

April 17, 2018

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

Re: Response to NLRB's Request for Information Concerning Representation Case Procedures

Dear Ms. Rothschild:

My staff and I represent labor organizations and employees in matters before the National Labor Relations Board. I write to provide information concerning the Board's representation case procedures in response to your request.

The amendments to the procedures adopted in December 2014 represent modest and common-sense changes in the processing of petitions for an election. I urge the Board not to alter the amended rules (hereinafter also referred to as the Final Rule or the Rule).

In our experience under the amended rules:

1. Unnecessary litigation has been reduced. For example, under the Final Rule Regional Directors have the discretion to defer, in the pre-election hearing, litigation of unit placement issues involving a relatively small percentage of potential voters. Those issues may still be litigated in a post-election hearing if the disputed individuals are sufficient in number to potentially affect the results of the election (otherwise they are moot). This change as well as other rules changes has allowed the Board to better utilize its scarce resources. For example, between February and October 2017, as compared to the time frame of February through October of 2016, "the Board's output of contested unfair labor decisions and published representation case decisions has been reduced by approximately 45 percent."<sup>1</sup>

In addition, statistical data maintained by the Board that Member Pearce cited in his dissent to the Request for Information shows that the time required for the Board to process representation petitions has been shortened. For contested cases, the amended rules have reduced the median time from petition to election by more than three weeks.<sup>2</sup> See Median Days from Petition to Election, [www.nlr.gov/news-outreach/graphs-data/petitions-and-](http://www.nlr.gov/news-outreach/graphs-data/petitions-and-)

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<sup>1</sup> See <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1718/Notice%20and%20Request%20for%20Information%20re%20Election%20Rule.pdf> at 5 n.2.

<sup>2</sup> *Id.* at 9

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[elections](#) (reporting post-Final Rule median processing times for contested cases as 35 days in FY 2016 and 36 days in FY 2017, as compared to pre-Final Rule median processing times ranging from 59 to 67 days in FYs 2008 to 2014.<sup>3</sup> Moreover, the percentage of elections that were conducted more than 56 days from petition has decreased since the amended rules went into effect.<sup>4</sup> See Performance Accountability Reports, FYs 2013-2017, [www.nlr.gov/reports-guidance/reports](http://www.nlr.gov/reports-guidance/reports) (reporting that, pre-Final Rule, the Agency processed 94.3% of its representation cases from petition to election in 56 days in FY 2013 and 95.7% of its cases in FY 2014, as compared to post-Final Rule rates of 99.1% in FY 2016 and 98.5% in FY 2017).

2. The rules have been made simpler and easier for union representatives and employees to understand. Many of the beneficial rule changes noted by Member Pearce in his dissent to the Request for Information point to such user-friendly improvements. For example:
  - Parties may now use modern technology to electronically file and serve petitions and other documents, thereby saving time and money, and affording non-filing parties the earliest possible notice.
  - Board procedures are more transparent, and more meaningful information is more widely available at earlier stages of [Board] proceedings.
  - Nonemployer parties are able to communicate about election issues with voters using modern means of communication such as email, texts and cell phones, and are less likely to challenge voters out of ignorance.
  - Notices of Election are more informative, and more often electronically disseminated.
  - Employees voting subject to challenge are more easily identified, and the chances are lessened of their ballots being commingled.<sup>5</sup>

Consequently, under the amended rules union and employee petitioners have become increasingly willing to enter into voluntary election agreements, contrary to the dire predictions of the Final Rule dissenters.<sup>6</sup> This increased willingness by unions and employees to compromise with employers has led to an increase in the Board's election agreement rate from 91.1% in FY 2013 and FY 2014 to 91.7% in FY 2017.<sup>7</sup>

3. Board practice has been brought more into line with judicial practice and thus made participation in representation cases easier for counsel. This includes the implementation of electronic filing and service of petitions, which leads to earlier notice, and the

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<sup>3</sup> *Id.* at 9 n.6.

<sup>4</sup> *Id.* at 9 n.5.

<sup>5</sup> *Id.* at 5-6.

<sup>6</sup> *Id.* at 8-9. The dissenters mistakenly argued that the Final Rule did not provide enough time to reach agreement, 79 FR 74442, and would lead to a significant increase in pre- and post-election litigation, 79 FR 74450.

<sup>7</sup> See Percentage of Elections Conducted Pursuant to Election Agreements in FY 2017, [www.nlr.gov/news-outreach/graphs-data/petitions-and-elections](http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections).

