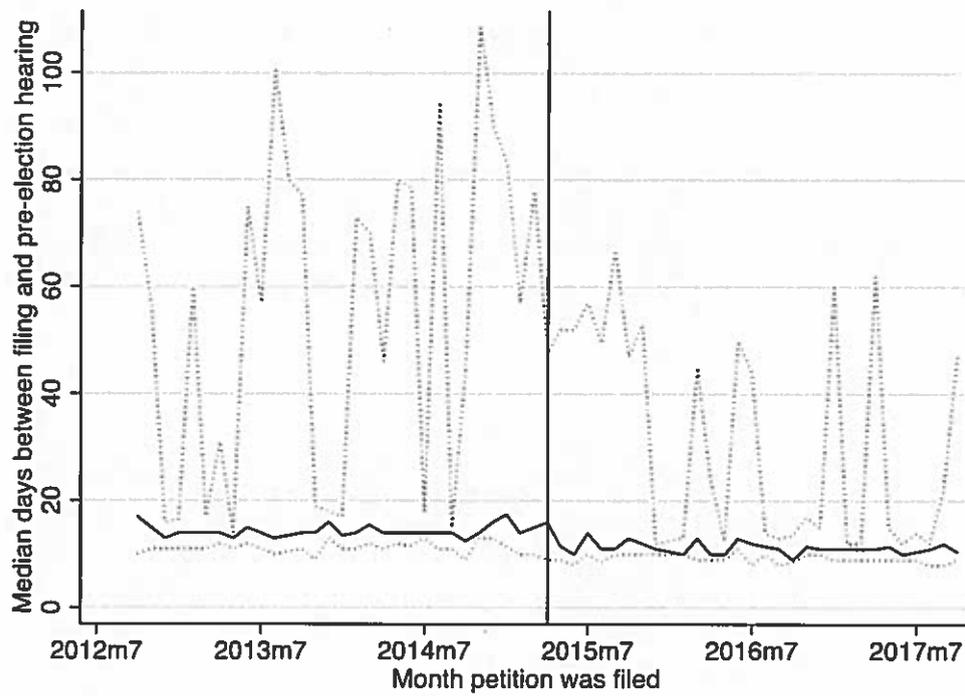


Figure 15: Median days between filing and pre-election hearing with interquartile range, October 2012 – October 2017. Decline in median days after the rule change (red line) is statistically significant.

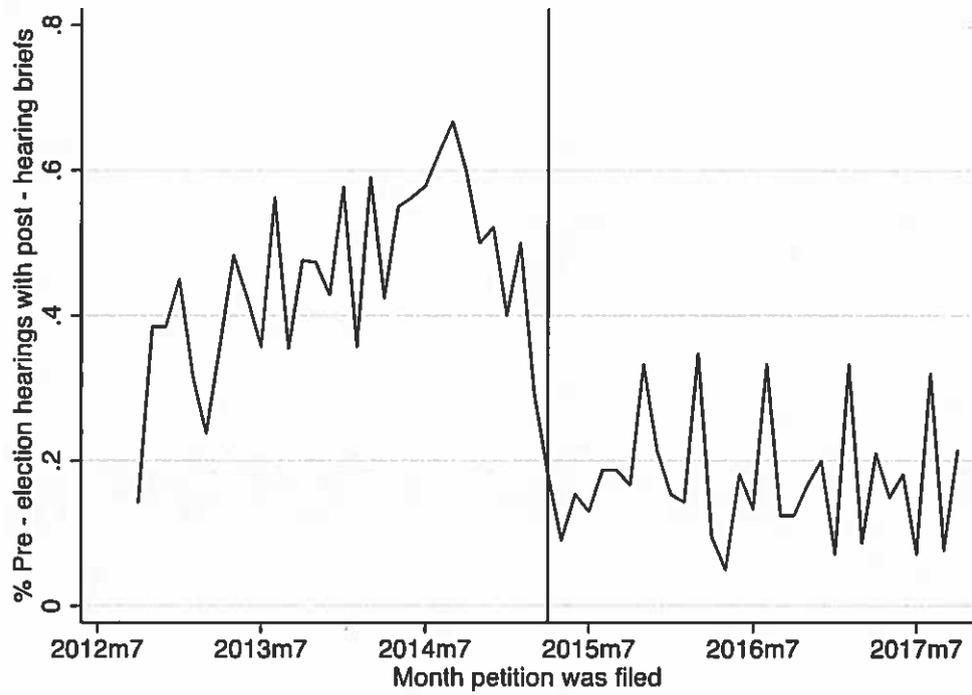


Figure 16: Percentage of those cases in which pre-election hearing was held in which briefs were filed by any party. The red line marks the implementation of the election rule changes.

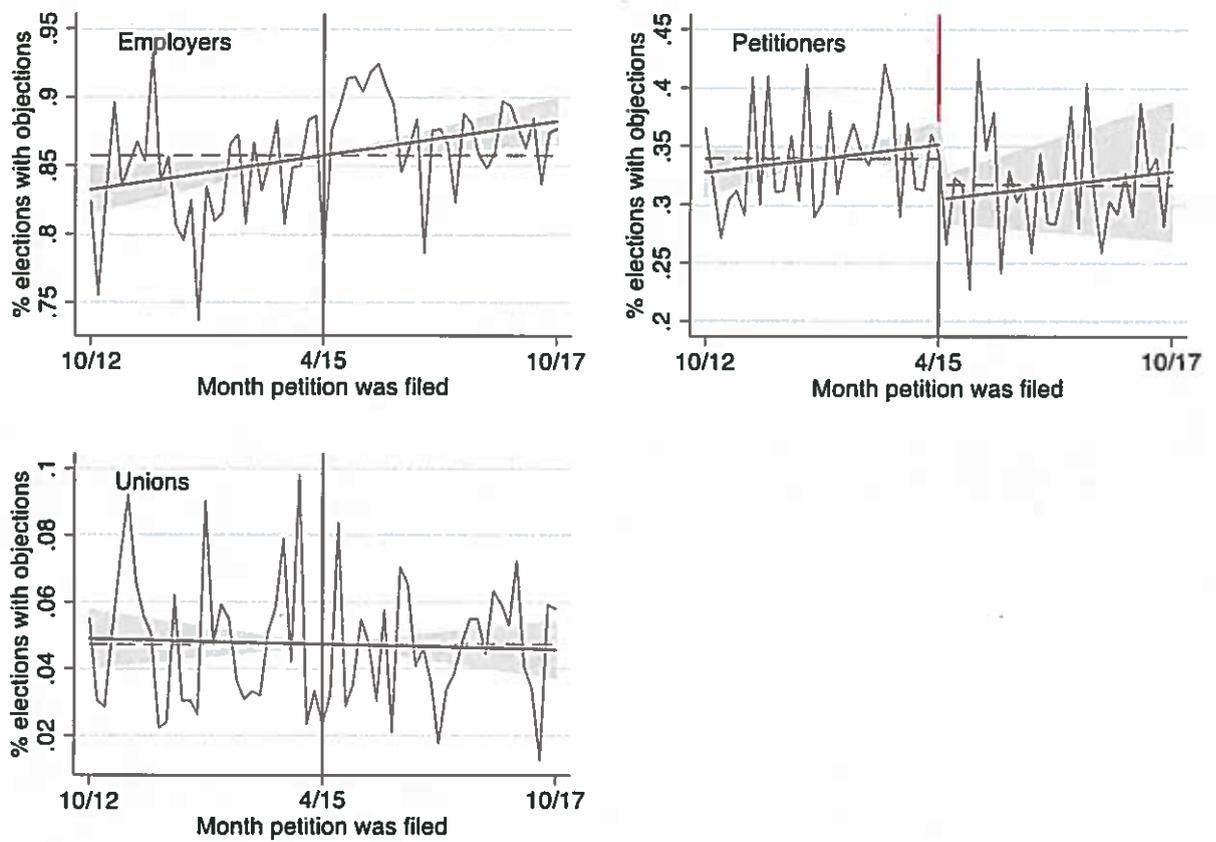


Figure 17: Rates of objections filed after representation elections, October 2012 – October 2017, by filing party. Note the different vertical scales. The employer objection filing rate has risen with time, but shows no relationship with the rule change. The petitioner objection filing rate does not have a statistically significant time trend, but the means before and after the rule change are significantly different. The union objection filing rate shows no temporal trend. The red line marks the implementation of the election rule changes.

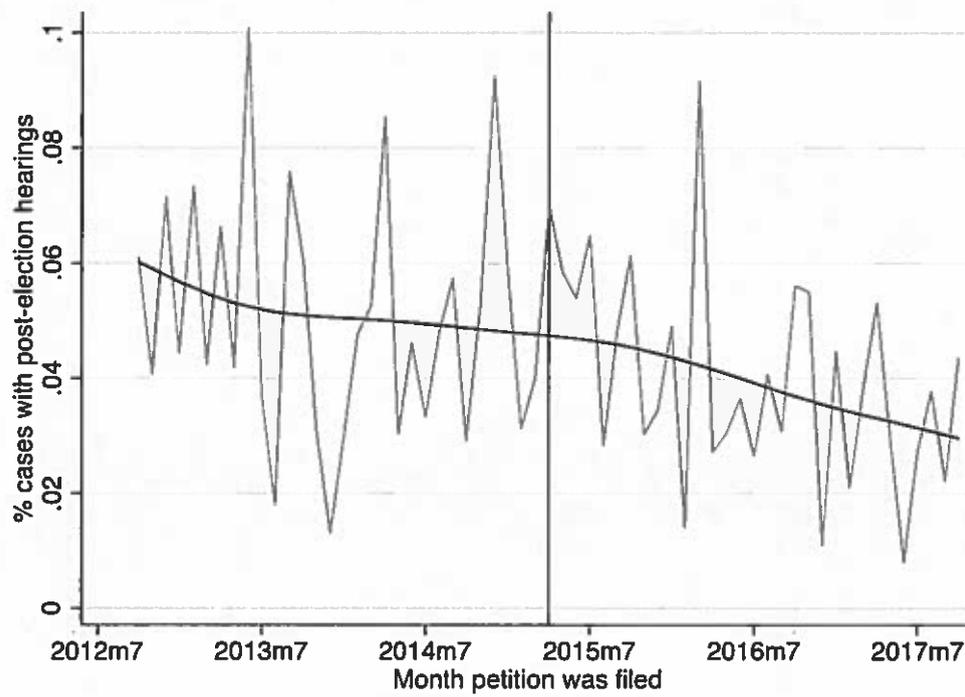


Figure 18: Share of cases that went to election that had post-election hearings, October 2012 – October 2017. Red line indicates implementation of the election rule changes. Downward trend is uncorrelated with the rule change.

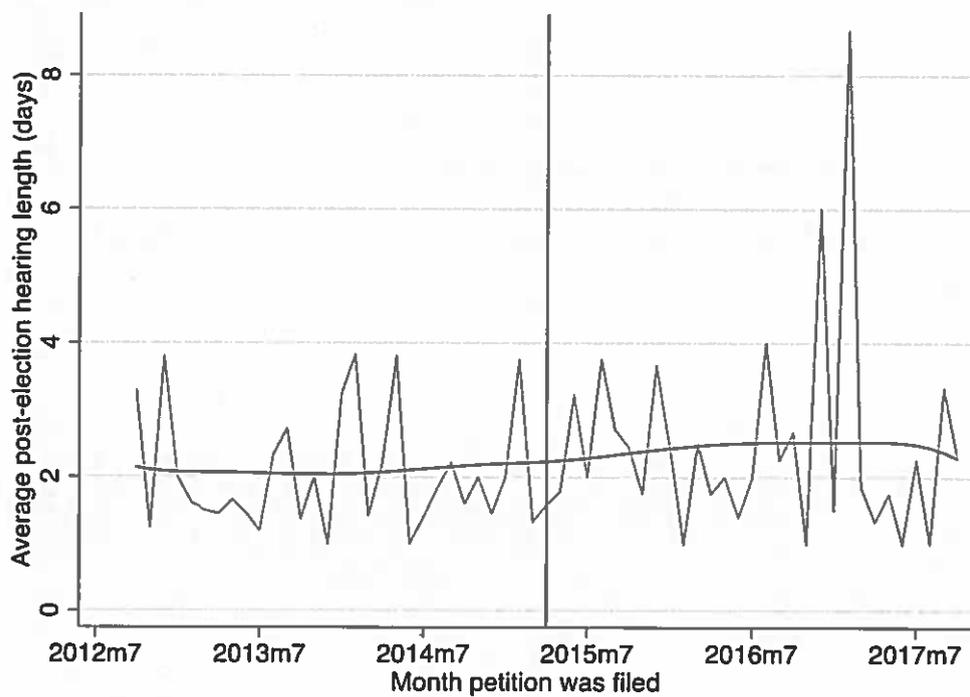


Figure 19: Typical post-election hearing lengths, in days, October 2012 – October 2017. Red line indicates implementation of the election rule changes. No significant change is associated with the rule changes.

