April 13, 2018

Submitted via https://www.nlrb.gov/reports-guidance/public-notices/request-information

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

Re: Representation Case Procedures; Request for Information (RIN 3142-AA12)

Dear Ms. Rothschild:

I am pleased to submit these comments on behalf of the Retail Industry Leaders Association (RILA) in response to the Request for Information (RFI) by the National Labor Relations Board (NLRB or Board) regarding Representation Case Procedures that was published in the Federal Register on December 14, 2017.¹

Summary of Comments

As described in more detail below, the process that led to the 2014 revisions was fatally flawed. Consequently, the Board should rescind the revisions in their entirety. Only after the Board fully analyses those minority of cases in which representation questions are not decided in a timely manner should it consider additional reforms. However, if the Board does not rescind the 2014 revisions in their entirety, it should reconsider those provisions, itemized below, that are not based on a proper balancing of employee, employer, and labor union rights under the National Labor Relations Act (NLRA or Act). These comments should be read in conjunction with our comments on the Board’s proposed rulemakings made in 2011 and 2014 that led to the 2014 revisions. Copies of our 2011 and 2014 comments are attached for convenience.

Statement of Interest

RILA is a trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad. Given the enormous role that RILA members play in the U.S. economy, representing nearly a third of all retail sales, RILA has a strong interest in this RFI, which could have a major impact on hundreds of thousands of retail employees across the country.

The 2014 Revisions Were Based on a Deeply Flawed Process and Cannot Be Salvaged

The revisions to the Board’s representation case procedures that were finalized in 2014 were the result of a deeply flawed process that was based on a faulty premise and ignored the careful balance of rights established under the NLRA. With singular focus, the Board majority focused on the “expeditious resolution of questions concerning representation,” or shortening the time period for elections, while neglecting important rights such as employee privacy, freedom not to associate, free speech, and due process. Taken together the 2014 revisions accomplished their stated goal. However, at what cost?

The Board Should Have Focused on Problem Cases Rather Than a Wholesale Re-Write of Its Rules

Throughout the rulemaking process, the Board majority framed its goal in revising the representation case procedures as furthering the Act’s policy of “expeditiously resolving questions concerning representation” by removing unnecessary barriers and making Board processes more efficient.2 While there is broad consensus that questions concerning representation should be resolved in a timely manner, the simple fact is that the vast majority of questions concerning representation were already being resolved quickly.

For example, as observed by the Board majority, in the decade before it initiated the rulemaking process, 90 percent of elections were conducted within 56 days of the filing of a petition, with a median time of 37-38 days between petition and election.3 In other words, the clear majority of elections were already being conducted expeditiously—there was no problem to correct.

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To be sure, there were outlier cases. The rulemaking record shows that some cases dragged on for many months between petition and election. As noted in the 2014 dissenting opinion by Members Miscimarra and Johnson, as of October 1, 2014, there were 33 re-election representation cases pending before the NLRB for more than one year, four of which had been pending for more than three years. However, the Board never conducted any thorough analysis of why these cases were pending for such a long time. Anecdotal evidence suggests that much of the delay in such cases was directly attributable to labor union delays or delays at the Board, not delays caused by employers. For example, in our 2011 comments we described one RILA member that waited 27 months for an election, but fully two-thirds of that time was spent waiting for the Board to make a unit determination.

The record also indicates that some of the problem cases continued for months because labor unions filed blocking charges – charges that were eventually dismissed. A more appropriate process to examine expeditious resolution of questions concerning representation should have begun with a thorough review of the minority of cases that were not being resolved expeditiously.

Focusing on the problem cases could have led the Board to a narrower set of issues that warranted consideration. For example, if a large percentage of cases that take months to resolve involve blocking charges, are the charges meritorious or mere delay tactics? Is there a policy change specific to those cases that would further expedite resolution? Focusing on a narrower set of issues, tailored to address these relatively few problem cases, would have caused less collateral damage to the other rights protected by the NLRA.

However, the Board did not take such an approach. Instead, it proposed – and enacted – revisions to dozens of provisions of its rules that will apply in all cases causing a significantly adverse impact on other important rights that the Board is charged with protecting.

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5 In notice and comment rulemaking, failure to consider an important aspect of the problem under consideration is sufficient to violate the Administrative Procedure Act’s prohibition on rulemaking that is arbitrary and capricious. See Motor vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co., 463 U.S. 29, 43 (1983). Regardless of whether the NLRB’s rulemaking violated the APA, the process utilized by the agency was inferior as a matter of sound policy development.
6 See, for example, Pioneer Plastics, 1-RD-02134, and Alan Richey, 19-UD-00605.
The Revisions Adversely Impacted Many Rights the Board Is Charged with Protecting

The NLRA establishes and regulates the competing rights of employees, employers, and labor organizations. One of these rights is the right of employees to engage in concerted activity or to self-organize and select representatives of their own choosing. However, this right is equally balanced by employees’ rights to refrain from such activities. In addition to promoting freedom of association, the NLRA explicitly recognizes and protects freedom of speech. Implementation and enforcement of the Act by the Board, sometimes with guidance or correction by the Supreme Court, has also led to many additional rights that have long been recognized, such as private property rights, freedom to contract, privacy, and due process.

