



**United States Government  
NATIONAL LABOR RELATIONS BOARD  
Office of the General Counsel**

DIVISION OF LEGAL COUNSEL  
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Members of the Board:

This comment is submitted in response to the National Labor Relations Board's Request for Information dated December 13, 2017, on behalf of the NLRB's Division of Legal Counsel.<sup>1</sup> The Division is responsible for defending the NLRB against suits brought under the Administrative Procedure Act (APA) challenging its Rules and Regulations.

As explained in the Request for Information, on December 15, 2014, the NLRB made a consolidated group of changes to its procedures for handling and processing election petitions and related litigation (the Rule).<sup>2</sup> The Rule, which took effect on April 14, 2015, has been the subject of a small number of judicial and administrative challenges, described below. Those challenges have been uniformly unsuccessful in all respects.

### **Facial Judicial Challenges**

Facial challenges to the Rule's validity were brought in two court proceedings: *Chamber of Commerce of the United States v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015) (*Chamber of Commerce*), and *Associated Builders & Contractors of Texas, Inc. v. NLRB*, No. 15-cv-00026 (RP),

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<sup>1</sup> The Division's comment is submitted with the authorization of the Board's General Counsel.

<sup>2</sup> The final product of this rulemaking is generally referred to collectively as "the Rule," although it embraced some 25 distinct provisions, most of which are severable from one another. National Labor Relations Board, *Representation—Case Procedures*, 79 Fed. Reg. 74308, 74308 n.6 (2014).

2015 WL 3609116 (W.D. Tex. Apr. 1, 2015), *aff'd*, 826 F. 3d 215 (5th Cir. 2016) (*ABC*). We discuss each of these challenges in turn.

### ***Chamber of Commerce of the United States v. NLRB***

In *Chamber of Commerce*, the eponymous business organization challenged the Rule on numerous grounds. An individual employer, Baker DC, filed a separate case in the same court after a union filed an election petition against Baker under the Rule. Baker DC's case was consolidated with the Chamber's case. The National Right to Work Legal Defense Foundation filed an amicus brief in support of the challenge. In a lengthy opinion, the court rejected the challenges in their entirety and upheld the Rule.

As an initial matter, the court addressed whether challenges to the Rule were ripe. The court concluded that facial challenges to the Rule were indeed ripe. 118 F. Supp. 3d at 183-85. However, the court dismissed Baker's case for lack of subject-matter jurisdiction to the extent that it sought to bring an as-applied challenge to the Board's election procedures, concluding that such a challenge was both premature and filed in the wrong forum in any event. *Id.* at 186-89.

Turning to the Chamber's and Baker's facial challenges to the Rule, the court first addressed the Rule's requirement that employers post a notice that a petition for election has been filed within two days of service of the notice of hearing on the petition. The court concluded that this requirement did not violate Section 8(c) of the NLRA because the Rule did not deem a failure to post evidence of an unfair labor practice, *id.* at 191-92, and further concluded that the notice is government speech that did not violate the First Amendment, *id.* at 192-95.

Next, the court addressed contentions that the Rule improperly restricted the scope of pre-election hearings under the NLRA by permitting regional directors to defer litigation of certain issues to post-election proceedings. The court determined that it did not violate the NLRA to grant regional directors such authority, because the NLRA does not expressly or impliedly require that all such litigation be conducted at pre-election hearings. *Id.* at 196-200. The court also found

that the Board had appropriately distinguished or overruled prior precedent, and thus this part of the Rule was not arbitrary and capricious. *Id.* at 200-02. Finally, the court rejected allegations that this procedural change violated due process, finding that the plaintiffs had failed to show any liberty or property interest in representation proceedings and that, in any event, due process was satisfied by the NLRB's procedures for post-election hearings and the NLRA's judicial review provisions. *Id.* at 202-03.

