

Congress of the United States
Washington, DC 20515

April 18, 2018

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

RE: Comments on Request for Information, RIN 3142-AA12, Representation-Case Procedures under the National Labor Relations Act

Dear Ms. Rothschild:

Thank you for the opportunity to submit comments in response to the National Labor Relations Board's ("NLRB" or "the Board") December 14, 2017 Request for Information ("RFI") on Representation-Case Procedures under the National Labor Relations Act ("NLRA").¹ The Board has sought information on whether to retain, rescind, or modify the 2014 Election Rule, which streamlined the Board's process for union representation elections.²

The 2014 Election Rule has reduced unnecessary delays in the election process while increasing transparency and codifying best practices. It has furthered the purposes of the NLRA by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection."³ The 2014 Election Rule has been upheld in every court where it has been challenged.⁴

The RFI provided no justification for reopening the 2014 Election Rule, and excluded data that would be required to support evidence-based criticism of the 2014 Election Rule. Given this vacuum of information, on December 21, 2017, Members of Congress requested from the Board "comprehensive data regarding the Rule's implementation."⁵ On February 15, 2018, the Board produced its responses, but left 12 of the 23 requests totally or partially unanswered on the grounds that the Board "do[es] not have the data elements that track" the requested information.⁶ Following staff-level efforts to better understand alleged data limitations, on March 28, Members of Congress further specified requested information and further explained how the information is within the Board's possession and critical to evaluating criticism of the 2014 Election Rule.⁷

¹ Request for Information, 82 Fed. Reg. 58783 (Dec. 14, 2017).

² Representation-Case Procedures, 79 Fed. Reg. 74307 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101-03).

³ 29 U.S.C. § 151.

⁴ *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016), *affirming* 1-15-CV-026, U.S. Dist. LEXIS 78890 (W.D. Tex. June 1, 2015); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).

⁵ Letter from Senator Patty Murray, Representative Robert C. "Bobby" Scott, Representative Gregorio Kilili Sablan, and Representative Donald Norcross to the National Labor Relations Board (Dec. 21, 2017) (hereinafter "Dec. 21 Letter from Congress"), available at <https://democrats-edworkforce.house.gov/download/letter-to-nlrb-re-nlrb-2014-election-rule->.

⁶ Letter from Chairman Marvin Kaplan and General Counsel Peter Robb to Senator Murray and Representatives Scott, Sablan, and Norcross (Feb. 15, 2018) (hereinafter "Feb. 15 Letter from Board"), available at <http://democrats-edworkforce.house.gov/download/nlrb-response-to-congress-2014-election-rule-data>.

⁷ Letter from Senator Patty Murray, Representative Robert C. "Bobby" Scott, Representative Gregorio Kilili Sablan, and Representative Donald Norcross to the National Labor Relations Board (Mar. 28, 2017) (hereinafter "Mar. 28 Letter from Congress"), available at <http://democrats-edworkforce.house.gov/download/letter-to-nlrb-election-rule-data-request>.

Ms. Roxanne Rothschild

March 18, 2018

Page 2

On April 13, three business days before the deadline for comments, the Board produced partial responses to four of the twelve outstanding requests, but failed to address the other eight outstanding requests for information.⁸

Most critically, the data supplied to Members of Congress clearly demonstrate that the 2014 Election Rule has been successful, and the Board appears to lack any substantive, evidence-based grounds to reopen the 2014 Election Rule.

The Board's Prior Election Rules Were Burdened with Unnecessary Delays and Had Not Been Updated to Accommodate Advances in Communications Technology

Systematic delays were key features of the Board's prior election procedures, and they obstructed the Board's ability to efficiently protect "the right [of workers] to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."⁹ These delays were often tactically exploited and intentionally elongated by employers seeking to suppress workers' organizing momentum, chilling their exercise of Section 7 rights. As a result, the median number of days between when the workers filed a petition and the date of the election was 38 days.¹⁰ In cases where the parties could not reach a pre-election agreement, and thus had to rely on the Board to resolve pre-election disputes, the median number was significantly higher, at 64.5 days in 2011, 66 days in 2012, and 59 days in 2013.¹¹ In many egregious cases, an employer could delay an election by as many as 193 days by exploiting pre-election litigation.¹²