The Board did not properly consider or balance these rights in promulgating the 2014 revisions. For example:

Employee Privacy: The Board’s requirement that employers provide their employees’ telephone numbers and, where available, e-mail addresses to union organizers constitutes an unreasonable invasion of privacy. Ironically, even the Board’s solicitation of comments in this very proceeding recognizes the sensitive nature of this type of information; it cautions against including “personal information such as . . . telephone numbers, and email addresses” in submitted comments. Yet the Board now appears to take the position that an employee who provides his personal e-mail or cell phone number to his employer—for example, as a means of emergency contact—thereby consents to have this information shared with strangers in the event of organizing. What’s more, the Board has implemented this requirement in a heavy handed manner by requiring employers to go to great lengths to search for personal employee information. For example, in RHCG Safety Corp., the Board found an employer failed to satisfy the requirements of the election rule by not turning over to the union personal phone numbers or email addresses that supervisors may have had on their own electronic devices even though the employer did not maintain any central repository of the information and the information was not readily available.

Freedom of Association and Freedom Not to Associate: As provided for in the 2014 revisions, many questions that arise during an organizing campaign will be deferred until after the election, including determinations of eligible voters and supervisory status of

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8 79 Fed. Reg. at 7318.
9 365 NLRB No. 88 (2017).
employees. However, voters cannot make informed decisions about exercising their freedom of association if they do not know with any certainty which co-workers will be included in the bargaining unit. This problem was further exacerbated by the Board’s decision in *Specialty Healthcare*\(^{10}\) that greatly increased the ability of labor unions to gerrymander bargaining units. However, even with the Board’s decision to overrule *Specialty Healthcare*,\(^{11}\) the election rules provide too little certainty for employees to exercise their rights to freely associate. After all, how can an individual make an informed decision to exercise or not exercise freedom of association rights without knowing with whom he or she will be associated?

**Due Process:** The 2014 revisions violate basic principles of due process in that they eliminate the opportunity for Board review of critically important questions and dramatically shorten the opportunity for employers to develop and submit their position on these matters. Specifically, the revisions require an employer to state its position a mere seven days after the filing of an election petition. Any issues the employer does not include in this statement may be permanently waived. The amendments further direct the exclusion of evidence regarding important election issues. In practice, this discretion could be applied to preclude an employer from developing a complete record that would assist the regional director—and, perhaps, the Board—in making the highly fact-specific determination of whether the bargaining unit is appropriate. Development of a record has been further limited by the direction, in most cases, to hearing officers to not permit post-hearing briefs. Improper limitations on the scope of the record have also significantly hindered the ability to seek later review in court.

Finally, it should also be noted that the Board has applied its rules in a way that further erodes due process by applying requirements in a hyper-technical manner with respect to employers, even though no party is harmed. The same hyper-technical application has not been made with respect to labor unions.\(^{12}\)

**Free Speech:** Free speech rights in the context of an election only have meaning if there is sufficient time to exercise those rights. The revisions significantly shorten the time for election to make it more difficult for employees who want to exercise their right not to associate to exercise their freedom of speech rights. While labor unions and pro-union employees may have months to plan their organizing strategy, employees opposed to

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\(^{10}\) 357 NLRB 934 (2011).

\(^{11}\) *PCC Structurals*, 365 NLRB No. 160 (2017).

unionization may be the last to learn of the organizing efforts and may have comparatively little time to educate themselves, organize, and communicate. The lack of robust, informed debate only does a disservice to employees who will benefit from hearing all sides of the debate and having sufficient time to formulate questions and consider responses to those questions. Similarly, employer free speech is also curtailed by shortening the time period for an election. Employer speech rights are also eroded by deferring unit determination issues as employers may not know which employees are considered supervisors permitted to communicate the employer’s message.

_The 2014 Revisions Should Be Rescinded_

For the reasons summarized above, the process used by the Board to arrive at the current representation case procedures was fatally flawed and is best addressed by rescinding them and returning to the prior procedures until after the Board conducts a thorough review of those few cases in which representation cases have not been decided expeditiously. In addition, we agree with the 2014 dissenting opinion when it observed that it is unreasonable to suggest that any portion of the 2014 rules be viewed in isolation and that the “manifold problems [identified with] mean the entirety of the new election process is beset with fatal infirmity.”

_The Following Changes Must Be Made If the Board Does Not Wholly Rescind the 2014 Revisions_

As detailed above, rescinding the 2014 revisions and conducting further analysis is preferable to modifying the 2014 revisions. Further, a return to the previous election rules gives certainty of over seventy years of precedent that are fully understood by all stakeholders. However, if the Board decides not to rescind the 2014 revisions, the following are revisions that must be made to restore some balance to the representation case procedures:

- Rescind the requirement to provide employee phone numbers and email addresses as part of the voter list;
- Abandon hyper-technical application of rigid rules that could result in setting aside an election, especially if no party has been harmed;
- Require pre-election hearings for unit determination issues such as voter eligibility and supervisory status;

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13 79 Fed. Reg. at 74,441 (emphasis in original).
• Permit appeal to the Board as a matter of right of all unit determination questions and other decisions by a Regional Director before an election is held;
• Reintroduce pre- and post-hearing briefs that permit more robust development of positions than the 2014 revisions permit and eliminate the current statement of position requirement;
• Eliminate the requirement to post a notice of petition; and
• Eliminate the requirement to provide differing lists of employees prior to and after the hearing.