The court then turned to challenges to the Rule's requirement that nonpetitioning parties file statements of position prior to pre-election hearings. The court upheld the statement-of-position requirement. It first determined that the requirement that parties state positions prior to a hearing was not inconsistent with the NLRA, *id.* at 204-05, and then upheld the requirement that employers provide lists of employee names and classifications as an appropriate procedure, *id.* at 205. Finally, the court held that the statement-of-position requirement did not deny employers due process, partly because the plaintiffs had not articulated a protected interest (see above) and partly because the ability of regional directors to grant extensions of time on an appropriate showing precluded any possible finding that the deadlines contained in the Rule facially violate due process. *Id.* at 206.

Next, the court addressed the Rule's elimination of a presumptive 25-30 day waiting period in contested cases. The court determined that the discretion that regional directors have to set elections for "the earliest date practicable"—a direction that specifically encompassed parties' desires to campaign—precluded any argument that the Rule improperly denied employers the right to speak on organizing issues. *Id.* at 206-07. The court also rejected claims that unenacted legislative proposals to require a minimum of 30 days from petition to election evidenced congressional intent on that point. *Id.* at 207-08.

The court then turned to the Rule's expansion of required disclosures connected with the *Excelsior* voter list. It noted that while the required disclosures were not affirmatively mandated by the NLRA, the statute did not prohibit the Board from requiring them either (and neither did any of several other statutes relating generally to informational privacy cited by the plaintiffs). *Id.* at 209-10. The court

then concluded that the disclosure requirements were not arbitrary and capricious. In so doing, it found that the Board had adequately determined that the required disclosures would benefit employee free choice and the public interest. *Id.* at 210-12. It also rejected the plaintiffs' assertions that the Board had arbitrarily disregarded employee privacy interests, finding to the contrary that the Board had directly addressed and accommodated those interests, and unambiguously warned parties that misuse of voter lists would result in the imposition of appropriate sanctions. *Id.* at 212-215.

The final substantive challenge brought by the plaintiffs was to the Board's change in the language of its stipulated election agreements to eliminate mandatory Board review of hearing officer decisions resolving post-election objections and challenged voter ballots. The court found that the statute unambiguously foreclosed the plaintiffs' arguments by authorizing the Board to delegate election decisions to regional directors, and rejected as unduly speculative the plaintiffs' assertions that the change would decrease election-agreement rates. *Id.* at 215-18.

Finally, the court rejected the plaintiffs' broader assertion that the Rule's provisions, taken as a whole, were arbitrary and capricious because they expedited speed in elections over all other relevant considerations. *Id.* at 218-20. The *Chamber of Commerce* court thus upheld the Rule in its entirety. The case was not appealed.

### ***Associated Builders & Contractors of Texas, Inc. v. NLRB***

In *ABC of Texas*, a group of Texas-based employer trade associations (referred to herein as ABC for simplicity) challenged the Rule as invalid on similar grounds as in *Chamber of Commerce*. The *ABC* court rejected the challenge and upheld the Rule, and that decision was affirmed on appeal.

Like the *Chamber of Commerce* plaintiffs, ABC challenged a number of provisions of the Rule. In particular, it alleged (i) that the Rule abrogated parties' claimed "rights" to litigate any and all issues, including issues of individual voter eligibility, in a pre-election hearing, whether or not those issues had any bearing on the existence of a

question of representation; (ii) that the Rule violated employee privacy by requiring that parties receive lists of voters' phone numbers and email addresses in the employer's possession; and (iii) that the Rule permitted elections to be held within too fast of a timeframe for parties to campaign. The district court rejected each of these challenges and upheld the Rule in its entirety. 2015 WL 3609116.

The district court first discussed the standard of review. It determined that ABC's challenge was purely facial, and given that posture, ABC was required to demonstrate (for a given provision of the Rule) that there was "no set of circumstances" in which the provision could be lawfully applied. *Id.* at \*4. Because ABC's challenges were facial, the district court found the dispute to be ripe for decision. *Id.*

The court then upheld the Board's authority to defer litigation of individual voter-eligibility proceedings to its challenged-ballot procedures. Noting that Section 9(c) of the Act provides for a hearing to determine whether a question of representation exists, the court rejected ABC's argument that the legislative history of the Act demonstrated congressional intent to require the litigation of voter-eligibility issues in pre-election hearings. *Id.* at \*5-\*7. The court explained that the legislative concept of an "appropriate hearing" was a flexible one that contemplated a nontechnical, nonadversary procedure. The court also noted that regional directors retained discretion to litigate individual voter-eligibility issues in appropriate circumstances, dooming any effort to show that the Rule could be applied in "no set of circumstances." *Id.* at \*7.