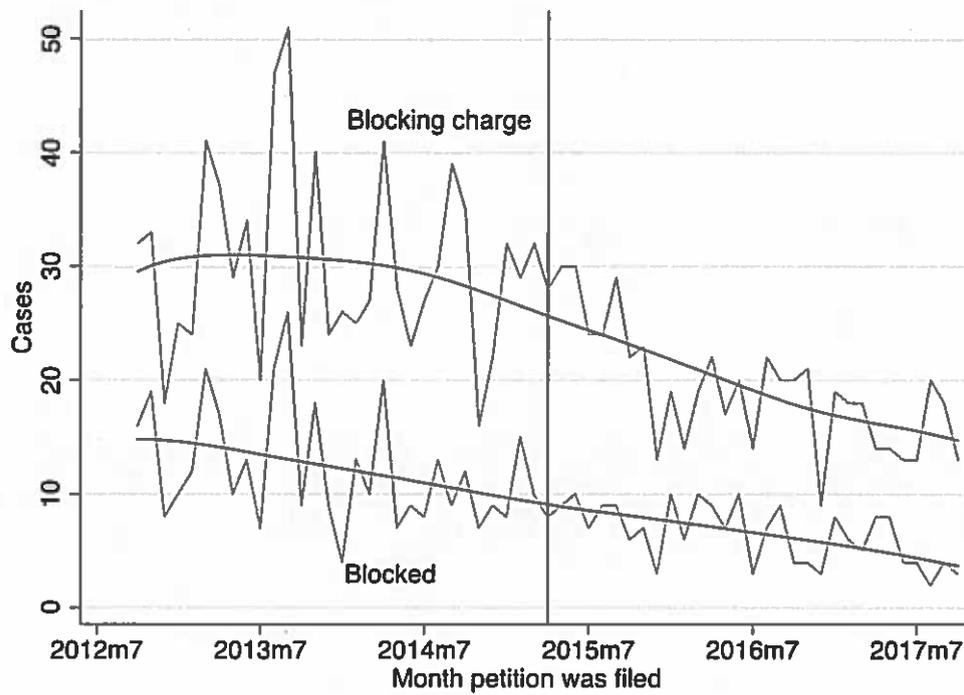


Figure 20: Numbers of blocking charges filed per month and number of cases blocked, October 2012 – October 2017. Cases blocked as a share of blocking charges is nearly constant over time. Red line indicates implementation of the election rule changes.

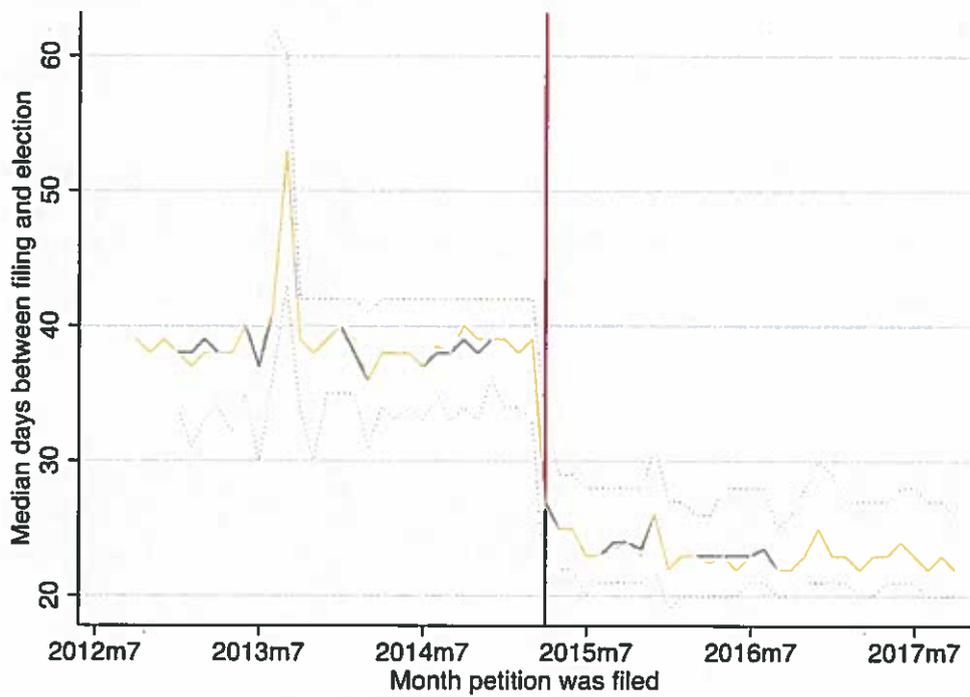


Figure 1A: Median days between petition filing and election, October 2012 – October 2017. The black line reproduces figure 1; the tan overlay, which almost perfectly covers the black line, is calculated only for RC cases. Dotted lines show the interquartile range. The red line indicates the implementation of the election rule changes.

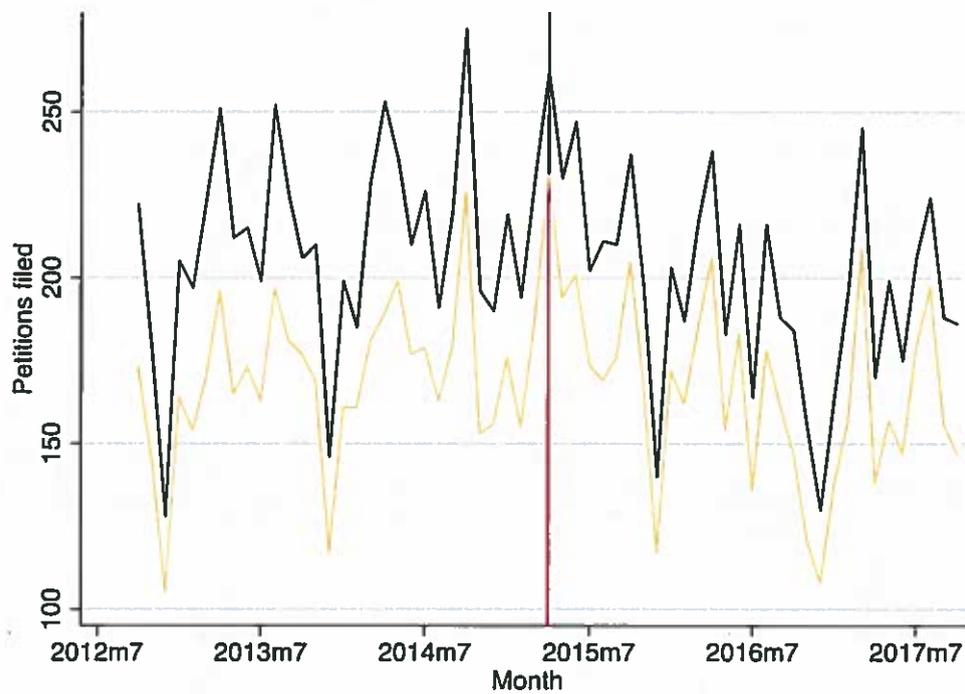


Figure 2A: Monthly counts of petitions filed with the NLRB, October 2012 – October 2017. The black line reproduces figure 2; the tan overlay is calculated only for RC cases. The red line indicates the implementation of the elections rule changes.

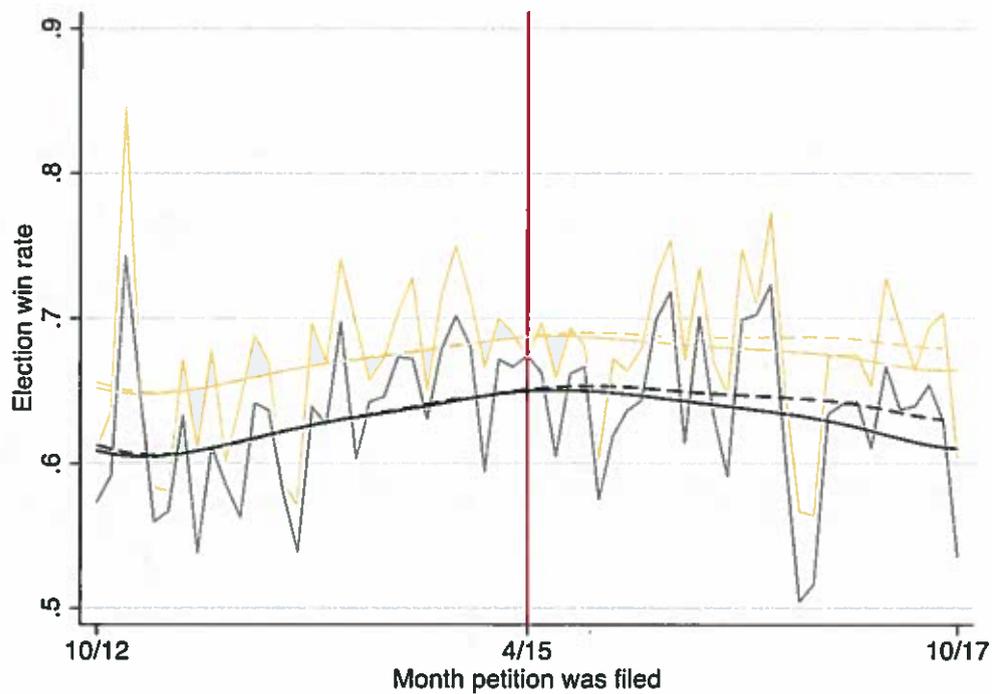


Figure 5A: Average monthly union win rates in NLRB-supervised representation elections, October 2012 – October 2017. The black line reproduces figure 3; the tan overlay is calculated only for RC cases. The red line marks the implementation of the election rule changes. The solid black line is a LOWESS curve; see the text for details. The dashed black line is also a LOWESS curve, estimated while excluding petitions filed in October and November 2016 from the analysis. The post-rule time trend of the dashed line is indistinguishable from zero.

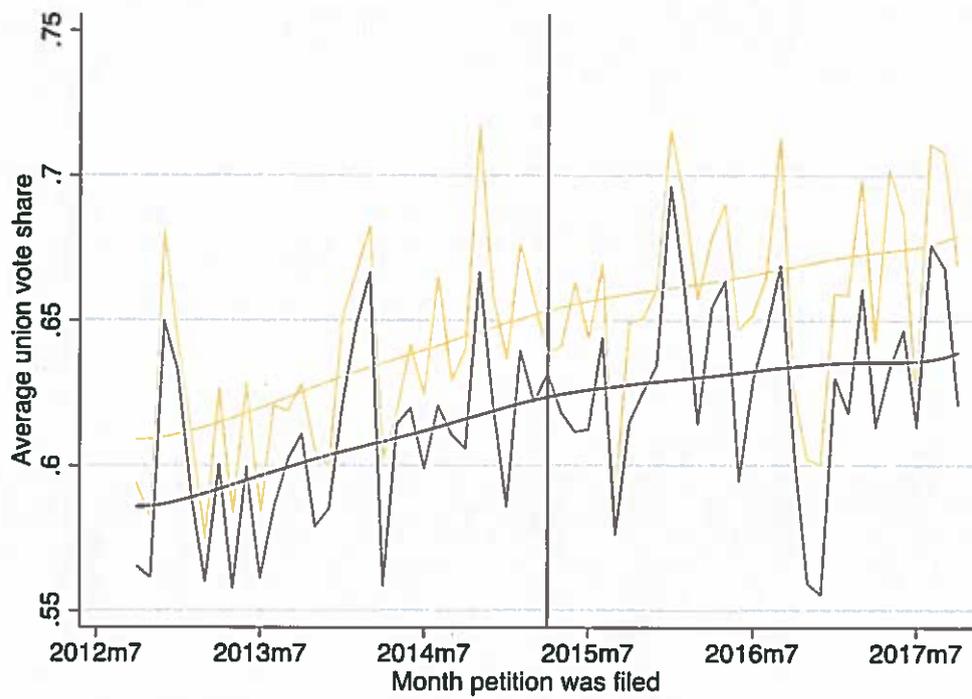


Figure 6A: Average union vote share in representation elections, October 2012 – October 2017. The black line reproduces figure 6; the tan overlay is calculated only for RC cases. Red line indicates implementation of the election rule changes. Differences in the positive time trend before and after the rule change are not statistically significant.

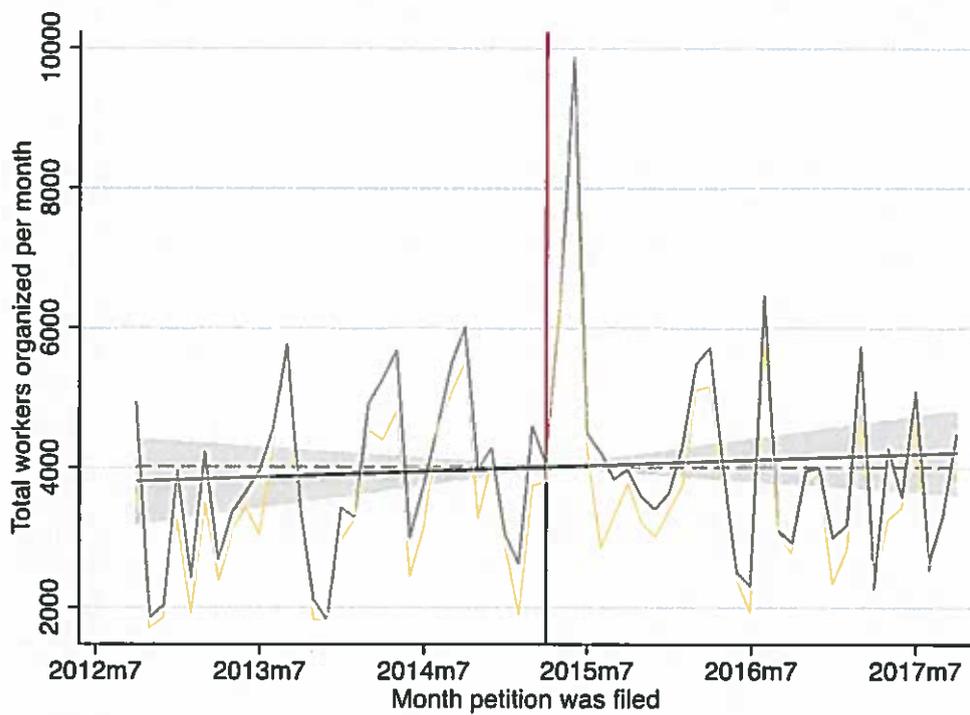


Figure 7A: Total workers gaining representation per month, October 2012 – October 2017. The black line reproduces figure 7; the tan overlay is calculated only for RC cases. Red line indicates implementation of the election rule changes. The spike in workers gaining representation in May 2015 obviously merits further investigation, but it does not alter the fact that the estimated time trend for workers added during this period (black line) is not statistically distinguishable from zero (grey dashed line).