Conclusion

Thank you for the opportunity to submit comments in response to the Board’s request for information regarding its Representation Case Procedures. For the reasons outlined in this letter and attached comments, we urge the Board to rescind the 2014 revisions and to consider more targeted reforms only after a careful analysis of the cases that have historically been most responsible for delay at the Board. Alternatively, if the Board does not decide to rescind the 2014 rules in their entirely, we urge the Board to address the most problematical provisions of the 2014 revisions, as described above.

Please do not hesitate to contact me if RILA may be of assistance to you as the Board considers this important matter.

Sincerely,

/s

Evan Armstrong
Vice President, Government Affairs

Attachments
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

PROPOSED AMENDMENTS TO THE NLRB'S RULES GOVERNING
EMPLOYEE REPRESENTATION ELECTIONS (RIN 3142-AA08)

COMMENTS OF THE
RETAIL INDUSTRY LEADERS ASSOCIATION

The Retail Industry Leaders Association ("RILA"),1 on behalf of itself and
its member companies, submits the following comments in response to the
NLRB’s proposed amendments to its rules governing employee representation
elections.2 RILA strongly objects to the NLRB’s proposal and agrees with the
specific objections raised in Member Hayes’s dissent and at the NLRB’s hearing
on July 18–19, 2011. Our comments draw from the experiences of our member
companies to elaborate on four reasons why the NLRB should not adopt its
proposed amendments: (1) Requiring employers to develop their legal position in
only seven days would be infeasible and unfair; (2) Shortening the time between
petition and election would result in employees being critically uninformed; (3)
Deferring issues affecting less than 20% of the proposed unit would lead to
inaccurate election results and unnecessary confusion; and (4) Providing employee
phone numbers and email addresses to unions would result in unwarranted
invasions of privacy and interferences with normal business operations.
Considered as a whole, the NLRB’s proposed amendments would have the effect
of silencing employers and helping unions win elections through unfair—and often
misleading—“ambush” tactics.

Before turning to our specific objections, we briefly take issue with the
NLRB’s general premise. As noted in Member Hayes’s dissent—and as made

1 RILA is a trade association whose membership includes top retailers, product manufacturers,
and service suppliers, including nine of the top ten U.S. retailers, as ranked by annual
revenue. Together, RILA members provide millions of jobs and operate more than 100,000
stores, manufacturing facilities and distribution centers domestically and abroad.

explicit in the Department of Labor’s concurrently-proposed “persuader rule”\(^3\)—the NLRB believes that the employer community is uniformly responsible for delaying union representation elections. In RILA members’ experience, this is categorically untrue. As the Board itself has noted, representation cases are generally processed quickly.\(^4\) And when they are not, it is often the Board’s or the union’s fault rather than the employer’s. One member company provided an example in which 18 of the 27 months in a heated election contest were spent simply waiting for the Board to make a unit determination.\(^5\) Another member offered examples of unions purposefully sending their certification petitions to incorrect Board locations and filing before holidays to obtain additional time for campaigning. In addition to considering the specific objections discussed below, RILA exhorts the NLRB to reexamine the basic assumptions driving its proposal.

I. **It Is Not Possible For Retail Employers To Develop An Informed Position On A Union Organizing Campaign In Only Seven Days.**

The most fundamental problem with the NLRB’s proposed rule is the provision requiring Regional Directors to schedule a pre-election hearing within seven days of a union’s certification petition: The employer would have to state most of its objections during that hearing or else waive them in all subsequent proceedings. For a number of reasons, it is not possible for retail employers to develop an informed opinion about an organizing campaign in only seven days.

Unions typically organize retail employers on a covert basis over the course of several months. In RILA members’ experience, organizers contact retail employees out of the employer’s sight, such as by visiting them at home or approaching them in the common areas of malls where members’ stores may be located. “Salting,” in which union employees apply for work in retail stores as a means of talking with retail employees on the job, is also very common. To maintain their secrecy, unions tell employees not to notify the employer about their organizing efforts; there have been reports of unions coupling such instructions with an implied or explicit threat that the employer would meet any notification with adverse employment actions. It is because of these practices that retail

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\(^3\) See 76 Fed. Reg. 36190 (describing the “deleterious effect” of “consultant-led anti-union campaigns and their resulting disruptions”).


\(^5\) This employer ultimately prevailed in its objections to the proposed unit.
employers usually do not learn about union organizing drives until after a certification petition is filed.

Having learned about an organizing campaign, employers need considerable time to gather the facts and information that are essential to developing an informed opinion. It takes at least two to three weeks to gather general information about the union, such as its LM-2 financial report, its bylaws, its strike history, its past- and current-contracts with other employers, and its record of unfair labor practices. Moreover, just as unions spend months planning their organizing campaigns, it takes time for employers to identify the specific allegations and promises driving those campaigns. Gathering this information is particularly time consuming, in RILA members’ experience, because unions do not share any of it on a voluntary basis; instead, employers must spend time searching union and government websites, and conferring with employees, as well as other employers who have experience with the union. It then takes additional time for the employer to fact-check the union’s claims, decide whether to oppose or support unionization, and articulate the reasons for its opposition or support.