A key reason for this lengthy timeframe was that the prior procedures facilitated unnecessary or frivolous litigation. The NLRA explicitly states that "the Board shall investigate such petition and *if it has reasonable cause to believe that a question of representation affecting commerce exists* shall provide for an appropriate hearing upon due notice."¹³ However, the Board's previous regulations did not limit pre-election hearings to this statutory purpose.¹⁴ The Board's previous regulations also did not require parties to submit written position statements to determine the scope of pre-election disputes.¹⁵ As a result, the previous rules enabled employers to manipulate pre-election procedures by launching frivolous litigation for the purpose of delaying the

⁸ Letter from Chairman Marvin Kaplan to Senator Murray and Representatives Scott, Sablan, and Norcross (Apr. 13, 2018) (hereinafter "Apr. 13 Letter from Board"), available at <http://democrats-edworkforce.house.gov/download/election-rule-data-congressional-response-from-chairman-kaplan>.

⁹ 29 U.S.C. § 157.

¹⁰ Representation-Case Procedures, 79 Fed. Reg. at 74317; see also Median Days from Petition to Election FY08 to FY17, <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election> (last accessed Apr. 16, 2018).

¹¹ In those same years, the median number of days from petition to election when the parties reached an election agreement was 37 days. Median Days from Petition to Election FY08 to FY17, <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election> (last accessed Apr. 16, 2018).

¹² John Logan, Erin Johansson, and Ryan Lamare, "New Data: NLRB Process Fails to Ensure a Fair Vote," University of California, Berkeley Center for Labor Research and Education (Jun. 2011), available at <http://laborcenter.berkeley.edu/new-data-nlr-process-fails-to-ensure-a-fair-vote/> ("Ten percent of elections with a hearing took place more than 193 days after the petition was filed.").

¹³ 29 U.S.C. § 159(c) (emphasis added).

¹⁴ Representation-Case Procedures, 79 Fed. Reg. at 74309.

¹⁵ *Id.* at 74309; see also 74308 (explaining that, under the prior procedures, hearings had "at times been disordered, hampered by surprise and frivolous disputes...").

representation election.¹⁶ Many disputes involving eligibility for voting that could be rendered moot by the outcome of the election do not have to be litigated in a pre-election hearing.¹⁷

This inefficiency was compounded by other delays inherent in the prior procedures. For example, the prior election procedures required a delay of 25 to 30 days between the direction of an election and the actual election, in order to allow the parties an opportunity to request Board review of the direction.¹⁸ However, the Board granted review in less than one percent of all representation cases where an election was conducted.¹⁹ The prior rules also allowed parties to file written briefs after the pre-election hearing, creating as much as two weeks of delay caused by waiting for transcripts and drafting the briefs.²⁰

Employers seized upon these inefficiencies as opportunities to undermine union campaigns. In 2011, research from the University of California, Berkeley found that “the longer the delay between the filing of the petition and the election date, the more likely it is that the NLRB will issue complaints charging employers with illegal activity.”²¹ One management-side law firm even advised clients to consider pre-election litigation as “an opportunity for the heat of the union’s message to chill prior to the election.”²²

As the Board correctly described, “the possibility of using unnecessary litigation to gain strategic advantage...sometimes articulated as an express threat...had the effect of detrimentally affecting negotiations of pre-election agreements.”²³ In a hearing before the House of Representatives Committee on Education and the Workforce before the Rule became effective, Brenda Crawford, a registered nurse who sought to organize a union in her workplace, described how her employer raised the possibility of unnecessary litigation to force its desired terms into a pre-election agreement:

The Company had recently insisted in another, nearly identical bargaining unit on a pre-election hearing to argue that charge nurses were supervisors...We thought they belonged in the bargaining unit, so they could exercise their rights with the rest of the RNs. But we also knew that if a hearing was held to determine whether or not the charge nurses were supervisors, the resulting litigation would delay our chance to vote for weeks.

The organizing committee had to make a difficult decision. We could either go ahead with the hearing and have the election significantly delayed, or we could agree to the Company’s position that these workers were supervisors and thereby lose workers who really should have been in the union. We ultimately conceded the charge nurses so as not to hold up the election any longer than necessary.

¹⁶ Statement of Arthur J. Martin before the Committee on Education and the Workforce, U.S. House of Representatives (Sept. 22, 2011).

¹⁷ Representation-Case Procedures, 79 Fed. Reg. at 74385.

¹⁸ Representation-Case Procedures, 79 Fed. Reg. at 74317.