The court next upheld the provision requiring employers to disclose additional voter information (such as employees' job classifications, personal phone numbers and email addresses) to other parties. The court rejected plaintiffs' assertions that the Rule would violate employee privacy as unduly speculative and unsupported by evidence from the application of the Board's existing voter-list rules. *Id.* at \*8-9. It further found that the Board rationally determined that employee privacy interests were outweighed by the benefits of the rule and that the Rule appropriately left open the question of remedies in the event of voter-list misuse. *Id.* at \*9-\*11.

The court also rejected plaintiffs' challenge to the Rule on the basis that it unduly rushed the election process. The court readily concluded that nothing in the Act mandated any sort of "waiting period" from petition to election. *Id.* at \*11-\*12. The court also found that plaintiffs had failed to prove that the Rule would, in all circumstances, prevent employers from effectively conveying views on unionization to employees, concluding that the discretion exercised by regional directors in setting election dates "renders it virtually impossible for Plaintiffs to show the election period in every set of circumstances violates free speech." *Id.* at \*12.

Finally, like the *Chamber of Commerce* court, the *ABC* district court dismissed allegations by the plaintiffs that the Rule, taken as a whole, was arbitrary and capricious. The court explained that the Rule as a whole rationally sought to improve the efficiency of NLRB election proceedings. It also rejected ABC's assertion that the Rule was unnecessary, noting that "[i]ncreasing efficiency and effectiveness are hardly bases for concluding enactment of a rule is arbitrary and capricious." *Id.* at \*14. The court further rejected ABC's argument that the Board had failed to consider delay caused by its blocking-charge policy, noting that the Board had in fact changed its rules concerning blocking charges. *Id.* at \*15-\*16. Finally, the court rejected ABC's general challenge that the Rule was contrary to record evidence or based upon implausible justifications. *Id.* at \*17.

*ABC* was appealed to the Fifth Circuit, where the plaintiffs made essentially the same arguments. The court of appeals, however, rejected each of these appealed issues. On deferral of litigation, the Fifth Circuit held that the NLRA "does not demand a hearing on all issues affecting the election, or even all substantial issues affecting the election." *ABC of Texas*, 826 F.3d at 222. As to required disclosures of information, the court explained that the plaintiffs had failed "to identify any federal law that restricts the disclosure of employee information to unions by employers" or "any change in circumstances that would undermine the Board's concern for encouraging an informed employee electorate by allowing unions the right of access to employees." *Id.* at 224. With regard to the elimination of the automatic 25-day stay of election, the court concluded both that there was no "provision of the Act or other statute that mandates a specified waiting period prior to an election[,]"

*id.* at 227, and that “discretion afforded to the regional director [in setting election dates] effectively precludes the ABC entities’ facial challenge[,]” *id.* The court lastly rejected the plaintiffs’ “cumulative impact” argument, noting that “the final rule was necessary to further a variety of additional permissible goals and interests” and that “an agency does not act in an arbitrary and capricious manner simply because it attempts to improve a regulatory scheme.” *Id.* at 228. The court concluded that the Board had “conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions.” *Id.* at 229. For these reasons, it upheld the Rule in its entirety.

### **Board Cases Involving the Rule**

In a small number of additional cases, parties have advanced arguments challenging or exploring the parameters of the new Rule as they have been applied in representation cases. We have not attempted to catalogue all Board decisions mentioning the Rule in any way, as many of those decisions touch on the Rule only tangentially. Rather, this comment reviews only decisions containing some discussion or disagreement among Board members as to the validity or application of the Rule.