The current Board procedures allow adequate (but by no means ample) time for retailers to gather information and develop a position. But as a simple matter of logistics, it is not possible for retail employers to accomplish all of the above steps and to develop their legal arguments in only seven days. These difficulties are amplified by the seasonal nature of retail sales. Under the current system, unions have been known to file certification petitions during the holiday season to catch employers off guard during a time when their stores are especially busy. A holiday-season petition coupled with a seven-day turnaround would amount to a complete and utter ambush.

II. **Shortening The Amount of Time Between Petition And Election Would Result In Employees Being Critically Uninformed.**

Another problematic aspect of the NLRB’s proposed rule is that employees would lack adequate time to develop an informed opinion about the question of workplace representation. It has been estimated that the amended rule could result in elections being held in as little as ten days after a union files its certification petition.\(^6\) On such a tight schedule, retail employees will not have time to ask important questions or fully explore their options. This is especially true for the many retail employees who work multiple jobs or balance work and school. And

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\(^6\) *See* Transcript of NLRB Public Meeting on Proposed Election Rule Changes, at 54, 254, 391, 423.
many teenage and other first-time employees will be experiencing workplace democracy for the first time.

Further, the nature of the retail industry makes it difficult for employers to quickly communicate information to employees, including but not limited to their position on unionization. The need to maintain a fully-staffed sales floor and checkout area, and to provide other services to customers on an ongoing basis, makes it infeasible for numbers of employees to gather in a break area for meetings. A substantial number of retail employees are part-time, moreover, and many of these employees are not available for meetings outside of their scheduled working hours because (1) they have other obligations like school or a second job, and (2) they rely upon public transportation or car-sharing and cannot travel at their convenience. Also, a sizable number of retail employees are recent immigrants, who do not speak English and have little or no understanding of U.S. labor laws and union practices. Because of these factors, employers need several meetings with different shifts of supervisors to train them on communicating the employer’s position and avoiding unfair labor practices. In turn, those supervisors need several more meetings to communicate with hourly employees. The whole process easily takes 30-42 days.

Given the above difficulties, the Board’s amendments would largely silence employers and require employees to vote having only heard information that the union was willing to share. To the extent an employer is able to communicate with employees at all under the new procedures, it would only be able to take a wholly-defensive posture, rebutting specific claims made by the union and not having time to articulate a coherent statement in favor of its position. The inability of employers to communicate their position would deprive employees of critical information. In the interest of currying employees’ favor, unions sometimes make false claims or hide unflattering information about the union that could sway employee opinions. The employer’s informed participation is therefore necessary to foster transparency. RILA member companies provide the following examples:

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7 For these same reasons, many employees could not accommodate a last-minute change in their scheduled working hours, e.g. a change meant to help the employer communicate its position during the amended rule’s shortened time period.

8 One member indicated that, given the large number of its employees who are recent immigrants with little or no English skills, basic training on simple tasks like cleaning and operating a cash register takes an extended period of time. These employees would be severely prejudiced by an expedited election schedule involving complex issues presented to them in a language they cannot easily understand.
1. One Northeast retailer first learned about a union’s organization campaign when it received a petition for state-wide representation. Over the two to three weeks preceding the election, the company researched the union on LexisNexis and other news databases. The company learned that a Local official had been linked to an organized crime syndicate and that a judge had issued a significant monetary judgment against him for failing to provide union members with promised benefit books. Based upon this information, the employees flatly rejected the union. But they would not have had the benefit of the company’s thorough research under the NLRB’s amended procedures.

2. At the same retail store, a different union promised during its organization campaign to provide members with medical insurance benefits that exceeded those offered by the company. The company could not immediately address the union’s claims because the union did not provide the details of its plan to the company. Over the course of approximately one month, however, the company learned that the union’s medical plan required members to pay premiums for several months before receiving any medical coverage. The employees voted against the union upon learning this information. But once again, they would not have received this information under the NLRB’s amended procedures.

3. One Midwest grocer agreed to recognize a union on the basis of a showing that more than 50% of employees had signed authorization cards. Following certification, however, several employees revealed that the union told them they needed to sign authorization cards, that not signing would result in higher initiation fees after the union was certified, and/or that signing a card would result in an up-or-down vote.\(^9\) While this example speaks more directly to the dangers of card-check recognition, it emphasizes why employers need sufficient time to develop their own positions and (if necessary) counter the union’s claims.

The fundamental unfairness of requiring employees to make a decision about workplace representation in as little as ten days is highlighted by comparison to other timeframes that are familiar to retail employees. RILA member companies typically offer their employees approximately 60 days to make benefits elections, for example. The typical general-merchandise return policy among RILA member companies allows several months to make a return. RILA has no reason to believe that these time periods are unique to the retail industry. To the contrary, RILA believes these timeframes are indicative of broader workplace norms. If employees have come to expect 60 days to choose a health plan that they

will subsequently have many chances to alter, and if customers have come to
expect several months to decide whether or not to return merchandise (however
inexpensive), then employees should certainly have more than ten days to decide
whether a union is properly qualified to speak for them in all matters affecting
their terms and conditions of employment. Employees need time to consult their
families, gather facts, and make informed decisions. In other contexts where their
basic rights are at stake, employees typically have much greater time than the
NLRB’s amendments would provide. The closest analog to a union election that
most employees will have experienced is a political election involving months of
time to collect information and reach a decision. The NLRB’s rushed procedure
effectively assumes that employees would prefer unionization. In doing so, it
ignores the lessons from the above examples and denies employees a voice.