¹⁹ Representation-Case Procedures, 79 Fed. Reg. 7318, 7333 n.56 (proposed Feb. 6, 2014).

²⁰ *Id.* at 74309; Testimony of Caren P. Sencer before Committee on Health, Employment, Labor and Pensions, U.S. Senate (Feb. 11, 2015).

²¹ John Logan, Erin Johansson, and Ryan Lamare, “New Data: NLRB Process Fails to Ensure a Fair Vote,” University of California, Berkeley Center for Labor Research and Education (June 2011), available at <http://laborcenter.berkeley.edu/new-data-nlr-process-fails-to-ensure-a-fair-vote/>.

²² Howard Bloom and Patrick L. Egan, “Time is On Your Side,” Jackson Lewis (July 7, 2001).

²³ Representation-Case Procedures, 79 Fed. Reg. at 74318.

Under the NLRB's current election procedures, employers have an unbalanced ability to demand when and how an election takes place. In our case, the Company had the leverage of forcing a hearing on the small issue of charge nurses. To avoid the delay caused by litigating this small issue, the nurses were forced to give up the rights of those charge nurses. And that was not the only concession we had to make. The Union had to agree to the election date the Company wanted, again to avoid the need for a hearing. We had to agree to an election date that was a month and a half after the petition was filed, even though there were no longer any issues that needed to be decided for an election to take place earlier.²⁴

The threat of prolonged litigation enabled the employer to secure a later election date and the exclusion of certain employees from the proposed bargaining unit.²⁵ Efficient representation procedures are necessary to prevent one party from forcing terms on another without a chance to litigate the dispute in a timely manner.

The Board had also failed to update its election procedures to account for decades of advances in communications technology. For example, even though electronic filing had become the norm in many government bodies' litigation practices, the Board did not allow representation petitions to be electronically filed.²⁶

Failing to adapt to modern communications practices hampered the effectiveness of the voter eligibility list. In 1966, the Board decided in *Excelsior Underwear* that, upon direction of an election, the employer must provide the regional director with a list of eligible voters' names and home addresses.²⁷ The regional director, in turn, would supply this list to the union as it campaigns for the election. As the Supreme Court explained when it approved this requirement, providing this list "encourage[es] an informed employee electorate and [allows] unions the right of access to employees that management already possesses."²⁸

However, in the decades following *Excelsior*, the Board never updated the requirements of the voter eligibility list to adapt to changes in technology, such as the growing use of telephone and email communication over postal mail.²⁹ The lack of alternative means of contact prevented parties from efficiently verifying the information in the list. Further, the time for the regional office to transmit the list to the union further delayed the pre-election process.³⁰ In her testimony to the Committee on Education and the Workforce, Crawford explained how these inefficiencies prevented her coworkers from being informed about the organizing campaign:

The Company communicated anti-union messages to us daily, on every shift. My fellow nurses and I were taken off patient care constantly to attend anti-union meetings. The Company would send anti-union propaganda emails to the nurses, and even sent anti-union text messages to the

²⁴ Statement of Brenda Crawford before the Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and the Workforce, U.S. House of Representatives (Mar. 4, 2015); *see also* Testimony of Caren P. Sencer before Committee on Health, Employment, Labor and Pensions, U.S. Senate (Feb. 11, 2015).

²⁵ Statement of Brenda Crawford before the Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and the Workforce, U.S. House of Representatives (Mar. 4, 2015). Perhaps as a result of these terms, the union lost the election.

²⁶ Representation-Case Procedures, 79 Fed. Reg. at 7323.

²⁷ 156 NLRB 1236 (1966).

²⁸ *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969).

²⁹ Representation-Case Procedures, 79 Fed. Reg. at 7323.

³⁰ *Id.*

nurses' personal cell phones on off work time. The Company's anti-union campaign created a great amount of stress among the RNs, whose main concern was patient care...

At the same time, the Union struggled to get accurate contact information from the Company. Since the only contact information the Company was required to provide was home addresses, the Union could not communicate with the nurses in the same ways the Company did. Additionally, the Union didn't know shift times or other job information for the nurses, who work 12 hour shifts. Without that information, the Union had difficulty knowing when nurses would be home, or how to avoid bothering them when they had just gotten off shift. For many nurses, ten in the morning is the equivalent of ten at night. If we had more information about the nurses than just their home addresses, we could contact them to set up a time to meet with them.³¹

This unequal access to information undermined employees' free and fair choice of bargaining representative. When the Board reexamined its election procedures, it found that the voter eligibility list required an update in order to fulfill its purposes.³²

The 2014 Election Rule Has Reduced Unnecessary Delays in the Board's Election Procedures, Without Imposing Burdens on Employers or Employees

The Board's Amendments Have Improved the Efficiency of the Election Process

In response to the delays in processing elections, in 2014 the Board issued modest amendments to mitigate this problem. All available evidence indicates that the 2014 Election Rule was successful in making the Board's procedures more efficient.