#### ***Facial administrative challenges***

##### ***Pulau Corp.*, 363 NLRB No. 8 (2015)**

An employer requested Board review of a union’s certification. The employer challenged the Rule provision requiring it to provide employee names and addresses, asserting, in effect, that the latter provision was facially unlawful. Also, although it had stipulated to a particular election date, it subsequently asserted that the time between petition and election did not provide it an adequate opportunity to exercise its right of free speech concerning unionization. The Regional Director overruled these objections. The majority (Chairman Pearce and Member Hirozawa) denied review. Member Miscimarra, dissenting, would have granted the requests for review on the basis that they raised

substantial unspecified “questions regarding the effect and application of the Board's Final Rule.”

*Durham School Services*, Case 32-RC-150090 (Nov. 4, 2015) (not reported in Board volumes), *reaff'd on summary judgment*, 363 NLRB No. 126 (2016), *petition for review dismissed*, No. 16-1074 (D.C. Cir. Mar. 21, 2017)

In this case, an employer petitioned for review, attacking, among other things, the facial validity of the Rule. The Board (Members Hirozawa and McFerran) denied review in part because the employer had failed to timely raise any challenge to the application of the Rule before the Regional Director. Dissenting, Member Miscimarra would have granted review to address unspecified “substantial questions regarding the effect and application of the Board’s Final Rule.”

*Pottstown Hospital Co.*, Case 04-RC-181689 (Oct. 20, 2016) (not reported in Board volumes)

An employer petitioned for review objecting generally to the Rule on the basis expressed in the dissent to the adoption of the Rule. The Board (Chairman Pearce and Member McFerran) denied review. Member Miscimarra, concurring, noted that the employer had failed to cite any particular facts regarding the effect and application of the Rule that would warrant review.

*University of Southern California*, 365 NLRB No. 11 (2016), *reaff'd on summary judgment*, 365 NLRB No. 89 (2017), *petition for review filed*, No. 17-1149 (D.C. Cir. petition filed June 8, 2017)

In this case, the employer petitioned for review of a determination that certain employees did not possess managerial authority, and also brought a facial challenge to the validity of the Rule on essentially the same grounds as the court cases previously discussed. The Board (Chairman Pearce and Member McFerran) denied review as to both issues. Member Miscimarra dissented from the denial of review as to managerial status, but did not directly address the employer’s challenge to the Rule. Following the Board’s decision, the certified union filed an unfair labor practice charge alleging the employer’s refusal to bargain, and the Board granted summary judgment to the General Counsel, who

had issued complaint on that basis. The case is now pending before the D.C. Circuit, but the employer has not pressed its challenges to the Rule in its briefing to that court.

*Disputes concerning the Rule's application*

***European Imports, 365 NLRB No. 41 (2017)***

The employer sought expedited Board action to postpone an election by six days. The majority (Members Pearce and McFerran) denied the request without substantive comment. Dissenting, Acting Chairman Miscimarra contended that the Regional Director's decision gave insufficient notice to certain employees, and that the hearing officer had improperly failed to permit the employer to create a record of alleged problems associated with the Rule's application.

***UPS Ground Freight, 365 NLRB No. 113 (2017), motion for summary judgment filed, Case 04-CA-205359 (Oct. 12, 2017)***

In this case, the Board (Members Pearce and McFerran) granted review and affirmed the Regional Director's decision that a key employee was not a statutory supervisor. It denied review in all other respects, including, as relevant here, several objections raised by the employer to procedural rulings made at the pre-election hearing. Specifically, the employer challenged the Regional Director's partial denial of a request to extend time to file a Statement of Position, partial denial of a request to continue the date of the preelection hearing, provision of limited time to draft posthearing oral arguments, and concomitant refusal to permit filing of posthearing briefs. In a footnote, the majority stated that these rulings were well within the discretion of the hearing officer, not "demonstrably unfair," and not evidently prejudicial to the employer. The majority rejected what it deemed "our colleague's invitation to relitigate the merits of the Board's Rule", finding that the provisions of that Rule are "not susceptible to alteration in an individual adjudication." Dissenting, Chairman Miscimarra stated that he would have granted review of "substantial issues [] regarding the impact of the procedural rulings on the other issues being litigated."