III. **Deferring The Resolution Of Issues Affecting Less Than 20% Of The
Proposed Unit Would Create Inaccurate Election Results And
Unnecessary Confusion.**

RILA is also deeply troubled by the NLRB’s proposed amendment that
would require Regional Directors to defer resolution of all questions affecting less
than 20% of a proposed unit until after the representation election. The pre-
election resolution of these issues does not have any shown propensity to delay
representation elections under the current system. Yet, deferring these issues
would inevitably create inaccurate election results and unnecessary confusion.
And these problems are especially salient in the retail industry, where most
objections to union election petitions concern less than 20% of the proposed unit.

In the experience of RILA members, the most-disputed aspect of pre-
election proceedings is the practice by unions of including front-line managers in
the proposed unit, even though these employees are properly excluded from the
Act’s coverage as “supervisors.” Since retail employers typically have multiple

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10 The NLRB’s election proceedings are already incredibly streamlined by comparison to other
judicial norms. In 2010, according to the NLRB’s Acting General Counsel, the median time
from petition to election was 38 days. See [www.nlrb.gov](http://www.nlrb.gov). By contrast, the median federal
court case takes seven and a half months, not counting appeals, see 2010 Annual Report of
the Director, Administrative Office of the United States Courts, available at
[www.uscourts.gov](http://www.uscourts.gov), and the defendant has 21 days (compared with the NLRB’s proposed
seven days) to file its Answer, see Fed. R. Civ. Pro. 12(a). The 21-day period for filing an
Answer under the Federal Rules is automatically extended to 60 days if service is waived, see
id., and it is also frequently extended by agreement or court order. Moreover, unlike the
Board’s envisioned procedure, the Federal Rules provide many opportunities for parties to
revise or amend their positions throughout the course of litigation.
storefronts—often hundreds or thousands of them—and since individual stores are the most common target of retail unionization efforts, retail employers depend upon front-line managers to communicate their messages to employees. The ability of retail employers to promptly challenge the inclusion of managers in a proposed unit is therefore of heightened importance: If a manager is even arguably within the unit, the employer cannot rely upon him or her to interface with employees and provide information. Otherwise, the employer would run the risk of committing unfair labor practices insofar as such reliance could be construed as unlawful interference.

The proposed rule would uproot retail employers’ ability to rely upon front-line managers, who typically comprise between 10% and 20% of the personnel at individual stores. Unions, recognizing the opportunity to seize an advantage, could purposefully include such managers in their proposed units. The employer would consequently have to gather the necessary facts and develop its position through persons typically located outside the targeted store and unfamiliar with its unique issues. This would render any response less informed and effective: The employer’s viewpoint could not properly take into account the perspective of those managers closest to the terms and conditions immediately at issue. And individual employees would learn their employer’s point of view from unfamiliar faces rather than from the managers who work with them on a daily basis and are best positioned to understand and respond to their specific concerns. The problem of responding from afar would exacerbate the already-discussed difficulties of developing a coherent position and rebutting false claims within a seven- or ten-day timeframe.

Another RILA member has revealed that a contingent of confidential administrative employees makes up less than 20% of its workforce. These employees could present yet another opportunity for unions to hinder day-to-day operations through strategic unit proposals. Faced with uncertainty about whether the individuals who handle their non-public financial information will wind up across the table from them in bargaining, employers would need new ways to accomplish everyday accounting tasks. Many could be pressured into concessions, including but not limited to card-check recognition, even if they would otherwise wish to oppose unionization or there are good reasons to doubt the union’s majority showing. Even assuming the truth of the Board’s flawed assumptions about employers’ negative influence on election procedures, this fundamental rearrangement of economic leverage goes well behind what is necessary to reduce the perceived inefficiency of the current rules.
The practice by many RILA members of hiring seasonal workers during the winter holiday season would create additional unit issues. Typically, these workers make up less than 20% of a retailer’s total work force. Thus, by including them in a proposed bargaining unit, a union could create substantial uncertainty that would not be resolved until a certification decision had been made and the employees-at-issue had long since ceased employment. Unions could also “salt” a retail employer with seasonal employees to create a skewed picture of employees’ preferences and prompt a certification election.

The unfairness of deferring issues affecting less than 20% of the proposed unit is heightened by the NLRB’s proposed amendments that would obligate employers to counter a union’s proposal with the “most similar” acceptable unit. Since the union is “master” of the initial petition, it can describe the unit however it wants, no matter how nonsensical or infeasible the description is in practice. One member provided an example of a union whose proposed unit was based upon a fundamentally inaccurate understanding of the company’s basic job structure; it took several days of hearings for the union to understand why its unit crossed existing classifications and would have been impossible to administer. Forcing employers to work from the union’s proposed unit—and to do so while deferring objections affecting less than 20% of the unit—would prevent the parties and the hearing officer from having a constructive dialogue informed by real-world conditions at the employer’s workplace. It is a recipe for further problems down the road.

IV. Requiring Employers To Provide Employee Phone Numbers and Email Addresses Raises Privacy Concerns And Could Interrupt Normal Business Operations.

RILA also objects to the provisions in the NLRB’s proposed rule that would require employers to provide a petitioning union with employees’ phone numbers and email addresses. While it is not clear whether the NLRB anticipates that employers would provide personal or work phone numbers and email addresses, neither option is desirable. Requiring employers to provide phone numbers and email addresses would allow unions to intrude on employees’ privacy and could interfere with employers’ normal business operations.