Of the amendments aimed at efficiency, many of the Board's updates simply adapted to electronic filing practices. For example, the 2014 Election Rule permits a person to file a petition electronically, which enabled the Board's filing practices to be consistent with those of other government bodies.³³ Further, the Rule provides that the regional director will ordinarily transmit the direction of election electronically to the parties, and will transmit the notice of election simultaneously.³⁴ If an employer customarily communicates with its employees electronically, then the Rule provides that employer shall distribute the notice of election electronically in addition to posting copies of the notice in conspicuous places.³⁵ These amendments should not be controversial, and were not even challenged in the litigation following the enactment of the Rule. Any rescission of these modest updates would strip the Board of its access to the modern litigation practices enjoyed by other government bodies.

The 2014 Election Rule sought to minimize the chances of unnecessary litigation. The Board's procedures now explicitly state, "The purpose of a hearing conducted under 9(c) of the Act is to determine if a question of

³¹ Statement of Brenda Crawford before the Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and the Workforce, U.S. House of Representatives (Mar. 4, 2015).

³² 79 Fed. Reg. 7322-23 (citing *Wyman-Gordon*, 394 U.S. at 768).

³³ 29 C.F.R. § 102.60; *see also* Representation-Case Procedures, 79 Fed. Reg. at 74327-28.

³⁴ 29 C.F.R. § 102.67(b); *see also* Representation-Case Procedures, 79 Fed. Reg. at 74405-06.

³⁵ 29 C.F.R. § 102.67(k); *see also* Representation-Case Procedures, 79 Fed. Reg. at 74405-06.

representation exists,” thus comports with the plain text of the NLRA.³⁶ To this end, questions of individual eligibility are now ordinarily deferred until after the election to avoid litigation over questions that could be mooted by the election results.³⁷ The Board also required parties to submit position statements before the pre-election hearing to focus the scope of litigation.³⁸ To prevent further delay caused by preparing transcripts of the hearing and post-hearing briefs, the Board’s procedures now allow post-hearing briefs only with special permission of the regional director.³⁹ The Board also codified a rule from its Casehandling Manual requiring regional directors to schedule an election “for the earliest date practicable” once they direct an election; this eliminated the 25 to 30 day waiting period.⁴⁰

The Board correctly predicted that its amendments would reduce unnecessary delays.⁴¹ Overall, the 2014 Election Rule reduced the median number of days from petition to election, from 38 days in the year prior to the date of effectiveness to 23 days in the past year.⁴² Because the Board’s procedures now only allow written post-hearing briefs when the regional director specifically grants them, the election is not delayed by the preparation of the hearing transcript and the briefs. As a result, the time between the close of the hearing and the issuance of the direction of election has decreased from 24 days in the year before the 2014 Election Rule to 12 in the year after.⁴³

Because the 2014 Election Rule restricts parties from using frivolous litigation to delay the election, parties have increasingly agreed to defer disputes over the eligibility of specific employees by letting those employees vote subject to challenge, which the parties would litigate after the election. The number of cases where the parties signed election agreements that allowed employees vote subject to challenge increased from 47 cases in the two years preceding when the Rule came into effect, to 191 in the two years after.⁴⁴ This demonstrates that the parties are fairly and freely entering into pre-election agreements, as the 2014 Election Rule prevents employers from raising the specter of lengthy litigation in order to force its preferred terms into an election agreement.

The Board Lacks Justification for Reconsidering Procedures that Have Made Its Election Procedures More Efficient

To date, the Board lacks a valid legal basis or empirical evidence that would weigh in favor of rescinding the 2014 Election Rule in whole or in part. When the U.S. District Court for the District of Columbia rejected challenges to the 2014 Election Rule, it noted that challengers “rel[ie]d heavily on the repetition of disparaging labels [such as] ‘ambush or quickie election rule,’” but that “when one descends to the level of the particular, the provisions at issue are not quite as described.”⁴⁵

³⁶ 29 C.F.R. § 102.64(a).