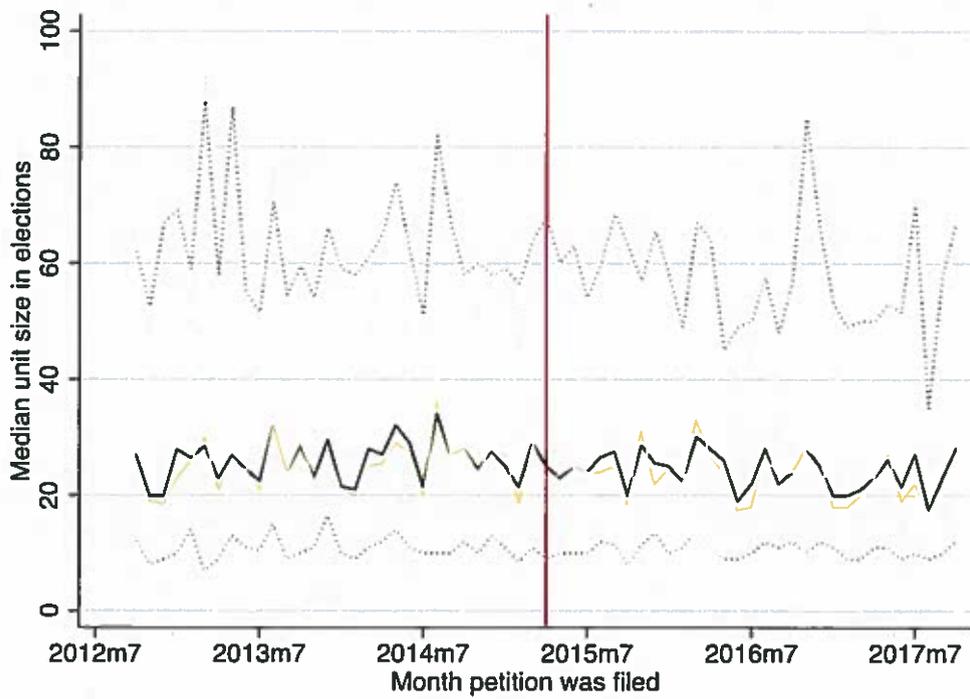


Figure 8A: Median unit size in elections, October 2012 – October 2017. The black line reproduces figure 8; the tan overlay is calculated only for RC cases. Dotted lines show the interquartile range. The red line represents the implementation of the election rule changes. There is a statistically significant downward trend in the median unit size, but it is substantively trivial (a reduction of just .05 workers per month) and unrelated to the rule change.

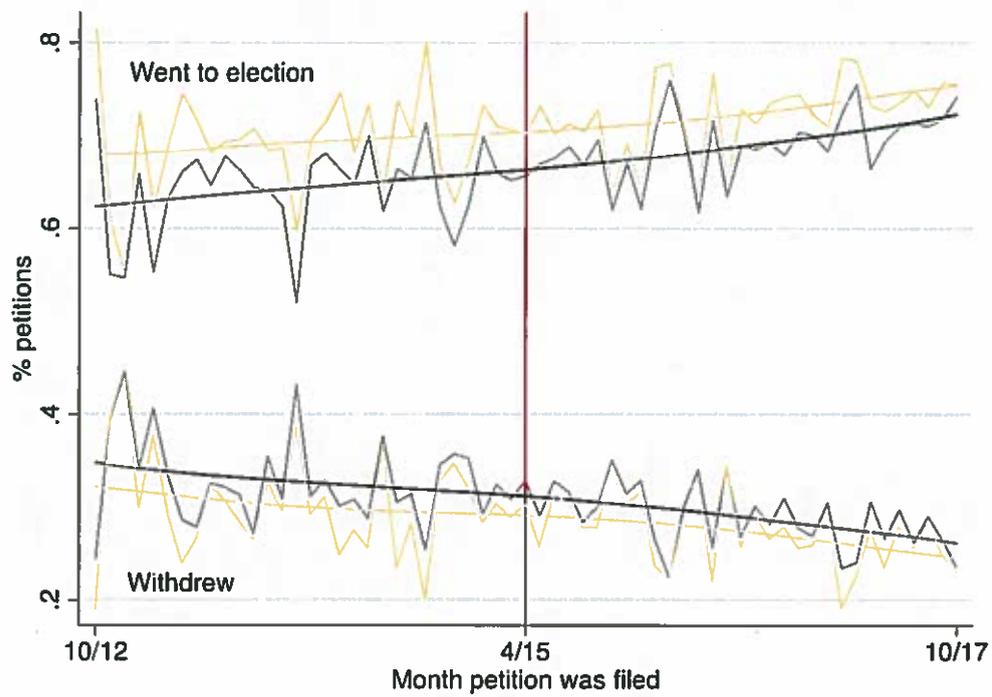


Figure 10A: Rate of monthly petition filings that result in election or withdrawal, October 2012 – October 2017. The gray and black lines reproduce figure 10; the tan overlay is calculated only for RC cases. The smooth lines are LOWESS curves; the red line indicates implementation of the elections rule changes. LOWESS curves are non-linear but in this case the local trend is constant over nearly the entire range.

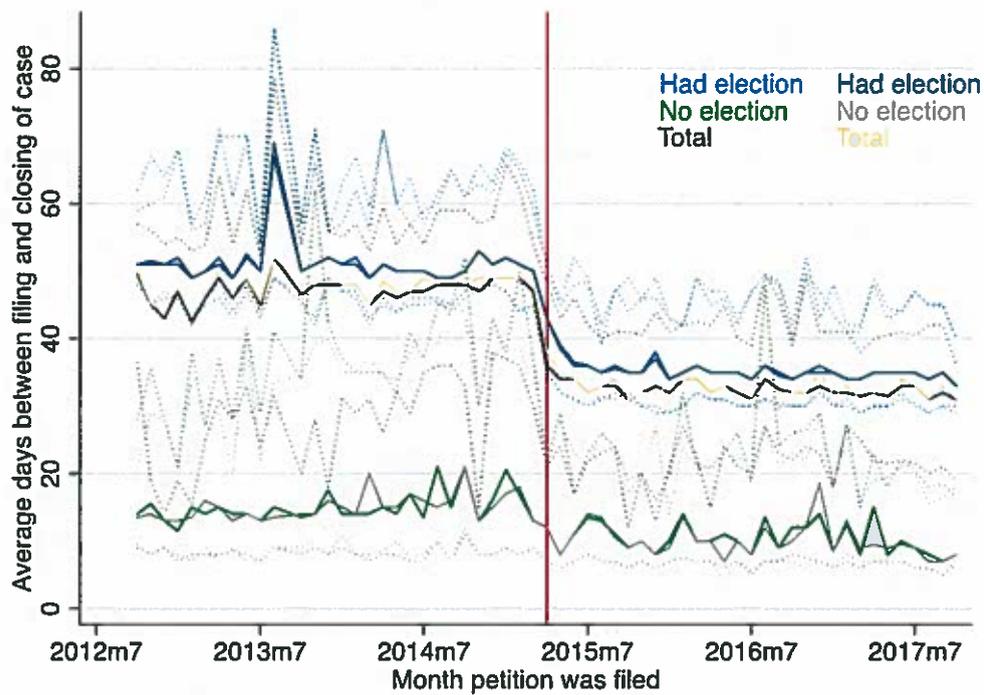


Figure 11A: Median case lengths in days. The blue, green, and black lines reproduce figure 11; the navy, grey and tan overlays are calculated only for RC cases. Correspondingly colored dotted lines show the interquartile ranges. The red line marks the implementation of the election rule changes. Most of the decline in case length in the wake of the election rule amendments occurred among cases that held elections, but the length of other cases also declined. This difference is statistically significant.

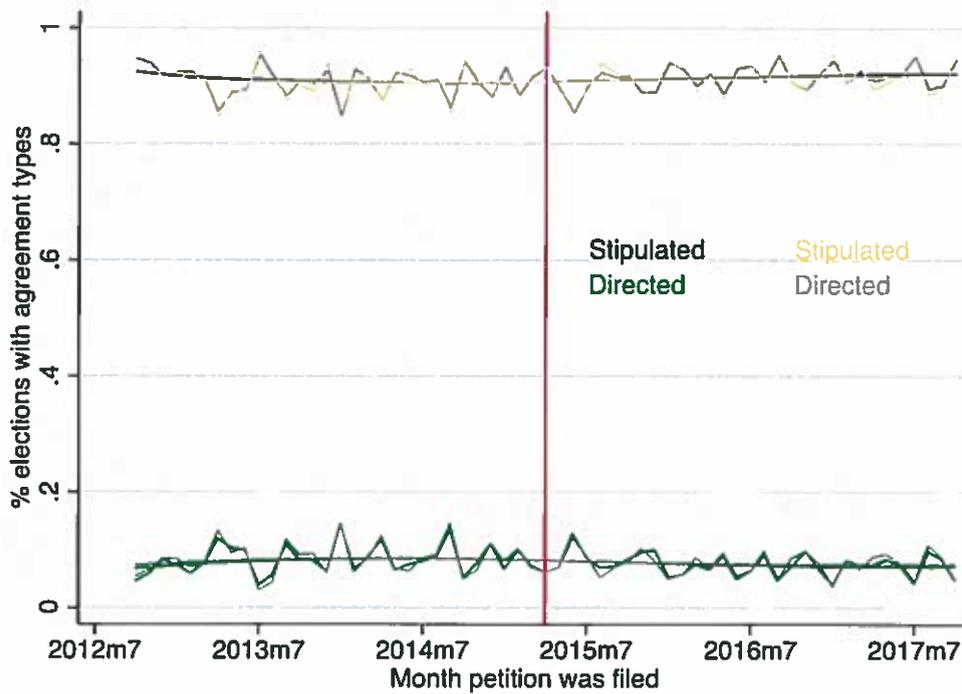


Figure 12A: Rate of stipulated and directed elections in monthly filings, October 2012 – October 2017. The black and green lines reproduce figure 12; the tan and gray overlays are calculated only for RC cases. The red line marks the implementation of the election rule changes.

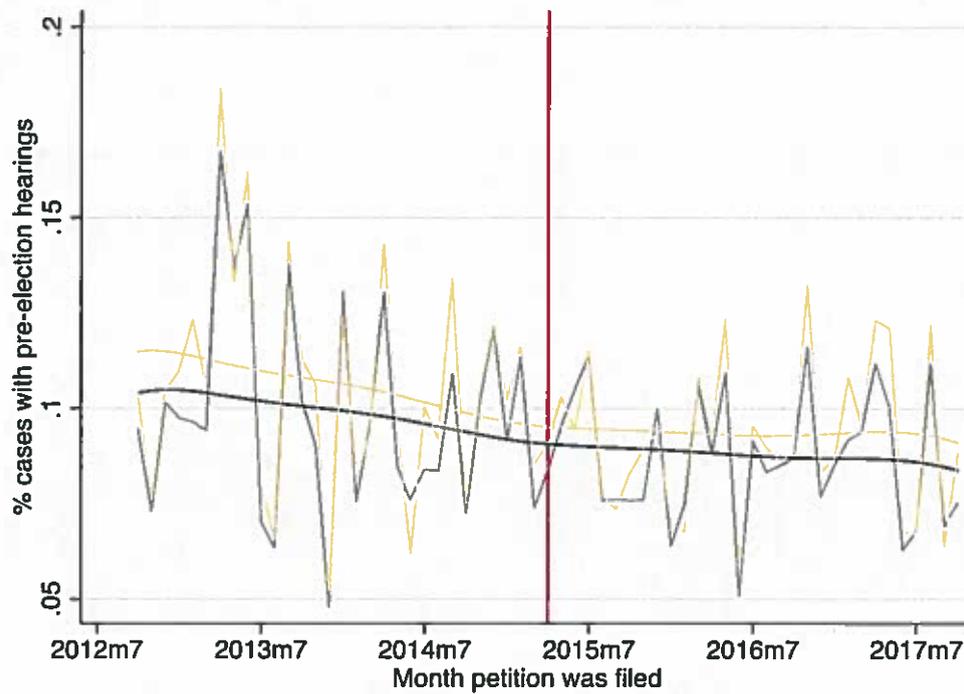


Figure 13A: Average rate of monthly filings leading to pre-election hearings, October 2012 – October 2017. The black line reproduces figure 13; the tan overlay is calculated only for RC cases. The plotted time trend is indistinguishable from zero. The red line marks the implementation of the election rule changes.