First, allowing a union carte blanche authority to call and email employees is an invasion of employees’ privacy interests. Many RILA members’ employees have expressed consternation at the actions of union organizers in aggressively approaching them in public areas and in their homes. By way of example, one member’s employees have complained about 11:00 p.m. home visits from five or more organizers who insisted on speaking with them. Requiring employers to
provide phone numbers and email addresses regardless of employees’ wishes ignores the fact that many employees would strongly prefer to be left alone. Since it is not uncommon for people to share phones or maintain joint email accounts, moreover, the NLRB’s rule would give unions an audience with people beyond the targeted employee: people whose right to privacy is unquestioned, and for whom the union’s message will have little relevance or likely interest. Giving a union unfettered personal access to employees would also increase the covert spread of misinformation that the employer would have no chance to rebut. Presumably, unions have ample means to solicit phone numbers and email addresses from the employees they wish to organize; employees deserve the chance to say “no” and to draw elementary boundaries in their private lives.

Second, if the NLRB’s rule requires employers to provide access to employees’ work phone numbers and email addresses, then the agency is contradicting Supreme Court precedent and inviting union interference with normal business operations. The Supreme Court has clearly permitted employers to prohibit union organizers from soliciting employees in working areas during working time. See Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) (except where unions lack reasonable access, employers may forbid nonemployee union organizers from soliciting employees on their private property); see also UPS Supply Chain Solutions, Inc., 2010 WL 5099880 (NLRB Div. of Judges) (“The Board has held, almost since the Act’s inception, that an employer may, in normal situations, make and enforce a rule prohibiting employees from engaging in solicitation during ‘work time.’”). The Board lacks any authority to depart from the logic of this settled decisional law, and there is no good reason to attempt such a departure. With access to company phones and emails, unions could distract employees during working time and intentionally or unintentionally interfere with network speed and network space, limiting productivity and encumbering intra-office communications. Retail employers typically limit the use of work phones and work email addresses to company business. They should not have to make an exception for unions. And employees, meanwhile, should not have to sift through union emails when attempting to send and receive communications that are essential to the completion of their assigned work tasks.

As a practical matter, many RILA members do not assign phone numbers or email addresses to employees, nor do they require employees to provide personal email addresses. Thus, many retail employers would not have any additional information to provide to the NLRB. And to the extent the NLRB’s proposal would require employers to obtain and/or provide additional information, it would
require employers to invade employees' privacy in a way that they are reluctant to do and may be legally prohibited from doing.¹¹

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For the above reasons, RILA strongly opposes the NLRB's proposed rule. The existing rules provide a relatively-balanced (and if anything, pro-union) opportunity for employers and unions to present their views on unionization and to foster employees' informed decision making. Allowing unions to conduct an election by ambush while silencing employers, withholding information from employees, deferring important questions until after the election, and compromising both employee privacy and workplace productivity distorts the NLRA's basic statutory framework.

Respectfully submitted,

[Signature]

August 22, 2011

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¹¹ Federal and state privacy and anti-spam laws may be implicated by the distribution of union materials via email, especially if those communications are deemed deceptive. See, for example, the federal CAN-SPAM Act, 15 U.S.C. § 7701, et seq., the Washington Commercial Electronic Mail Act, RCW § 19.190.010–.070, and Omni Innovations, LLC v. Impulse Marketing Group, Inc., 2007 WL 2110337 (W.D. Wash. July 18, 2007).
The Retail Industry Leaders Association (“RILA”), on behalf of itself and its member companies, submits the following comments in response to the NLRB’s proposed amendments to its rules governing employee representation elections. See Representation-Case Procedures, 79 Fed. Reg. 7318 (proposed Feb. 6, 2014) (to be codified at 29 CFR Parts 101, 102, 103). RILA also incorporates by reference the comments it submitted in response to the Board’s nearly-identical proposal made in 2011, some of which are repeated and expanded on in the following paragraphs. In addition, RILA joins into the comments filed this date by the Coalition for a Democratic Workplace.

RILA is the trade association of the world’s largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

RILA strongly objects to the NLRB’s proposal. Specifically, RILA submits that: 1) the Board’s proposed “twenty percent rule” would create unnecessary post-election uncertainty and undermine collective bargaining, 2) the Board’s proposed amendments are at odds with its recent decision in Specialty Healthcare, and 3) the Board’s proposal that employers provide voting unit employee contact information, other than a home mailing address, unnecessarily violates employee privacy.

I. The Board’s Proposed “Twenty Percent Rule” Would Create Unnecessary Post-Election Uncertainty and Undermine Collective Bargaining

The NLRB’s proposed “twenty percent rule” is a solution in search of a problem. Specifically, the rule would require regional directors to defer for post-election resolution all questions affecting less than 20 percent of a proposed unit. Such unit placement issues could include supervisory status, managerial status, independent contractor status, confidential employee status, and student vs. employee status. Further, single employer and joint employer issues associated with unit placement questions may also be subject to deferral under the 20 percent rule. The Board has demonstrated no need for such a bright line requirement; in fact, its own statistics show that, under existing practices over the last decade, the median time between the filing of a petition and an election is between 37 and 39 days. 79 Fed. Reg. at 7320. Moreover, implementation of the proposed “twenty percent rule” would impede an employer’s pre- and post-election communications with employees, while increasing the risk that the election may ultimately be declared invalid.
The twenty percent rule is particularly objectionable to RILA members. A question that frequently arises in the retail setting is whether individual store managers are supervisors or employees under the National Labor Relations Act. Because store managers generally comprise less than 20 percent of a store’s staff, however, the Board’s proposed amendments would in all likelihood defer this determination until after an election.