***Brunswick Bowling Products*, 364 NLRB No. 96 (2016)**

The Regional Director in this case found a contract bar which precluded a decertification election. The Board unanimously granted requests for review solely as to whether the Regional Director appropriately admitted the union's untimely Statement of Position into evidence and permitted litigation of contract-bar issues. On review, the Board (Members Hirozawa and McFerran) held that the Regional Director should not have permitted the Statement of Position to be admitted and should have precluded the union from litigating the issue of contract bar. The Board also, however, determined (unanimously) that the error was harmless insofar as the Regional Director could have raised the question of contract bar on her own motion, and accordingly affirmed her dismissal of the petition. Member Miscimarra, concurring in part, reiterated his prior dissent from the Rule provisions precluding parties from litigating questions as to which they filed no timely Statement of Position.

***URS Federal Services*, 365 NLRB No. 1 (2016)**

In this case, the union petitioned for review of a Regional Director's decision overruling an objection based on failure to timely serve a voter list. The Board (Chairman Pearce and Member McFerran) noted that the employer had plainly failed to serve the voter list on the union, and distinguished *Brunswick Bowling*, above, as unlike the filing of a Statement of Position, Regional Directors have no discretion to excuse a late-served voter list under the Board's regulations. Accordingly, the Board remanded the case for the holding of a second election. Member Miscimarra, dissenting, would have found that the employer's failure to serve the voter list was harmless because the list was served on the union by the Regional Director two days after it was filed.

***IGT Global Solutions*, Case 01-RC-176909 (Dec. 21, 2016) (not reported in Board volumes)**

In this case, a union requested Board review of a Regional Director's Decision and Order finding that a petitioned-for unit was inappropriate, and of the Director's prior determination that the

employer could litigate matters addressed in an untimely Statement of Position. The Board (Chairman Pearce and Member McFerran) granted review, and the case remains pending before the Board at this time. Member Miscimarra concurred in the grant of review as to the unit issues, but would have denied review as to the issue of whether the employer should have been precluded from litigating issues due to failure to serve a Statement of Position.

***Yale University, 365 NLRB No. 40 (2017)***

In this case, the employer sought a stay of the election and/or impoundment of the ballots in the matter of nine partially-consolidated petitions seeking certification as representative of teaching fellows. The Board (Members Pearce and McFerran) denied the employer's request for relief. Acting Chairman Miscimarra dissented. In pertinent part, he contended that "important election-related questions will likely require many months and possibly years to resolve" and that "all parties . . . should be given the benefit of the Board's resolution of election-related issues before voting takes place."

***XPO Logistics Freight, Case 13-RC-184190 (Apr. 6, 2017) (not reported in Board volumes), reaff'd on summary judgment, 365 NLRB No. 105 (2017), petition for review filed, No. 17-1177 (D.C. Cir. oral argument scheduled May 10, 2018)***

The employer requested Board review of a decision by the Regional Director that its offer of proof in support of its election objections raised no substantial and material issue of fact warranting a hearing. The majority (Members Pearce and McFerran) denied the request. Dissenting, Acting Chairman Miscimarra would have granted review of three of the employer's six objections. In so doing, he relied upon certain critiques of the definition of an offer of proof advanced in his dissent to the Rule, and also would have granted review "to the extent that the Regional Director relied on the Election Rule in denying the request for a hearing in the instant case." The employer then refused to bargain with the union, and the case is currently pending before the D.C. Circuit, although the employer has not challenged the Rule in any material way before that court.

***North Shore Ambulance, Case 29-RC-185400 (May 3, 2017) (not reported in Board volumes)***

As in *XPO Logistics*, the employer in this case requested Board review of a decision and certification of representative, alleging that the Region improperly failed to hold a hearing. The majority (Members Pearce and McFerran) denied the request on the basis that the employer's objections were procedurally deficient as it submitted no offer of proof, and in any event were contrary to extant law. Chairman Miscimarra, dissenting, would have excused the employer's procedural default, citing his dissent from the Rule. He also stated his disagreement with the extant substantive law cited by the majority.