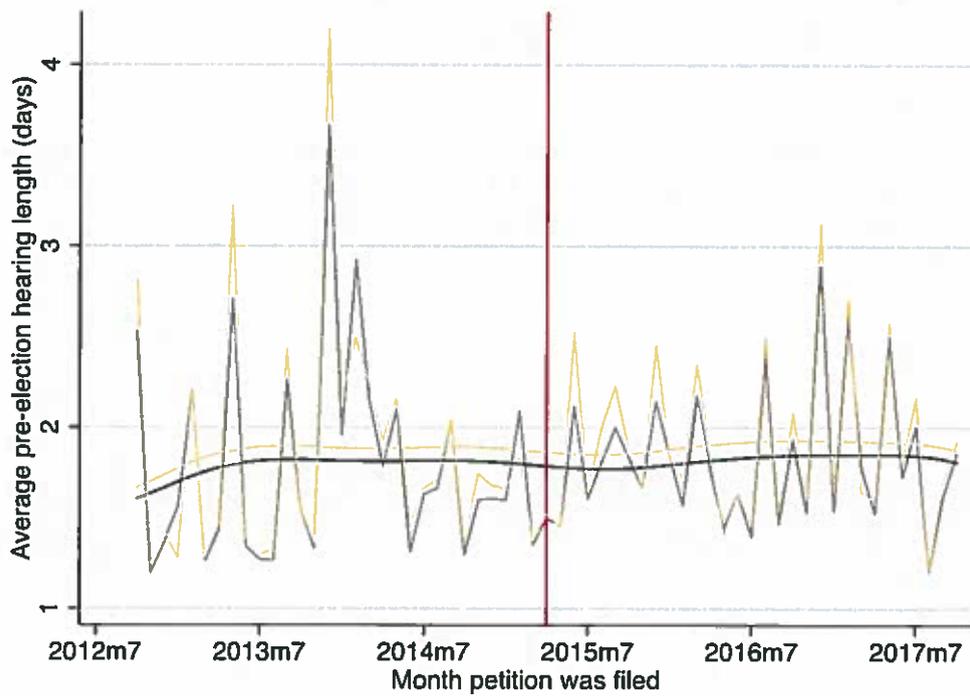


Figure 14A: Average length of pre-election hearings, in days, October 2012 – October 2017. The black line reproduces figure 1; the tan overlay is calculated only for RC cases. The red line marks the implementation of the election rule changes.

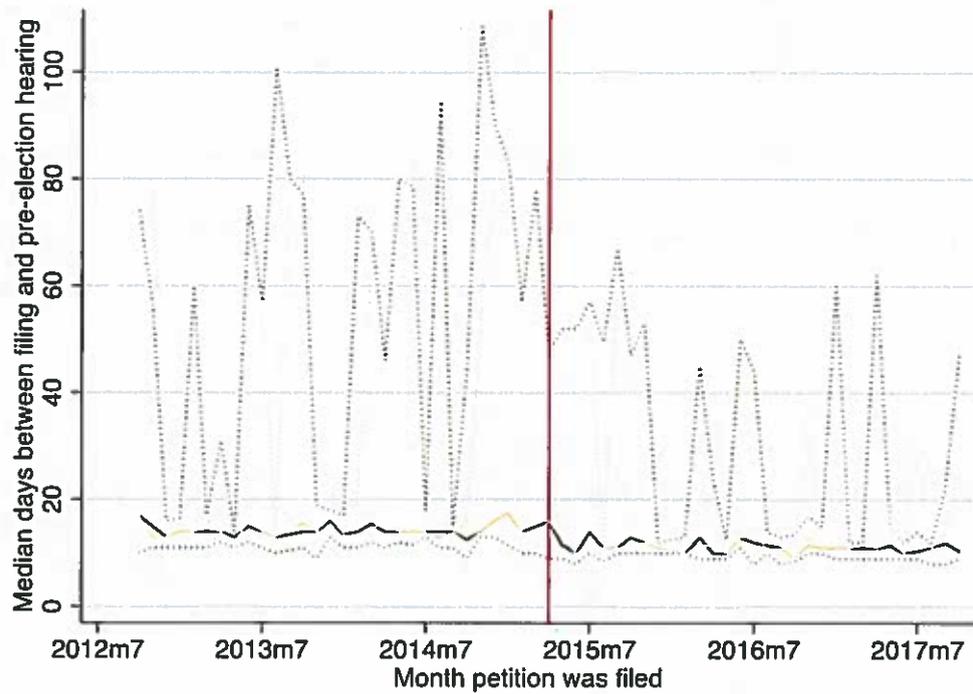


Figure 15A: Median days between filing and pre-election hearing, October 2012 – October 2017. The black line reproduces figure 1; the tan overlay is calculated only for RC cases. Correspondingly colored dotted lines indicate the interquartile range. Decline in median days after the rule change (red line) is statistically significant.

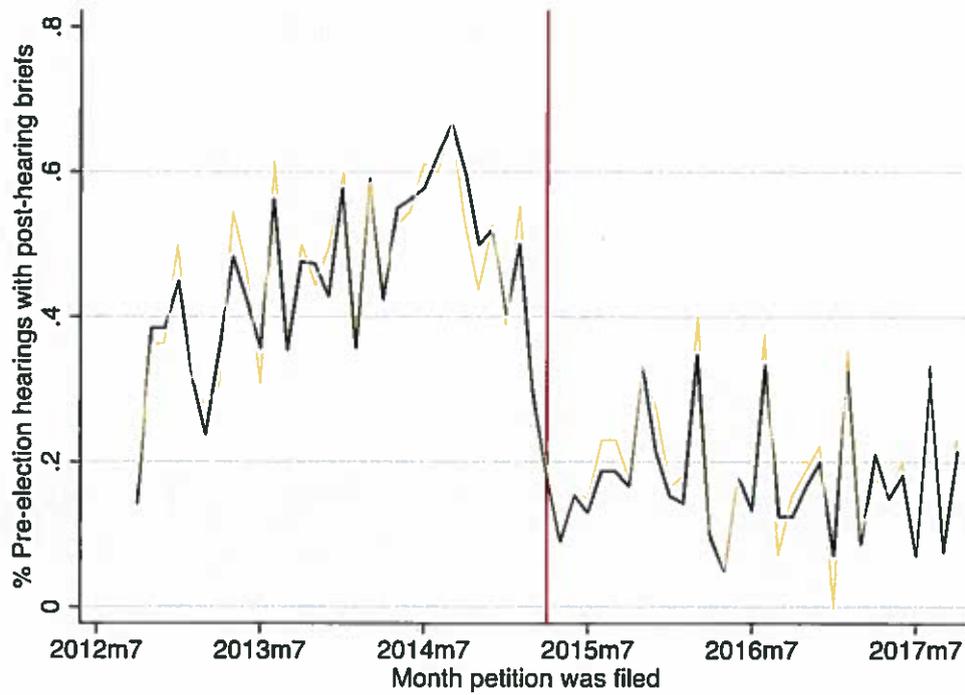


Figure 16A: Percentage of those cases in which pre-election hearing was held in which briefs were filed by any party. The black line reproduces figure 16; the tan line is calculated solely on RC cases. The red line marks the implementation of the election rule changes.

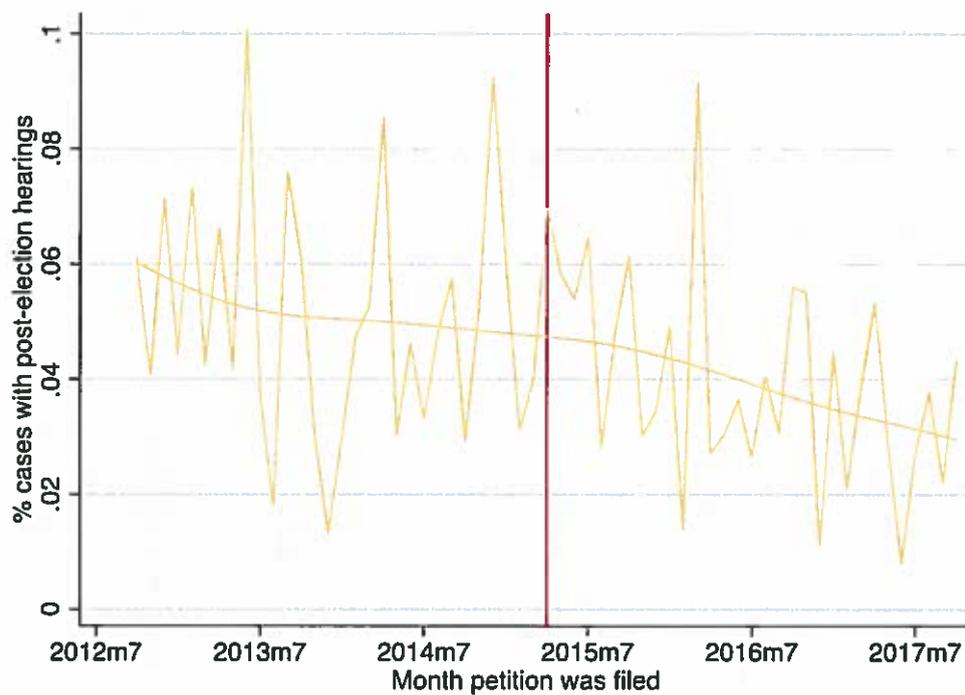


Figure 18A: Share of cases that went to election that had post-election hearings, October 2012 – October 2017. In this case, post-election hearings coincided completely with RC cases. Red line indicates implementation of the election rule changes. Downward trend is uncorrelated with the rule change.

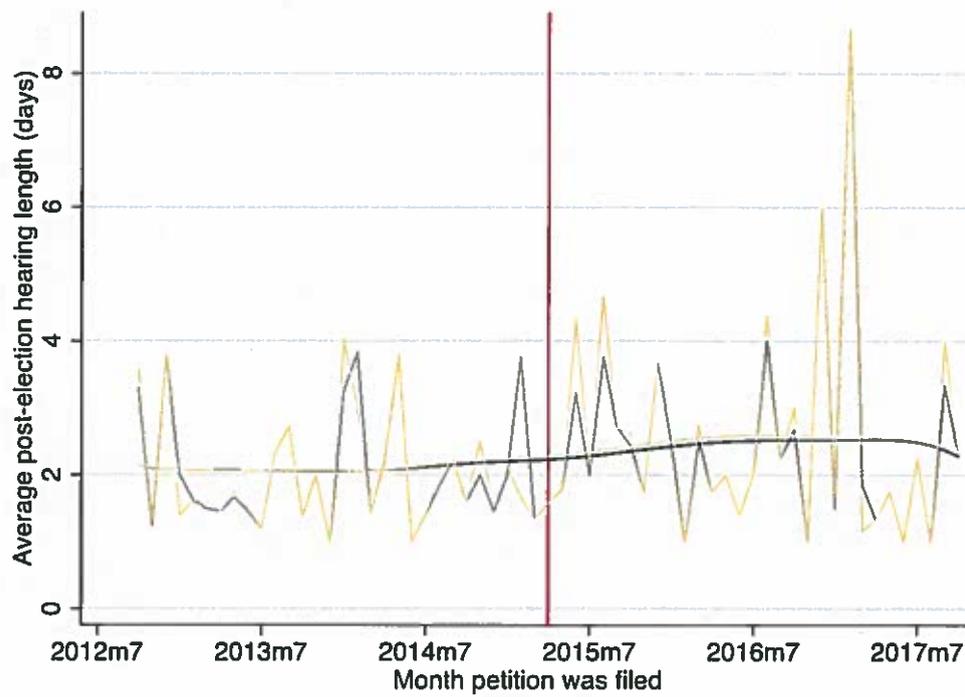


Figure 19A: Typical post-election hearing lengths, in days, October 2012 – October 2017. The black line reproduces figure 19; the tan overlay is calculated only for RC cases. Red line indicates implementation of the election rule changes. There is not significant change associated with the rule changes.

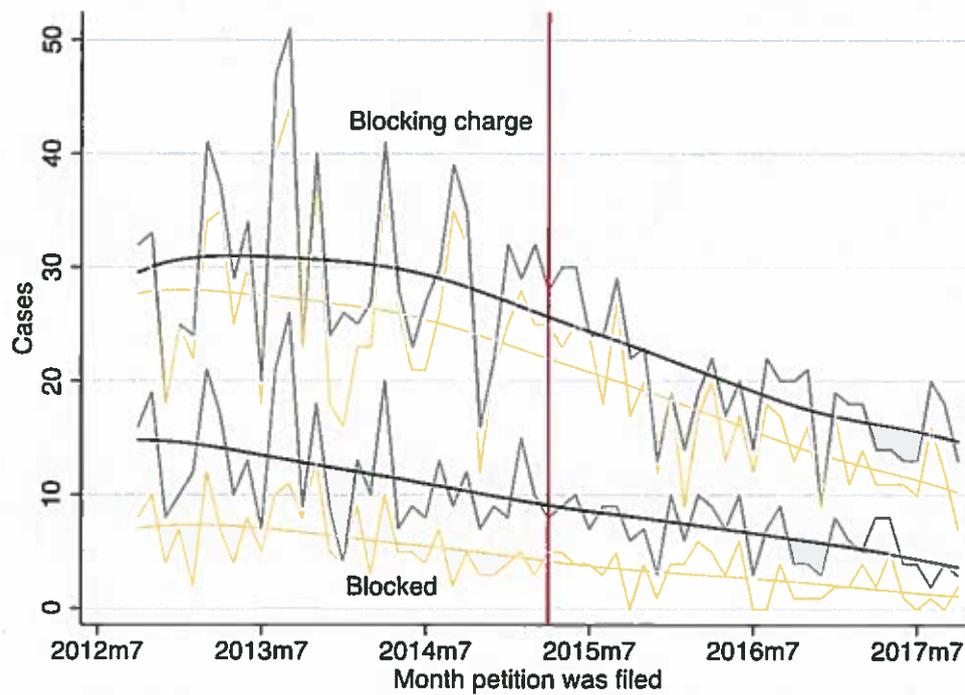


Figure 20A: Numbers of blocking charges filed per month and number of cases blocked, October 2012 – October 2017. The black lines reproduce figure 20; the tan overlays are calculated only for RC cases. Cases blocked as a share of blocking charges is nearly constant over time. Red line indicates implementation of the election rule changes.