This deferral has significant real world consequences. For example, an employer who acquiesces in a union’s proposed unit definition may violate the Act by allowing a store manager to discuss unionization with her coworkers, only to discover later that she should properly have been classified as a supervisor.

Similarly, under the Harborside Healthcare line of cases, 343 N.L.R.B. 906, 906-07 (2004), an election may be overturned if, for example, the union utilized an individual who was initially misclassified as a non-supervisor employee to hand out union authorization cards or otherwise engage in certain pro-union conduct.

Most significantly for retailers, store managers are often a retail employer’s sole on-site operational representatives. Failure to determine their supervisory status before an election may thus undermine a retailer’s most effective means of communication. If a manager is even arguably within the unit, the employer cannot rely upon him to communicate with employees regarding questions concerning unionization without running the risk of engaging in election misconduct and also, perhaps, committing an unfair labor practice.

As explained in detail in RILA’s 2011 comments, limiting an employer’s ability to communicate during an organizing campaign—either by postponing determinations of supervisory status or by shortening the time period between petition and election—could result in employees being critically uninformed. For example, one RILA member describes an incident in which employees voted for a union solely on the basis of the union’s propaganda; the employer had voluntarily entered into a neutrality agreement preventing it from countering any of the union’s claims. The employees then entered into bargaining with the expectation that they would receive every benefit the union had promised. This expectation was not met. Because the union was then required to spend months coaching its new members on the realities of collective bargaining and to build realistic expectations, it took the parties more than a year and a half of contentious negotiations to reach a contract. This painful process set a tone of animosity between labor and management—an outcome clearly at odds with the purpose of the Act.

The Board’s proposed twenty percent rule has the potential to paralyze post-election bargaining in additional ways. In particular, if challenged ballots would be determinative to the outcome of the election, bargaining may not begin until such unresolved issues are litigated and decided. In other words, the proposed amendments merely delay, rather than avoid, the time and cost of litigation. An election may take place sooner, but reaching a first contract will take longer if the proposed rules are implemented.

By contrast, challenged ballots that are not determinative may never be decided in the course of election proceedings. The Board’s proposed solution to this problem is to defer the
issue to negotiations and attempt to resolve it there. As we know, first contract negotiations may, and often do, take a year or 18 months to complete. If the issue cannot be resolved during negotiations, the rule suggests that an employer timely file a unit clarification petition shortly after a contract is reached, and go through yet another, even lengthier, evidentiary hearing to determine the scope of the represented unit. See 79 Fed. Reg. at 7331. Bargaining would be counterproductive for employers who decide to engage in this process—neither side can effectively analyze or agree to proposals while the scope of the bargaining unit is unclear. Even if the other terms of a contract are agreed, putting off the determination until a unit clarification hearing is held and a decision rendered places the employer at risk. Employers would act at their own peril in making any unilateral changes that affect employees it believes are supervisors, managers, or independent contractors. Thus, for example, where the Regional Director has put off determining the supervisory status of a store manager, a retailer risks committing an unfair labor practice by giving her a raise or asking her to work a modified schedule. It is untenable to have the status of a group of employees, such as store managers, be unresolved for that length of time.

In sum, implementation of the Board’s twenty percent rule would do nothing more than delay litigation, at the expense of election integrity and meaningful and efficient collective bargaining.

II. The Board’s Proposed Amendments Are At Odds With Its Recent Decision In Specialty Healthcare

The Board’s proposed amendments are at odds with the fact-intensive standard for unit appropriateness set out in Specialty Healthcare, 357 NLRB No. 83 (2011). This 2011 case overruled decades of prior law requiring the party petitioning for an election to demonstrate that the interests of employees in its proposed unit were “sufficiently distinct” to warrant separate treatment. Now, union organizers can successfully seek certification of multiple subsets of employees, including groupings of workers on a job classification or fragmented basis, by showing only that they share some minimal community of interest.

The burden then shifts to employers to show that employees in the petitioned-for unit share an “overwhelming community of interest” with excluded employees. This “overwhelming community of interest” standard is highly fact-specific and burdensome for employers to meet. Indeed, the standard was extracted from a line of cases holding that employees should be accreted to existing bargaining units rather than given the chance to participate in a representation election. Because these cases involved the substitution of the Board’s judgment for employee free choice, the standard understandably developed as a demanding one.