***University of Chicago, Case 13-RC-198365 (June 1, 2017) (not reported in Board volumes)***

In this case, the employer sought expedited review of a decision and direction of election, along with an order to stay the election or impound the ballots. The Board (Members Pearce and McFerran) denied review, finding that the Regional Director properly precluded the employer from presenting evidence that, even if credited, would not have made any material difference to the decision. Dissenting, Chairman Miscimarra would have granted review for several reasons, including his disagreement with the offer of proof procedure for preelection hearings set forth in the Rule. He also would have granted the employer's motion to stay the election pending review because, in his view, "all parties . . . would benefit from the Board's resolution of election-related issues before voting takes place."

***RHCG Safety Corp., 365 NLRB No. 88 (2017)***

In this consolidated unfair labor practice and representation case, the Board unanimously voted to set aside an election on the basis that the final voter list contained pervasive inaccuracies; approximately 90 percent of the addresses on the list were inaccurate. The majority (Members Pearce and McFerran) additionally found that the election should be set aside because the employer failed to supply available telephone numbers to the Union as required by the Rule, and omitted at least 15 voters from the list. The majority found that the employer had

the opportunity to argue that it needed additional time to produce a complete voter list, and voluntarily abandoned that opportunity by entering into a stipulated election agreement. Chairman Miscimarra dissented in part from the finding that phone numbers were available to the employer, and did not pass on omissions from the voter list as such a finding would be cumulative.

***PCC Structural, Inc.*, Case 19-RC-202188 (Sept. 22, 2017) (not reported in Board volumes), *remanded on other grounds*, 365 NLRB No. 160 (2017)**

The employer sought an order to stay an election or impound the ballots. The Board (Members Pearce and Kaplan) denied the employer's request for extraordinary relief. Member Kaplan noted that, without expressing any views on his agreement or disagreement with the Rule, it applied to this case and warranted denial of the employer's motion. Dissenting, Chairman Miscimarra would have granted the employer's motion to stay the election pending review, stating that "all parties . . . should have the benefit of the Board's resolution of election-related issues before the election takes place."

***Republic Silver State Disposal, Inc.*, 365 NLRB No. 145 (2017)**

Denying review of a request for review of a Regional Director's direction of election, the Board rejected a number of arguments, including the contention that the Regional Director acted inappropriately by certifying the union as representative prior to final Board action on the request for review. The majority (Members Pearce and McFerran) explained that Section 3(b) of the NLRA expressly authorizes, and 29 C.F.R. §102.69 expressly requires, a regional director to "certify the results" of an election even though a party may yet request Board review of that decision. In a concurring footnote, Chairman Miscimarra opined that it is "objectionable and ill-advised as a matter of policy for regional directors to issue a certification before the Board has had an opportunity to address issues raised by the parties regarding the election," but noted that the employer had not specifically sought a stay of certification or other interim relief while the request for review was pending.

## Conclusion

To the extent that parties have brought facial challenges against the Rule, those challenges have been judicially rebuffed (*ABC*), or abandoned (*Chamber of Commerce, Pulau, Durham, University of Southern California, Pottstown Hospital Co.*). Accordingly, there is little prospect of wholesale judicial invalidation of the Rule.

However, challenges to specific applications of the Rule have been more common. In the three years the Rule has been in effect, we have uncovered twelve serious disputes as to how to apply its terms. Eight of these cases (*European Imports, UPS Ground Freight, Brunswick Bowling, URS Federal Services, IGT, Yale, RHCG, and PCO*) involved the kind of case-by-case working out of the meaning of the Rule's terms seemingly contemplated by its authors.<sup>3</sup> The other four (*XPO, North Shore, University of Chicago, and Republic Silver State*) involved intra-Board disagreements about the policy efficacy of particular aspects of the Rule such as the offer-of-proof procedure or when certifications should issue. To reduce future litigation, the Board may wish to consider providing additional guidance as to those provisions of the Rule that have been the source of repeated disagreement, whether between the parties or between Board Members.

Respectfully submitted,

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<sup>3</sup> See, e.g., 79 Fed. Reg. at 74427 (explaining that regional directors should have discretion to determine whether posthearing briefs are necessary on a case-by-case basis).