Ferguson Report Exhibit 1

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4 April 2018

Employment

2009 – Assistant Professor of Organizational Behavior, Stanford Graduate School of Business

Education

2009 PhD in Management, MIT Sloan School of Management
2001 MA in International Relations, The Johns Hopkins University
1999 BAs in Political Science and History, the University of Oklahoma

Peer-Reviewed Publications

- Ferguson John-Paul and Rembrand Koning. 2018. Firm Turnover and the Return of Racial Establishment Segregation. Forthcoming in the *American Sociological Review*.
- Ferguson, John-Paul and Thomas Dudley and Sarah A. Soule. 2017. Osmotic Mobilization and Union Support during the 'Long Protest Wave.' Forthcoming in *Administrative Science Quarterly*.
- Ferguson, John-Paul and Gianluca Carnabuci. 2017. Risky Recombinations: Institutional Gatekeeping in the Innovation Process. *Organization Science* 28(1): 133 – 151.
- Ferguson, John-Paul. 2016. Racial Diversity and Union Organizing in the United States, 1999 – 2008. *Industrial and Labor Relations Review* 69(1): 53 – 83.
- Hasan, Sharique and John-Paul Ferguson and Rembrand Koning. 2016. The Lives and Deaths of Jobs: Technical Interdependence and Survival in a Job Structure. *Organization Science* 26(6): 1665 – 1681.
- Ferguson, John-Paul. 2015. The Control of Managerial Discretion: Evidence from Unionization's Impact on Employment Composition. *American Journal of Sociology* 121(3): 675 – 721.
- Ferguson, John-Paul and Sharique Hasan. 2013. Specialization and Career Dynamics: Evidence from the Indian Administrative Service. *Administrative Science Quarterly* 58(2): 233-256.
- Ferguson, John-Paul. 2008. The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999 – 2004. *Industrial and Labor Relations Review* 62(1): 1-18.
Reprinted in *Labor and Employment Law Initiatives and Proposals Under the Obama Administration* (New York: Kluwer Law International, 2011)
- Kochan, Thomas A. and John-Paul Ferguson and Joel Cutcher-Gershenfeld and Betty Barret. 2007. Collective Bargaining in the Twenty-First Century: A Negotiations Institution at Risk. *Negotiations Journal* 23(3): 249-265.
- Douglas, William A. and Erin Klett and John-Paul Ferguson. 2004. An Effective Confluence of Forces in Support of Workers' Rights: ILO Standards, US Trade Laws, Unions and NGOs. *Human Rights Quarterly* 26(2): 273-299.

Working Papers

- “Firm Relocation and Spatial Mismatch: Evidence from Natural Disasters.” With Kaisa Snellman.
- “Relational Categorization: Evidence from the Diversification of American Labor Unions, 1961 – 1999.”

Other Research Projects

- “Employee Sorting in the Absence of Managerial Discretion.” With Christine Isakson. Data collection in progress.
- “Bureaucratic Careers and Communal Violence in India.” With Sharique Hasan and Rembrand Koning. Data collection complete.

Presentations

- “Population Processes and Establishment-level Racial Employment Segregation.” Presented at the 17th Organizational Ecology Workshop, Madrid, Spain, June 2017.
- “Plant Relocation and Spatial Mismatch: Evidence from Natural Disasters.” Presented at the 8th People and Organizations Conference, the Wharton School, November 2015; the INSEAD joint economics/organizational behavior seminar, May 2016; the 32nd Colloquium of the European Group for Organizational Studies, Naples, Italy, July 2016; and the Strategy Seminar at Harvard Business School, December 2016.
- “Risky Recombinations: Institutional Gatekeeping in the Innovation Process.” Presented at the London Business School strategy seminar, April 2016; and the Instituto de Empresa organizational behavior seminar, Madrid, April 2016.
- “Employee Sorting in the Absence of Managerial Discretion.” Presented at the joint IWER/OSG seminar, MIT-Sloan, March 2016.
- “Movement Spillover and Union Support during the ‘Long Protest Wave.’” Presented at the 2nd Junior Organization Theory Conference, Haas School of Business, November 2014; the 110th annual meeting of the American Sociological Association, Chicago, August 2015; and the Workshop on Social Movements and the Economy, Northwestern University, November 2015.
- “The Control of Managerial Discretion: Evidence from Unionization’s Impact on Workplace Composition.” Presented at the INSEAD OB seminar, March 2014; the 30th Colloquium of the European Group for Organizational Studies, Rotterdam, Netherlands, July 2014; and the 109th annual meeting of the American Sociological Association, San Francisco, August 2014.
- “Bureaucracy and Employment Segregation: Evidence from Labor-Union Elections.” Presented at the Management of Organizations Seminar, Haas School of Business, UC-Berkeley, February 2013; the Economic Sociology Working Group at MIT-Sloan, June 2013; and the Junior Organization Theory Conference, Chicago Booth School of Business, October 2013.
- “The Lives and Deaths of Jobs.” Presented at the 2nd annual Strategy Conference, Fuqua School of Business, Duke University, October 2012; the Organizations & Markets Workshop, Chicago Booth School of Business, November 2012; the 13th annual meeting of the Nagymaros Group on Organizational Ecology, Budapest, Hungary,

- July 2013; and the 108th annual meeting of the American Sociological Association, New York, August 2013.
- “Specialization and Career Dynamics: Evidence from the Indian Administrative Service.” Presented at the annual meetings of the American Sociological Association, Denver, CO, August 2012.
- “The Examiner’s Dilemma: Differential Selection and Patent Impact.” Poster at the 12th annual meeting of the Nagymaros Group on Organizational Ecology, Copenhagen, Denmark, July 2012.
- “Organizational Diversity as a Demographic Process.” Presented at the annual meetings of the Academy of Management, San Antonio, TX, August 2011; and the Human and Social Capital Seminar, the Wharton School of Business, University of Pennsylvania, April 2012.
- “Categorization in Labor Markets: Evidence from the Indian Administrative Service.” Presented at the IWER Seminar, MIT-Sloan, May 2011; the 11th annual meeting of the Nagymaros Group on Organizational Ecology, Lugano, Switzerland, July 2011; and the 4th annual People and Organizations Conference, the Wharton School of Business, University of Pennsylvania, October 2011.
- “Corrosion of Conformity: Resource Partitioning Among Trade Unions.” Presented at the 10th annual meeting of the Nagymaros Group on Organizational Ecology, Helsinki, Finland, June 2010.
- “Space Invaders: Categories, Valuation and Union Organizing Drives, 1961 – 1999.” Presented at the Harvard-MIT Economic Sociology Seminar, Cambridge, MA, October 2008; the annual meetings of the American Sociological Association, San Francisco, CA, August 2009; the Institute for Labor and Industrial Relations Seminar, Urbana-Champaign, IL, April 2010; and the SCANCOR Seminar, Stanford, CA, May 2010.
- “Whither Redistribution? The Death and Curious Rebirth of Social Concertation in Western Europe.” Roundtable presentation at the annual meetings of the American Sociological Association, Boston, MA, August 2008.
- “Sequential Failures in Worker Attempts to Organize.” Briefings for the AFL-CIO and National Labor Relations Board, Washington, DC, May 2008
- “Unfair Labor Practices and Union First Contracts.” Presented at the Collective Bargaining Roundtable, School of Industrial and Labor Relations, Cornell University, October 2005.

Teaching

- 2009 – Strategic Leadership, Stanford GSB (Core MBA course)
- 2016 Doctoral Proseminar on Theory Development (PhD course)
- 2014 Stratification in Organizations, Stanford GSB (PhD course)
- 2014 Work and Employment in Organizations, Stanford GSB (PhD course)
- 2013 Introduction to Organizational Behavior, Stanford Law School
- 2012 Social and Political Processes in Organizations, Stanford GSB (PhD course)
- 2004 – 2009 TA at the MIT Sloan School. Courses included Managerial Psychology and People & Organizations (undergraduate); Strategic Human Resource

Management, Power & Negotiations, and Organizational Processes (MBA); and Communicating with Statistical Data (Sloan Fellows)
2000 – 2001 TA at the Johns Hopkins University. Courses included International Trade Theory and Intermediate Microeconomics (MA courses)

Academic Memberships and Service

American Sociological Association

Academy of Management

Labor and Employment Relations Association

Ad Hoc Reviewer for *American Journal of Sociology*, *American Sociological Review*, *Organization Science*, *Management Science*, *Administrative Science Quarterly*, *British Journal of Industrial Relations*, *Journal of Labor Research*, *Industrial & Labor Relations Review*, *Sociological Compass*, *Sociological Forum*, *Industrial and Corporate Change*, *Industrial Relations* and *Research in the Sociology of Organizations*

Fellowships and Honors

2016 Shanahan Family Faculty Scholar, Stanford GSB

2015 John T. Dunlop Outstanding Scholar, Labor and Employment Relations Association (Given for outstanding contributions to work and employment research by faculty out less than ten years)

2015 Distinguished Faculty Service Award, Stanford GSB (Given for excellence in teaching and advising in the PhD program)

2010 Fletcher Jones Faculty Scholar, Stanford GSB (Given for contributions to MBA teaching)

2009 James D. Thompson Award for Best Graduate Student Work, ASA's Organizations, Occupations and Work section
Ronald W. Burt Award for Best Graduate Student Work, ASA's Economic Sociology Section

2006 – 2007 MIT Presidential Research Fellowship

2003 – 2006 Alumni Doctoral Studies Fellowship

1999 – 2000 Andrew W. Mellon Fellow in Humanistic Studies

1998 Cortez A.M. Ewing Congressional Fellow

1995 – 1999 National Merit Scholar

Relevant Professional Experience

2002 – 2003 Consultant, World Bank Group, Washington, DC

2001 – 2002 NGO Liaison, Mellempfolkeligt Samvirke, Copenhagen, Denmark

2001 Researcher for Special Projects, International Labor Organization, Washington, DC

Ferguson Report Exhibit 2



**American Federation
of Labor and
Congress of Industrial
Organizations**

815 16th St., NW
Washington, DC 20006

202-637-5000

aflcio.org

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AFL-CIO

AMERICA'S UNIONS

December 22, 2017

Freedom of Information Office
National Labor Relations Board
1015 Half Street, S.E.
4th Floor
Washington, D.C. 20570

Dear FOIA Officer:

In relation to the recently issued Request for Information concerning the National Labor Relations Board's representation election regulations, 82 Fed. Reg. 58783 (Dec. 14, 2017), we hereby request copies of the following documents. We ask that such documents be made available no later than January 26, 2018, so that we will have an opportunity to analyze them in time to provide the Board with meaningful information by February 12, 2018 deadline.

Definitions and Instructions

For purposes of this request, the term "Final Rule" means the final rule published by the Board on December 15, 2014, *see* 79 Fed. Reg. 74307 (Dec. 15, 2014).

For purposes of this request, the term "compilations" means data or information obtained from more than one representation proceeding for purposes of display, analysis, or any other purpose and the term "compiled" has the corresponding meaning.

Unless otherwise stated, these requests concern proceedings initiated by RC, RM and RD petitions.

Unless otherwise stated, these requests are for documents concerning representation proceedings initiated subsequent to January 1, 2000.

Requests

1. All compilations of data concerning representation case proceedings initiated under the Final Rule.
2. All analysis of data concerning representation case proceedings initiated under the Final Rule.

3. All data compiled and all analysis of data prepared for the Board in relation to the Request for Information.
4. All data compiled and all analysis of data prepared for Members Miscimarra and/or Johnson in relation to their dissent from the Final Rule.
5. All data compiled and all analysis of data prepared for Members Miscimarra and/or Johnson in relation to their dissent from the Notice of Proposed Rulemaking, 79 Fed. Reg. 7318 (Feb. 6, 2014).
6. All comparisons of data concerning outcomes of representation in cases governed by the Final Rule and representation cases not governed by the final rule.
7. All comparisons of data concerning the number of petitions filed in cases governed by the Final Rule and representation cases not governed by the final rule.
8. All comparisons of data concerning the number of elections conducted in cases governed by the Final Rule and cases not governed by the final rule.
9. All compilations of data or analysis of data concerning the time between filing of petitions and/or any of the following: opening of pre-election hearing, decision and direction of election (or decision and order), election, case closing.
10. All compilations of data or analysis of data concerning withdrawal of representation petitions.
11. All compilations of data or analysis of data concerning the range, mean and median unit size in representation proceedings.
12. All compilations of data or analysis of data concerning the size of units in representation cases.
13. All compilations of data or analysis of data concerning the number and percentage of representation cases that resulted in consent or stipulated election agreements.
14. All compilations of data or analysis of data concerning requests for continuances of the hearing date in representation cases under the Final Rule.
15. All requests for continuances of hearing dates in representation cases processed under the Final Rule.
16. All compilations of data or analysis of data concerning requests for extensions of time to file and serve position statements under the Final Rule.
17. All requests for extensions of time to file and serve position statements and ruling on such requests under the Final Rule.