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requirement that certain relevant information be provided to petitioners before the pre-election hearing, which reduces surprises at the hearing. Because of these changes, the timing and conduct of hearings is more predictable and “litigation is more efficient and uniform.”<sup>8</sup>

4. All parties have been accorded due process. The courts have soundly rejected due process and related statutory arguments first advanced by the Final Rule dissenters and later by employers who sued to block the amended rules. As recounted by Member Pearce in his dissent to the Request for Information, *id.* at 7-8, courts have held that:
  - The Final Rule’s accelerated deadlines and hearing provisions do not violate employers’ due process rights and the NLRA’s “appropriate hearing” requirement. See *Chamber of Commerce of the United States of America v. NLRB*, 118 F.Supp.3d 171, 177, 205-206 (D.D.C. 2015) (due process challenge does “not withstand close inspection”; it is “predicated on mischaracterizations of what the Final Rule actually provides”); *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 2015 WL 3609116 \*2, \*5-\*7 (W.D. Tex. June 1, 2015), *affd.*, 826 F.3d 215, 220, 222-223 (5<sup>th</sup> Cir. 2015) (“the rule changes to the pre-election hearing did not exceed the boundaries of the Board’s statutory authority”).
  - The Final Rule is not arbitrary and capricious. See *Chamber of Commerce*, 118 F.Supp.3d at 220 (rejecting claims that Final Rule is arbitrary and capricious or an abuse of discretion); *ABC of Texas*, 826 F.3d at 218 (The “rule, on its face, does not violate the National Labor Relations Act or the Administrative Procedure Act”); see also 118 F.Supp.3d at 195-203 and 826 F.3d at 220-223 (rejecting arguments that it was arbitrary and capricious to grant regional directors discretion to defer litigation to defer voter eligibility issues at the pre-election hearing).
  - The Board demonstrated that there was a need to amend the rules, and therefore the Final Rule does not violate the Administrative Procedure Act. See *Chamber of Commerce*, 118 F.Supp.3d at 219-220 (“the Board has offered grounds to show that the issues targeted by the Final Rule were sufficiently tangible to warrant action”).
5. Employers that wish to do so have mounted vigorous campaigns that have effectively conveyed the same types of information using the same methods as was the case prior to the amendments. One case in point is *IKEA U.S. East, LLC*, Case No. 1-RC-176529 – a representation case in NLRB Region One that my office litigated under the amended rules. The documentary evidence and testimony by IKEA management established that during the critical period the employer conducted 25 captive audience meetings to convey its views concerning unionization to the employees. (Hearing on Objections, Joint Ex. 1; TR 234) Why any employer would need (or should have the right) to hold 25 captive audience meetings is a legitimate question. In any event, this example shows that employers still have more than ample time to campaign against the union if they so choose. See *Chamber*

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<sup>8</sup> <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1718/Notice%20and%20Request%20for%20Information%20re%20Election%20Rule.pdf> at 5.

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*of Commerce*, 118 F.Supp.3d at 181-182, 189, 206-208, 220 (“The elimination of the presumptive pre-election waiting period does not violate the NLRA or the First Amendment” and there was no showing that “the Final Rule inhibits . . . debate in any meaningful way”); *ABC of Texas*, 826 F.3d at 220, 226-227 (rejecting claim that “the cumulative effect of the rule change improperly shortens the overall pre-election period in violation of the ‘free speech’ provision of the Act” or inhibits meaningful debate).<sup>9</sup>

6. Employees have been better able to exercise their right to petition and to make a free choice of whether to be represented. See, e.g., Response #2 above.

Finally, there is no good reason for this Board to even contemplate altering the amended rules. See *Federal Communications Commission v. Fox Television*, 556 U.S. 502, 515 (2009) (an agency that is considering modifying or rescinding a valid existing rule must treat the rule as the status quo and must provide “good reasons” to justify a departure from it). As Member McFerran observed in her dissent to the Request for Information, “by every available metric the Rule appears to have met the Board’s expectations, refuting predictions about the Rule’s supposedly harmful consequences.”<sup>10</sup> Moreover, the Board’s unnecessary and premature request for public input – which “is not framed to solicit detailed data, or even informed feedback” – “amount[s] to little more than an open-ended ‘raise-your-hand-if-you-don’t like-the-Rule’ straw poll. That hardly is a sound approach to gathering meaningful feedback.” *Id.* at 12-13. The Board is already in possession of “empirical, objective data” sufficient to make an informed assessment as to how the amended rules are working, *id.* at 13, and that data shows that the amended rules are working well.

In sum, the Board should not alter the amended rules.

Thank you for your attention to this matter.

Sincerely,



Nicholas W. Clark  
General Counsel  
United Food and Commercial  
International Union, AFL-CIO  
202-466-1522  
[nclark@ufcw.org](mailto:nclark@ufcw.org)

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<sup>9</sup> There has been no substantial change in party win-rates under the amended rules. See NLRB, Annual review of Revised R-Case Rules, available at <https://www.nlr.gov/news-outreach/news-story/annual-review-revised-r-case-rules>.

<sup>10</sup> <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1718/Notice%20and%20Request%20for%20Information%20re%20Election%20Rule.pdf> at 10.