In the context of representation petitions, the application of such a burdensome standard has led to the establishment of fragmented units—particularly in the retail industry. In Macy’s, Inc., Case No. 01-RC-091163, for example, a regional director certified a bargaining unit made up of only the cosmetics and fragrances department of a single retail store. Similarly, a regional director in Bergdorf Goodman, Case. No. 2-RC-076954, approved a bargaining unit of just 46 women’s shoe sales associates working on two floors of a Manhattan department store. The Board has yet to rule on these pending decisions.
RILA and the Retail Litigation Center have submitted amicus briefs in the Macy’s and Bergdorf Goodman cases, which are presently pending before the Board, arguing that these decisions represent an irrational departure from years of Board decisions that recognize the appropriateness of store-wide units in retail. Regardless of how these cases are ultimately decided, however, it is undisputed that employers now face significant uncertainty regarding whether and how employees may form separate units for collective bargaining purposes. This uncertainty was recognized last December by the Board’s General Counsel, who admitted that application of Specialty Healthcare has “caused a lot of confusion” and requires clarification.¹

The expedited pre-election procedures articulated in the Board’s proposed amendments would serve to impair further the development of coherent standards under Specialty Healthcare. In addition, in light of the heavily fact-based standard that the Board has created, its proposal to significantly curtail evidentiary hearings denies employers the right to fully present their positions regarding unit appropriateness, in violation of basic principles of due process. Specifically, the proposed amendments require an employer to state its position a mere seven days after the filing of an election petition. Any issues the employer does not include in this statement may be permanently waived. The amendments further vest a hearing officer with very wide and undefined discretion to limit an employer’s right to introduce any evidence that he or she determines is not “relevant to any genuine dispute as to any material fact.” 79 Fed. Reg. at 7329. In practice, this discretion could be applied to preclude an employer from developing a complete record that would assist the regional director—and, perhaps, the Board—in making the highly fact-specific determination of whether an overwhelming community of interest exists among employees. Development of a record would be further limited by a prohibition on filing post-hearing briefs without “special permission” of the hearing officer, who can dictate what subjects may and may not be addressed. Finally, improperly imposed limitations on the scope of a record at a representation hearing could also significantly hinder a party’s ability to present a case in the courts.

Current confusion over Specialty Healthcare will be further exacerbated by the elimination of an appeal as of right to the Board. Indeed, if the proposed amendments are finalized, the Board would have complete discretion to decline review of cases such as Macy’s or Bergdorf Goodman. Instead, as touted by the Notice of Proposed Rulemaking, it would be free to leave “final decisions . . . with the Board’s regional directors who are members of the career civil service.” 79 Fed. Reg. at 7323. Such discretionary review would slow development of binding and authoritative Board precedent. In addition, the outcome of representation proceedings may increasingly be determined by exacerbated regional splits like those that now characterize our federal courts.

The Board’s attempt to expedite pre-election proceedings fails to account for the burdensome, fact-specific “overwhelming community of interest” standard that it has imposed on employers. Implementation of the proposed amendments would thus increase confusion surrounding bargaining unit determinations, resulting in more disputes between employers and unions and, ultimately, the fracturing of cohesive workforces.

III. The Board’s Proposal That Employers Provide Voting Unit Employee Contact Information In Addition To Home Mailing Addresses Unnecessarily Violates Employee Privacy

Finally, the Board’s proposed requirement that employers provide their employees’ telephone numbers and, where available, e-mail addresses to union organizers constitutes an unreasonable invasion of privacy. Ironically, even the Board’s solicitation of comments recognizes the sensitive nature of this type of information; it cautions against including “personal information such as . . . telephone numbers, and email addresses” in submitted comments. 79 Fed. Reg. at 7318. Yet the Board now appears to take the position that an employee who provides his personal e-mail or cell phone number to his employer—for example, as a means of emergency contact—thereby consents to have this information shared with strangers in the event of organizing.

As an initial matter, the Board misplaces its reliance on advances in communications technology as a justification for this required disclosure of electronic contact information. See 79 Fed. Reg. at 7326-27. This false rationalization ignores the numerous avenues of electronic communication now available to a union, which were not even imagined when the Excelsior list was first prescribed nearly fifty years ago. Far from needing an employee’s cell phone number or e-mail address to engage in electronic media, a union can build a website, post to message boards, create a Facebook page, or host a Twitter or Instagram account. Given these numerous communication options, the invasion of employee privacy envisioned by the Board is simply not justified.

The Board’s proposed amendments are especially troubling given the numerous examples of harassment arising under the current practice of providing organizers only with employees’ home addresses. One RILA member reported that its employees have complained about home visits from five or more organizers, who insisted on speaking with them at 11:00 at night. Other cases have involved more egregious abuses, such as shipping pornography to the home address of a union opponent.

To the extent the Board contemplates requiring employers to provide employees’ personal phone numbers and e-mail addresses, if it maintains such information, the increased potential for abuse is staggering. Given recent data breaches at major retailers, RILA members are particularly sensitive to the importance of protecting such personal information. For example, an e-mail address could be used by a hacker to introduce a computer virus, either for purposes of harassment or identify theft. Moreover, personal e-mail addresses are often employed as user names for the purpose of accessing a multitude of secure websites, such as personal banking, credit card and shopping websites, including the websites of many of our members.

Given these risks, the Board cannot justify requiring the disclosure of employees’ personal contact information, other than a home mailing address. At a minimum, the union should be required to request and receive employees’ written consent before gaining access to their phone numbers and e-mail addresses, and sanctions should be imposed upon if the union uses the information improperly.

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For the above reasons, RILA strongly opposes the NLRB’s proposed amendments. Far from streamlining representation proceedings, the changes would merely postpone litigation of key issues. Kicking the can down the road in this fashion would increase confusion and delay during bargaining, making it harder for unions and employers to accomplish the ultimate goal of organizing: reaching a mutually acceptable collective bargaining agreement as soon as possible.