18. All compilations of data or analysis of data concerning requests to preclude a party from raising or contesting an issue or presenting evidence based on a failure to timely raise the issue in a position statement or response to a position statement under the Final Rule.
19. All compilations of data or analysis of data concerning the preclusion of a party from raising or contesting an issue or presenting evidence based a failure to timely raise the issue in a position statement or response to a position statement under the Final Rule or nonpreclusion under similar circumstances.
20. All compilations of data or analysis of data concerning motions for a stay of an election or other extraordinary review or relief.
21. All compilations of data or analysis of data concerning cases processed under the Final Rule in which the unit described in the initial notice of election did not include employees included in the unit (or permitted to vote subject to challenge) as described in the final notice of election.
22. Copies of all decisions and directions of elections issued under the Final Rules in cases in which the unit described in the initial notice of election did not include employees included in the unit (or permitted to vote subject to challenge) as described in the final notice of election.
23. All rulings on requests to preclude a party from raising or contesting an issue or presenting evidence based on a failure to timely raise the issue in a position statement or response to a position statement under the Final Rule.
24. All compilations of data or analysis of data concerning hearings conducted in representation cases, including, but not limited to, the percentage of cases in which hearings were held, whether evidence was introduced at the hearing (other than the position statement), and the number of days of hearing.
25. All compilations of data or analysis of data concerning regional directors' pre-election resolution of disputes concerning supervisory status, managerial status, professional status, guard status or other matters concerning eligibility to vote or inclusion in the unit.
26. All compilations of data or analysis of data concerning regional directors' or the Board permitting employees whose eligibility to vote is in dispute to vote subject to challenge.
27. All compilations of data or analysis of data concerning rulings by hearing officers or regional directors refusing to permit parties to introduce evidence concerning the eligibility or inclusion of individuals on the grounds that the number of individuals in dispute was a small percentage of the employees in the unit.

28. All compilations of data or analysis of data or any other documents concerning rulings by hearing officers or regional directors refusing to permit parties to introduce evidence concerning any issue.
29. All compilations of data or analysis of data concerning rulings by hearing officers or regional directors under the Final Rule concerning requests not to continue a hearing from day to day or for any other forms of continuance or delay.
30. All compilations of data or analysis of data concerning the filing of post-hearing briefs.
31. All compilations of data or analysis of data concerning hearing officers or regional directors' denying requests to file post-hearing briefs or denying in whole or in part the full time requested by a party to file a post-hearing brief.
32. All compilations of data or analysis of data concerning employer requests for an extension of time to serve and/or file eligibility lists.
33. All compilations of data or analysis of data concerning objections based on defects in service and/or filing and/or contents of eligibility lists.
34. All compilations of data or analysis of data concerning the time between the closing of hearings and/or filing of post-hearing briefs and issuance of the decision and direction of election (or decision and order).
35. All compilations of data or analysis of data concerning the time between the issuance of the decision and direction of election and the election date.
36. All compilations of data or analysis of data concerning the filing and disposition of pre-election requests for review.
37. All pre-election requests for review filed under the Final Rule that were dismissed as moot or otherwise mooted by the election results.
38. All decisions and directors of elections issued under the Final Rule in proceedings where employees whose eligibility was in dispute were permitted to vote subject to challenge and where the dispute was mooted by the elections results or the failure of the disputed employees to vote.
39. All compilations of data or analysis of data concerning withdrawal of pre-election requests for review, grants of pre-election review and/or disposition of pre-election requests for review.
40. All compilations of data or analysis of data concerning the number or percentage of challenged ballots and/or the number and percentage of challenged ballots that were ruled on by a hearing officer, regional director, administrative law judge or the board.

41. All compilations of data or analysis of data concerning the number or percentage of cases in which objections were filed, hearing were conducted concerning objections, and/or a hearing officer, regional director, administrative law judge or the board ruled on objections.
42. All compilations of data or analysis of data concerning the number or percentage of cases in which a post-election request for review was filed and/or the disposition of such requests.
43. All compilations of data or analysis of data concerning the number or percentage of cases in which the Board overturned a hearing officer's, regional director's, or administrative law judge's ruling on challenges or objections in proceedings not governed by the Final Rule.
44. All compilations of data or analysis of data concerning whether elections were conducted by mail or manually.
45. All compilations of data or analysis of data concerning the outcome of representation proceedings.
46. All compilations of data or analysis of data concerning the number or percentage of votes cast in favor of and/or against representation in elections.
47. All compilations of data or analysis of data concerning the time between the tally of ballots and the opening of post-election hearings and/or disposition of challenges or objections by the regional director and/or the Board.
48. All compilations of data or analysis of data concerning the number or percentage of representation cases that resulted in technical refusals to bargain and a Board finding that the employer violated Section 8(a)(5).
49. All compilations of data or analysis of data concerning blocking charges.
50. All compilations of data or analysis of data concerning any form of complaint concerning labor organization's use of eligibility lists.

Copies of any charge or any form of complaint concerning a labor organization's use of an eligibility list.

Thank you for your attention to this matter.

Sincerely,

Craig Becker
General Counsel

Filed online at <https://foiaonline.regulations.gov/foia/action/public/home>, by
facsimile to (202) 273-FOIA (3642) and by first class U.S. mail to the above address

Ferguson Report Exhibit 3



AFL-CIO
AMERICA'S UNION

Craig Becker <cbecker@afcio.org>

Status of FOIA Request NLRB-2018-000296

1 message

Breirather, Jodilyn M. <Jodilyn.Breirather@nlrb.gov>
To: "cbecker@afcio.org" <cbecker@afcio.org>

Mon, Feb 5, 2018 at 3:35 PM

I'm following up on FOIA request NLRB-2018-000296 which you submitted to the National Labor Relations Board (NLRB) on December 22, 2017, requesting various information pertaining to representation case processing (copy attached).

Per our phone call from a few minutes ago, below is a list of items we can provide, what we can't provide, and what we can partially provide.

In response to items 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 49 requesting various compilations, comparisons, and analysis of data concerning representation case proceedings, we can provide the requested information for the time period October 1, 2011, through December 31, 2017, from NxGen, our case tracking database.

Some additional data is also available from our retired database, Case Activity Tracking System (CATS). The information we can provide without delay are the following four spreadsheets that have been provided to a previous requester who subsequently published an article in 2012 based on that data (also see the items below in response to items 4 and 5):

- Professor Estreicher-Petition Election Certification Unit Size Calendar Year 2008
- Professor Estreicher-Petition to Election FY 2008
- Professor Estreicher-Petition to Election to Certification Calendar Year 2000
- Professor Estreicher-Unblocked Petition to Election Calendar Year 2008

In response to items 3 requesting data compiled and all analysis of data prepared for the Board in relation to the current Request for Information, we can provide this information.

In response to 4, and 5, we can provide the following information which was provided to the Board for the 2011 and 2014 Final Rule and Notice of Proposed Rulemaking:

- Responsive to 4 and 5-2008 Initial Elections List
- Responsive to 4 and 5-2008 Pre-Election Hrg data
- Responsive to 4 and 5-2008 Pre-Election info (RM-RC-RD only)
- Responsive to 4 and 5-2009 Block
- Responsive to 4 and 5-2009 Initial Election List
- Responsive to 4 and 5-2009 Pre-election info (RM-RC-Rd only)
- Responsive to 4 and 5-2010 Block
- Responsive to 4 and 5-2010 Initial Election List

- Responsive to 4 and 5-2010 Pre-Election data (RC RM RD only)
- Responsive to 4 and 5-2010 Pre-Election Hrg data
- Responsive to 4 and 5-Blocked 2008
- Responsive to 4 and 5-Petition to Election FY2001 - FY2011 (2)
- Responsive to 4 and 5-Pie Charts (2012)
- Responsive to 4 and 5-Pie Charts

In response to items 14 and 15 requesting information concerning continuances of the hearing date in representation cases under the Final Rule, the Agency does not statistically track this information. However, we will provide information for when a hearing was originally scheduled, when a hearing opened, and when a hearing closed.

In response to items 16 and 17 requesting information regarding extensions of time to file and serve position statements under the Final Rule, the Agency does not statistically track this information. However, we will provide information for when a position statement was due and when it was actually received.

In response to items 18 and 19 requesting information precluding a party from raising or contesting an issue or presenting evidence in relation to their position statement, the Agency does not statistically track this information.

In response to item 20 requesting information concerning motions for a stay of an election or other extraordinary review or relief, the Agency does not statistically track this information.

In response to item 21, 22, and 26 requesting information on cases in which employees were permitted to vote subject to challenge in the initial election, we can provide this information. The data is only available from October 1, 2011, through December 31, 2017.

In response to item 23 requesting information regarding rulings on requests to preclude a party from raising or contesting an issue or presenting evidence based on a failure to timely raise the issue in a position statement or response to a position statement under the Final Rule, the Agency does not statistically track this information.

In response to item 24 requesting information regarding hearing information, we can provide information on when a hearing is scheduled, when a hearing opened, when a hearing closed, and how many days the hearing was on the record. Regarding the portion of item 24 requesting whether evidence was introduced at the hearing other than the position statement, the Agency does not statistically track this information.

In response to items 25, 27, 28, 31 regarding rulings by hearing officers and/or Regional Directors relating to election eligibility, the introduction of evidence for any issue, and the denial of time to file post-election briefs, the Agency does not statistically track this information. We will, however, provide the case numbers where Regional Director decisions issued; those decisions are posted on the Agency's website (<https://www.nlr.gov/cases-decisions/regional-election-decisions>) if you wish to review those decisions.

In response to item 29 requesting information regarding hearing continuances or delays, the Agency does not statistically track this information. However, as we will provide hearing information for both pre- and post-election hearings as stated above in #24.

4/17/2018

AFL-CIO Mail - Status of FOIA Request NLRB-2018-000296

In response to item 32 requesting information regarding employer requests for an extension of time to serve and/or file eligibility lists, the Agency does not statistically track this information. However, we will provide information regarding when a voter list was due and when it was actually received.

In response to item 33 requesting information regarding objections based on defects in the service, filing, and/or contents of eligibility lists, the Agency does not statistically track this information.

In response to item 48 requesting information on cases resulting in technical refusals to bargain and the Board finding a violation of Section 8(a)(5), we will provide this information. The data was only available for Fiscal Years 2012 through 2016 as of two weeks ago; I will recheck for Fiscal Year 2017 before our final response is sent.

In response to items 50 and 51 (this item is below item 50 in the FOIA request but an assumption is being made this should be number 51) requesting information relating to complaints concerning a labor organization's use of eligibility lists, the Agency does not statistically track this information but we are attempting a manual search for this information.

We're working as quickly as we can to get you the information as soon as possible. Please review the above and let me know if you need additional information from CATS, but be aware that anything not specifically listed above for CATS will have an additional delay.

Jodilyn M. Breirather, FOIA Specialist

National Labor Relations Board

Division of Legal Counsel

FOIA and Privacy Act Branch

202-368-1927

 NLRB FOIA Request 12-22-17 - final.pdf
488K



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

February 28, 2018

Craig Becker
AFL-CIO
815 16th Street, NW
Washington, DC 20006

Re: FOIA Case No. NLRB-2018-000296

Dear Mr. Becker:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, dated and received in our office on December 22, 2017, in which you request representation case statistics for varying time frames, some dating back to Fiscal Year 2000. You also request any data and statistical analyses relied on by the Board in relation to the 2018 Request for Information regarding representation case procedures, and data and statistical analyses prepared for Members Miscimarra and/or Johnson in their dissent from the Notice of Proposed Rulemaking in 2014. You assumed fees up to \$9.25, but requested a fee waiver on the basis that the information was sought solely for use in responding to the Agency's December 14, 2017 Request for Information (RFI) regarding possible changes in the Agency's representation election case procedures and any subsequent rule-making process.

We acknowledged your request on December 22, 2017. On December 28, 2017, a member of my staff contacted you by email to request additional information to justify your fee waiver request, to which you responded by email on December 29, 2017. Your request for a fee waiver was granted on January 17, 2018.

On February 5, 2018, a member of my staff contacted you by telephone and email to describe the current data that could be provided to you more quickly, as opposed to older data that would take additional time to retrieve, and to advise you which specific types of requested data the Agency does not statistically track. To expedite processing, you agreed to narrow your request as described in the February 5, 2018 email exchange, that is, to the readily available data in the Agency's current electronic casehandling system, NxGen, in addition to four previously-released spreadsheets from the Agency's legacy database, Case Activity Tracking System (CATS), which maintains certain case data for the Agency's Regional Offices between Fiscal Years 2000 and 2010.

Craig Becker
February 28, 2018
Page 2

Pursuant to the FOIA, and consistent with your narrowed request for the readily available election data, a reasonable search for responsive data was conducted in our current electronic casehandling system, NxGen and our legacy system, CATS, and was further expanded through Integrated Search, or "iSearch", the Agency's custom document search tool used to locate specific case and document data and document content. In addition, further searches were directed to the relevant Board counsel staff and the Division of Operations Management for any data compiled and analyses of data prepared relating to the Request for Information.

Representation Case Information and Data Being Released

After a thorough search and review of the responsive data, 82 pages of responsive records plus 19 Excel spreadsheets are being released, which are attached. Portions of the responsive records have been redacted pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), which protects certain internal, pre-decisional agency records and information from disclosure. I am withholding in full, however, other additional predecisional records pursuant to FOIA Exemption 5. Accordingly, your request is granted in part and denied in part, as explained more fully below.

In response to your Request Items 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 30, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 49 for various compilations, comparisons, and analyses of data concerning representation case proceedings governed under the Final Rule, as well as prior to the effective date of the Final Rule, specifically from October 1, 2011, through December 31, 2017, a spreadsheet entitled "NLRB-2018-000296.1 2 6-13 30 34-47 49-AFL-CIO Data 10-1-2011 to 12-31-2017" ("the Main Spreadsheet") is attached. This spreadsheet includes the current data from NxGen, such as the number of petitions filed, election agreement information, pre-election hearing information, the issuance of pre-election directions of election and decisions and orders, case withdrawals, election information, unit size, and case closing information.

We are also attaching 18 additional spreadsheets. Sixteen of them contain information from our legacy system CATS (which pre-dates FY2012, the year the Agency began using NxGen). The remaining two spreadsheets contain data, which were manually compiled from iSearch. For ease of reference, the file names of the spreadsheets describe the data they contain.

Four of the spreadsheets, listed immediately below, contain various election and unit information for fiscal and calendar years 2000 and 2008. The information in these four spreadsheets was compiled and released in response to a 2012 inquiry by a law professor for a law review publication, and was also released in response to a 2014 FOIA request for similar data. These four spreadsheets are responsive in part to your Request Items 8, 9, 11, 12, 13, 34-36, and 39.

1. NLRB-2018-000296.CATS-Petition Election Certification Unit Size Calendar Year 2008.xlsx

Craig Becker
February 28, 2018
Page 3

2. NLRB-2018-000296.CATS-Petition to Election FY 2008.xlsx
3. NLRB-2018-000296.CATS-Petition to Election to Certification Calendar Year 2000.xlsx
4. NLRB-2018-000296.CATS-Unblocked Petition to Election Calendar Year 2008.xlsx

In response to your Request Item 3 for data compiled and all analysis of data prepared for the Board in relation to the Request for Information, a pdf document entitled "NLRB.2018-000296.3-responsive to current RFI" is attached. The data on pages 3-14 of the pdf file, titled "Issued Decisions in Contested Cases," includes information relevant to footnote two on page five of the December 14, 2017 RFI. The remainder of this pdf file (pp. 15-31) includes the RFI. As noted above, redactions to portions of the records in this pdf have been made pursuant to FOIA Exemption 5.

In response to your Request Items 4 and 5 for data compiled and all analysis of data prepared for Members Miscimarra and/or Johnson in relation to their dissent from the Final Rule and the Notice of Proposed Rulemaking, 79 Fed. Reg. 7318 (Feb. 6, 2014), a pdf document entitled "NLRB-2018-000296.4 5-2014 final rule info.pdf" and 12 spreadsheets beginning with the file name "NLRB-2018-000296.4 5-..." are attached. As noted above, redactions to portions of the records in this pdf have been made pursuant to Exemption 5.

1. NLRB-2018-000296.4 5-2008 Initial Elections List.xlsx
2. NLRB-2018-000296.4 5-2008 Pre-Election Hrg data.xlsx
3. NLRB-2018-000296.4 5-2009 Block.xlsx
4. NLRB-2018-000296.4 5-2009 Initial Election List.xlsx
5. NLRB-2018-000296.4 5-2009 Pre-election info (RM-RC-Rd only).xlsx
6. NLRB-2018-000296.4 5-2010 Block.xlsx
7. NLRB-2018-000296.4 5-2010 Initial Election List.xlsx
8. NLRB-2018-000296.4 5-2010 Pre-Election data (RC RM RD only).xlsx
9. NLRB-2018-000296.4 5-2010 Pre-Election Hrg data.xlsx
10. NLRB-2018-000296.4 5-Blocked 2008.xlsx
11. NLRB-2018-000296.4 5-Petition to Election FY2001 - FY2011.xlsx
12. NLRB-2018-000296.4 5-Pre-Election info (RM-RC-RD only).xlsx

In response to your Request Items 14 and 15 for information concerning continuances of the hearing date in representation cases under the Final Rule, the Agency does not statistically track this information. However, it may be helpful to note that information regarding when a hearing was originally scheduled, when a hearing opened, and when a hearing closed is included in the Main Spreadsheet.

In response to your Request Items 16 and 17 for information regarding extensions of time to file and serve position statements under the Final Rule, the Agency does not statistically track this information. However, it may be helpful to note that information

Craig Becker
February 28, 2018
Page 4

regarding when a position statement was due and when it was received is included in the Main Spreadsheet.

In response to your Request Items 18 and 19 for information precluding a party from raising or contesting an issue or presenting evidence in relation to their position statement, the Agency does not statistically track this information.

In response to your Request Item 20 for information concerning motions for a stay of an election or other extraordinary review or relief, the Agency does not statistically track this information.

In response to your Request Items 21, 22, and 26 for information on cases in which employees were permitted to vote subject to challenge in the initial election, two spreadsheets listed below are attached. These remaining spreadsheets, which were compiled using iSearch, contain data from October 1, 2011, through December 31, 2017.

1. NLRB-2018-000296.21 22 26-Election Agreements-vote subject to challenge.xlsx
2. NLRB-2018-000296.21 22 26-RD Decisions-vote subject to challenge.xlsx

In response to your Request Item 23 for information regarding rulings on requests to preclude a party from raising or contesting an issue or presenting evidence based on a failure to timely raise the issue in a position statement or response to a position statement under the Final Rule, the Agency does not statistically track this information.

In response to your Request Item 24 for percentages of cases in which data or analysis of data concerning hearings including when hearings were held and the number of days the hearing was on the record, the requested data is included in the Main Spreadsheet. Regarding the portion of item 24 requesting whether evidence was introduced at the hearing other than the position statement, the Agency does not statistically track this information.

In response to your Request Items 25, 27, 28, and 31 for rulings by hearing officers and/or Regional Directors relating to election eligibility, the introduction of evidence for any issue, and the denial of time to file post-election briefs, the Agency does not statistically track this information. However, please note that information included in the Main Spreadsheet contains case numbers where Regional Director decisions issued; those decisions are posted on the Agency's website (<https://www.nlr.gov/cases-decisions/regional-election-decisions>) if you wish to review the decisions for these issues.

In response to your Request Item 29 for information regarding hearing continuances or delays, the Agency does not statistically track this information. However, please note that information regarding when a hearing was initially scheduled, when a hearing opened, and when a hearing closed is included with the Main Spreadsheet.

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February 28, 2018
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In response to your Request Item 32 for information regarding employer requests for an extension of time to serve and/or file eligibility lists, the Agency does not statistically track this information. However, please note that included in the Main Spreadsheet is information regarding when a voter list was due and when it was received.

In response to your Request Item 33 for information regarding objections based on defects in the service, filing, and/or contents of eligibility lists, the Agency does not statistically track this information.

In response to your Request Item 48 for information on cases resulting in technical refusals to bargain and the Board finding a violation of Section 8(a)(5), a pdf document entitled "NLRB-2018-000296.48-Section 8a5 violations.pdf" is attached. The data is only available for Fiscal Years 2012 through 2017.

In response to your Request Item 50 and last unnumbered paragraph requesting information relating to complaints concerning a labor organization's use of eligibility lists, the Agency does not statistically track this information. However, a search was conducted using iSearch, and an additional search inquiry was directed to the Regional Directors in every Regional office by the Agency's Division of Operations Management. Based on the responses, it was confirmed that there were no cases or any form of complaint concerning misuse of eligibility lists.

Predecisional Agency Records Withheld

I have determined that 296 pages of records are exempt from disclosure in their entirety pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5). Exemption 5 permits an agency to withhold inter- and intra-agency records normally privileged from discovery in civil litigation, *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997), and thus encompasses intra-agency material which would be protected under the deliberative process, attorney work product and attorney client privileges. *Id.*; see also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Here, the documents being withheld include internal Agency email communications discussing advice, recommendations or opinions by and among Board counsel and staff and various draft documents that are part of the Agency's deliberative and decision-making process relating to the Agency's Notice and Request for Information.

Specifically, the deliberative process privilege protects the internal decision-making processes of government agencies in order to safeguard the quality of agency decisions. The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. The deliberative process privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Dep't of Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 8 (2001)(internal quotation marks omitted). To qualify for protection under the deliberative

Craig Becker
February 28, 2018
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process privilege, an agency's material must be both predecisional and part of the deliberative process. *Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008). In order to satisfy this latter criterion, a document "must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 532 F.2d 1136, 1144 (D.C. Cir. 1975). The protected status of a predecisional document is not altered by the subsequent issuance of a decision, see, e.g., *Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005), by the agency opting not to make a decision, see *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

The attorney work-product privilege further protects documents and other memoranda that reveal an attorney's mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See *United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product documents extends even after litigation is terminated. *Id.*

Here, the responsive records withheld meet the requirements for Exemption 5 protection under both the deliberative process and the attorney work-product privileges. They are internal and predecisional. They reflect the views of the Board members and their staffs in the drafting of the Proposed and Final Rule. Since they analyze various strategies, these internal documents clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from forced disclosure. *NLRB v. Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the documents are also attorney work-product, as they reflect legal analysis and opinions of the Board members and their staffs created to assist superiors in their decision-making process, in anticipation of possible litigation.

Moreover, the withheld records may also be protected under the attorney-client privilege. This prong of Exemption 5 protects confidential communications from clients to their attorneys made for the purpose of securing legal advice, services or assistance in some legal proceeding. See *Nat'l Security Counselors v. C.I.A.*, 960 F.Supp.2d 101, 193 (D.D.C. 2013) (citing *In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007)). In the context of FOIA, "the agency is the 'client' and the agency's lawyers are the 'attorneys' for the purposes of attorney-client privilege." *Judicial Watch v. Dep't of Treasury*, 802 F.Supp.2d 185, 200 (D.D.C. 2001) (citation omitted). Here, Board members' staff attorneys intended their communications to be in confidence. Certain email communications and exchanges between the dissenting Board members and their own staff counsel reflect discussions exchanged for the purpose of developing

Craig Becker
February 28, 2018
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legal strategy/securing legal assistance on positions to take regarding the election data and was sought to help develop analysis of the Rule, and are thus protected.

For all the foregoing reasons, your request is granted in part, and denied in part. Regarding the assessment of fees for this request, your request for a fee waiver was granted on January 17, 2018. Accordingly, there is no charge for this request in these circumstances.

You may contact Jodilyn Breirather, the FOIA Specialist who processed your request, at (202) 368-1927 or by email at Jodilyn.Breirather@nlrb.gov, as well as our FOIA Public Liaison at (202) 273-0902 or by email at FOIAPublicLiaison@nlrb.gov, for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services it offers. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at ogis@nara.gov, telephone at (202) 741-5770, toll free at (877) 684-6448, or facsimile at (202) 741-5769.

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.regulations.gov/foia/action/public/home>, by mail to: National Labor Relations Board, Division of Legal Counsel, 1015 Half Street, S.E., Washington, D.C., 20570, or by email to DLCFOIAAppeal@nlrb.gov, within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based. Should you have questions concerning this letter, you may also contact Denise Meiners, FOIA Supervisor, at (202) 273-2935 or by email at Denise.Meiners@nlrb.gov.

Sincerely,

Synta E. Keeling /s/

Synta E. Keeling
Freedom of Information Act Officer

Attachments: (82 pages – PDF documents)
(19 Excel spreadsheets)

Attachment 2



UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

February 15, 2018

The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor, and
Pensions
U.S. Senate
428 Dirksen Senator Office Building
Washington, DC 20510

The Honorable Robert C. "Bobby" Scott
Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives
2101 Rayburn House Office Building
Washington, DC 20515

The Honorable Gregorio Kilili Camacho
Sablan
U.S. House of Representatives
2411 Rayburn House Office Building
Washington, DC 20515

The Honorable Donald Norcross
U.S. House of Representatives
1531 Longworth House Office Building
Washington, DC 20515

Dear Senator Murray and Representatives Scott, Sablan, and Norcross:

Thank you for your December 21, 2017 letter requesting information regarding the National Labor Relations Board's (NLRB) 2014 Election Rule, which modified the Board's representation-election procedures located at 29 CFR parts 101 and 102.

Your request seeks data from representation (RC) petitions, decertification (RD) petitions, and employer-filed (RM) petitions from April 14, 2015, to the most recent date for which data is available, and for a period of equal length going back from April 14, 2015, with each of the two periods organized into one-year increments. It should be noted that April 14, 2015, is the date that the 2014 Election Rule took effect; petitions filed on and after April 14, 2015, are processed under the 2014 Election Rule.

The time period for the included data is July 26, 2012, through December 31, 2017. To accommodate your request for one-year increments, the time periods are broken down as follows:

Cases Processed prior to the Revised Rule:

7/26/2012 – 4/13/2013 (261 days)
4/14/2013 – 4/13/2014
4/14/2014 – 4/13/2015

Cases Processed under the Revised Rule:

4/14/2015 – 4/13/2016
4/14/2016 – 4/13/2017
4/14/2017 – 12/31/2017 (261 days)

For your convenience, we arranged most of your request into summary tables. The underlying data is compiled in an Excel spreadsheet that includes the Case Number, Case Name, and all relevant data points.

1. The number and percentage of elections where the parties stipulated to the terms of the election.

Please see the attached Summary Table, Lines 4 and 5.

2. The number and percentage of elections where the parties have not stipulated to the terms of the election, and a hearing was ordered. Please identify each such case by name and case number.

Please see the attached Summary Table, Lines 6 and 7.

3. The number and percentage of cases in which the employer requested a continuance of the originally-scheduled pre-election hearing date. Please identify each such case by name and case number.

We do not have data elements that track requests for the continuance of a hearing in a matter that can be responsive. The attached Excel spreadsheet lists the number of petitions filed during each time period, the date a Pre-Election hearing was originally scheduled, and the date the hearing was held. We do not track the reason for a difference in the scheduled and held dates.

4. The number and percentage of cases in which the employer's request described in Request No. 3 was granted. Please identify each such case by name and case number.

As stated above in the response to Request No. 3, we do not have data elements that track requests for continuance of a hearing in a matter that can be responsive.

5. The range, mean, and median number of additional days granted by each continuance described in Request No. 4.

As stated above in response to Request No. 3, we do not have data elements that track the underlying information, we cannot produce this calculation.

6. The number and percentage of cases where the labor organization requested a continuance of the originally scheduled hearing date. Please identify each such case by name and case number.

For the reasons set forth above in the response to Request No. 3, we do not have data elements that track this information.

7. The number and percentage of cases in which the labor organization's request described in Request No. 6 was granted. Please identify each such case by name and case number.

For the reasons set forth above in the response to Request No. 3, we do not have data elements that track requests for continuance of a hearing in a matter that can be responsive.

8. The range, mean, and median number of additional days granted by the each continuance described in Request No. 7.

As we do not have data elements that track the underlying information, we cannot produce this calculation.

9. The number and percentage of cases in which a pre-election hearing was held. Please identify each such case by name and case number.

Please see the attached Summary Table, Line 8.

10. The number and percentage of cases in which the only issues that were not agreed to by the parties were the election date or details regarding the conduct of the election.

We do not have data elements that track this information.

11. The range, mean, and median number of days for the duration of pre-election hearings.

Please see the attached Summary Table, Lines 9, 10, and 11.

12. The number and percentage of cases in which the parties stipulated that some employees should vote subject to challenge (a) as part of an overall election agreement and (b) in a case that resulted in a decision and direction of election. Please identify each such case by name and case number.

The information provided is for cases where elections were held and the results were certified.

Part (a) – Cases that resulted in Election agreements

Election Agreements – Prior to the Revised Rule

7/26/2012 – 4/13/2013: 27 cases (all RC representation petitions)

4/14/2013 – 4/13/2014: 25 cases (all RC representation petitions)

4/14/2014 – 4/13/2015: 22 cases (all RC representation petitions)

Election Agreements - Revised Rule:

4/14/2015 – 4/13/2016: 133 cases (all RC representation petitions)

4/14/2016 – 4/13/2017: 58 cases (all RC representation petitions)

4/14/2017 – 12/31/2017: Five cases (all RC representation petitions)

Part (b) – Cases that resulted in a Decision and Direction of Election

RD Decisions – Prior to the Revised Rule:

7/26/2012 – 4/13/2013: One case (RC representation petition)

4/14/2013 – 4/13/2014: Three cases (all RC representation petitions)

4/14/2014 – 4/13/2015: Two cases (all RC representation petitions)

RD Decisions - Revised Rule

4/14/2015 – 4/13/2016: Two cases (All RC representation petitions)

4/14/2016 – 4/13/2017: Two cases (all RC representation petitions)

4/14/2017 – 12/31/2017: Zero cases

13. The number and percentage of cases in which the Regional Director or Board directed that some employees should vote subject to challenge over the objection of a party. Please identify each such case by name and case number.

The information provided is for cases where elections were held and the results were certified.

RD Decisions – Prior to the Revised Rule:

7/26/2012 – 4/13/2013: Five cases (all RC representation petitions)

4/14/2013 – 4/13/2014: 11 cases (all RC representation petitions)

4/14/2014 – 4/13/2015: Six cases (all RC representation petitions)

RD Decisions - Revised Rule

4/14/2015 – 4/13/2016: 14 cases (13 RC representation petitions, one RM employer-filed petition)

4/14/2016 – 4/13/2017: Seven cases (all RC representation petitions)

4/14/2017 – 12/31/2017: Two cases (RC representation petition)

14. The number and percentage of cases in which the Regional Director or Board refused to permit a party to litigate an issue on the grounds that it was not identified or contested in its position statement. Please identify each such case by name and case number.

We do not have data elements that track this information.

15. The number and percentage of cases in which a dispute that was deferred by permitting employees to vote subject to challenge was mooted by the election results. Please identify each such case by name and case number.

Data responsive to #12 and #13 list cases where people were allowed to vote subject to challenge. The challenge information below is specific to those particular cases. The spreadsheets prepared for #12 and #13 contain determinative challenge information. We do not have data elements that track whether the parties' underlying dispute regarding status of the employees in question was resolved by the results of the election.

Time Frame	Election Agreements-vote subject to challenge	RD Decision-stipulated vote subject to challenge	RD Decision – RD Directed to vote subject to challenge	# of cases where challenges were filed	# of cases where challenges were determinative
7/26/2012 – 4/13/2013 (prior to revised rule)	27	1	5	24	3
4/14/2013 – 4/13/2014 (prior to revised rule)	25	3	11	29	5
4/14/2014 – 4/13/2015 (prior to revised rule)	22	2	6	22	1
4/14/2015 – 4/13/2016 (revised rule)	133	2	16	115	15
4/14/2016 – 4/13/2017 (revised rule)	58	2	7	51	6
4/14/2017 – 12/31/2017 (revised rule)	5	0	2	4	2

16. The number and percentage of cases in which the employer requested an extension of time to file and serve the voter eligibility list. Please identify each such case by name and case number.

We do not have data elements that track this information. The attached Excel spreadsheet lists the “original” and “current” due date for the voter eligibility list and the

date the list was provided ("completed due date"). We do not track the reason for any difference in the original and completed due dates.

17. The number and percentage of cases described in Request No. 16 in which the request was granted, and the number and percentage of cases described in Request No. 16 in which the request was denied.

As explained above in the response to Request No. 16, we do not have data elements that track an extension request.

18. The range, mean, and median number of additional days granted by each extension described in Request No. 17.

As explained above in the response to Request No. 16, we do not have data elements that track an extension request.

19. The number and percentage of cases in which a decision and direction of election was issued.

Please see the attached Summary Table – Line 6.

20. The range, mean, and median number of days between the close of a pre-election hearing and the issuance of a decision and direction of election.

Please see the attached Summary Table – Line 12, 13, and 14.

21. The range, mean, and median number of days between the filing of post-hearing briefs following a pre-election hearing, when such filing was permitted, and the issuance of a decision and direction of election.

Please see the attached Summary Table – Line 17.

22. The number and percentage of certifications of a representative that were followed by a technical refusal to bargain that resulted in a Board decision finding a violation of section 8(a)(5) of the National Labor Relations Act. Please identify each such case by name and case number.

Please see the attached spreadsheet Technical 8(a)(5) Violation Statistics FYs 2014-2017.

23. 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, together with copies of all such charges, objections, or complaints.

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.

If you or a member of your staffs have any questions or need additional assistance, please do not hesitate to contact the Office of Congressional and Public Affairs at (202) 273-1991.

Sincerely,



Marvin E. Kaplan
Chairman



Peter B. Robb
General Counsel

	7/6/2012 -- 4/13/2013	4/14/2013 -- 4/13/2014	4/14/2014 -- 4/13/2015	4/14/2015 -- 4/13/2016	4/14/2016 -- 4/13/2017	4/15/2017 to 12/31/2017
Petitions Filed	1848	2521	2619	2546	2269	1586
Elections Held	1169	1636	1713	1724	1566	1101
Elections Held Pursuant to Stipulated Election Agreements	1083	1490	1576	1580	1458	1014
Percent of Stipulated Elections	93%	91%	92%	92%	93%	92%
Directed Elections	87	153	140	142	108	86
Percent of Directed Elections	7%	9%	8%	8%	7%	8%
Pre-Election Hearings	142	205	240	223	192	122
Average (Mean) No. Days of Hearing	2	2	2	2	2	2
Median No. Days of Hearing	1	1	1	1	1	1
Range of No. Days of Hearing	1 to 13	1 to 35	1 to 12	1 to 15	1 to 21	1 to 92
Median No. Days from Close of Pre-Election Hearing to Issuance of the DDE	20	22	24	12	16	13
Average (Mean) No. Days Between Close of Pre-Election Hearing and the Issuance of the DDE	39	33	26	30	19	23
Range in No. Days Between Close of Pre-Election Hearing and the Issuance of the DDE	1 to 927	4 to 315	3 to 178	1 to 715	1 to 233	1 to 172
Median No. Days Between Filing of Briefs and Issuance of DDE	10	14	11	12	23	17
Average (Mean) No. Days Between Filing of Briefs and Issuance of DDE	28	20	16	36	36	30
Range in No. Days Between Filing of Briefs and Issuance of DDE	1 to 913	0 to 238	0 to 157	1 to 301	3 to 149	1 to 158
Median Days from Petition to Election	38	39	38	24	23	23

Attachment 3



UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

April 13, 2018

The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor, and
Pensions
U.S. Senate
428 Dirksen Senator Office Building
Washington, DC 20510

The Honorable Robert C. "Bobby" Scott
Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives
2101 Rayburn House Office Building
Washington, DC 20515

The Honorable Gregorio Kilili Camacho
Sablan
U.S. House of Representatives
2411 Rayburn House Office Building
Washington, DC 20515

The Honorable Donald Norcross
U.S. House of Representatives
1531 Longworth House Office Building
Washington, DC 20515

Dear Senator Murray and Representatives Scott, Sablan, and Norcross:

Thank you for your March 28, 2018 letter requesting additional information regarding the National Labor Relations Board's (NLRB) 2014 Election Rule, which modified the Board's representation-election procedures located at 29 CFR parts 101 and 102.

Your request seeks data from representation (RC) petitions, decertification (RD) petitions, and employer-filed (RM) petitions from April 14, 2015, to the most recent date for which data is available, and for a period of equal length going back from April 14, 2015. It should be noted that April 14, 2015, is the date that the 2014 Election Rule took effect; petitions filed on and after April 14, 2015, are processed under the 2014 Election Rule.

The time period for the included data is July 26, 2012, through December 31, 2017. For the purposes of this response, "Group A" petitions were filed between July 6, 2012 and April 13, 2015 and "Group B" petitions were filed between April 14, 2015 and December 31, 2017.

In your letter, you requested that the Agency run the following search:

For each of the two sets of representation cases identified as Group A or Group B, please query NxGen using the terms *postpone*, or *reschedule*, or *continuance and hearing or motion* or *order*. Please provide the number of results or “hits” for each group of representation cases. To the extent that there are fewer than 200 results within either group, please provide the information sought by Requests 3-8 in Attachment A with respect to such results. If there are more than 200 results, please include the production of all outstanding requests as set forth above.

The Agency ran a word search for the relevant case logs using the terms suggested in the above request. The search yielded over 5,000 results. With such broad search terms, these results did not accurately reflect those cases where continuances had been sought.

In an attempt to extricate the data requested, the Agency ran two additional sets of document searches:

- 1) All Motions for Postponement/Rescheduling of Hearing filed in Pre-Election Hearings. These Motions are identified by the party filing. This data is reflected in the chart below and the file attached.
- 2) All Orders issued in Pre-Election Hearing Actions. This includes all Orders Rescheduling, Orders Denying, and Miscellaneous Orders issued. Miscellaneous Orders were reviewed individually to determine if the Order was an Order Rescheduling or Order Denying. This data is reflected in the chart below and the file attached.

	Group A	Group B
	7/16/2012 to 4/13/2015	4/14/2015 to 12/31/2017
Total Motions to Postpone	455	242
Filed by Employer	392	197
Filed by Union	63	45
No. Cases Resulting in Hearing	93	56
No. Orders Rescheduling Hearing	2,380	1,018
No. Orders Denying Requests for Postponement	18	44

As you can see from the data attached, the results of the search for the Motions to Postpone differ from the results of the search for Orders Rescheduling/Orders Denying. There are several possible reasons for the variations in these data sets. First, a Region could have rescheduled the case sua sponte due to scheduling conflict or other circumstances. Second, one or both parties could have made a request for postponement that was not in writing. Those requests may not be reflected in the case file.

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.

In regards to your request to extend the deadline for comments until May 16, 2018, the Board has unanimously voted to deny your request.

If you or a member of your staffs have any questions or need additional assistance, please do not hesitate to contact the Office of Congressional and Public Affairs at (202) 273-1991.

Sincerely,

A handwritten signature in black ink, appearing to read "Marvin Kaplan", written in a cursive style.

Marvin E. Kaplan
Chairman