³⁷ *Id.*

³⁸ 29 C.F.R. § 102.66(b).

³⁹ 29 C.F.R. § 102.66(h).

⁴⁰ 29 C.F.R. § 102.67(b); Representation-Case Procedures, 79 Fed. Reg. at 74405 (citing Casehandling Manual Section 11302.1 (1975)).

⁴¹ Representation-Case Procedures, 79 Fed. Reg. at 74317-18.

⁴² Feb. 15 Letter from Board, Summary Table available at <http://democrats-edworkforce.house.gov/download/summary-of-congressional-data>.

⁴³ *Id.*, Response to Request No. 20.

⁴⁴ *Id.*, Response to Request No. 15.

⁴⁵ *Chamber of Commerce*, 118 F. Supp. 3d at 189.

The Board conceded in its RFI that the 2014 Election Rule has been upheld by every court where it has been challenged.⁴⁶ There is no dispute that the courts concluded that none of the challenged amendments violated the Constitution, the NLRA, or the Administrative Procedure Act.⁴⁷ Accordingly, the Board would act in error if it reconsidered any provision of the 2014 Election Rule on the basis of a legal argument that has already been rejected in court.

There is no statistical evidence to support longstanding arguments by some employers that the efficiency of the 2014 Election Rule has created adverse consequences for employers, employees, or unions. Thus, the Board does not provide any data to support these arguments in the RFI. Instead, available data have disproven many of the predictions of Members Philip Miscimarra and Harry Johnson, who dissented from the 2014 Election Rule.

The dissent predicted that the election would result in fewer pre-election agreements, thus resulting in an “increase in pre- and post-election litigation,” because the parties would have less time to resolve pre-election disputes.⁴⁸ The US. District Court for the District of Columbia rejected this argument, writing that “the Board considered these arguments, and it predicted that the calculus of whether to litigate pre-election issues or enter into an agreement would remain the same under the Final Rule as it did under the prior regime...”⁴⁹ Indeed, the percentage of stipulated elections has remained constant at over 90 percent in the two and three-quarters years before and after the date of the Rule’s effectiveness.⁵⁰ Similarly, the average and median number of hearing days have also remained constant during the same time period.⁵¹

The dissent challenged the very idea that the Board’s prior pre-election procedures were a major source of delay, and predicted an increase in delays from post-election litigation.⁵² This argument again has not proved to be correct. When measuring the median number of days between filing a petition and certifying a unit, which includes post-election litigation, the number of days decreased from 50 the year before the 2014 Election Rule to 35 the year following it.⁵³ Further, as explained in Member Mark Pearce’s dissent to the RFI, the rate at which the Board closes representation cases within 100 days is the highest it has ever been.⁵⁴

The dissent also challenged the 2014 Election Rule’s setting the hearing date eight days from the service of notice of a hearing, to codify best practices and ensure consistent timeframes among the regions.⁵⁵ The Regional Director may postpone the hearing for up to two business days if a requesting party presents special

⁴⁶ Request for Information, 82 Fed. Reg. at 58784.

⁴⁷ *Associated Builders and Contractors*, 826 F.3d at 218 (finding that the Rule, “on its face, does not violate the National Labor Relations Act or the Administrative Procedure Act”); *Chamber of Commerce*, 118 F. Supp. 3d at 220 (concluding that the Final Rule does not contravene the NLRA or the Constitution, and that the Rule is not “arbitrary and capricious or an abuse of the Board’s discretion”).

⁴⁸ Representation-Case Procedures, 79 Fed. Reg. at 74450.

⁴⁹ *Chamber of Commerce*, 118 F. Supp. 3d at 217.

⁵⁰ Feb. 15 Letter from Board, Response to Request No. 1 (recording the percentage of stipulated elections as 93 percent from July 6, 2012 to April 13, 2013; 91 percent from April 14, 2013 to April 13, 2014; 92 percent from April 14, 2014 to April 13, 2015; 92 percent from April 14, 2015 to April 13, 2016; 93 percent from April 14, 2016 to April 13, 2017; and 92 percent from April 15, 2018 to December 31, 2017).

⁵¹ *Id.*, Response to Request No. 11.

⁵² Representation-Case Procedures, 79 Fed. Reg. at 74434-36.

⁵³ Annual Review of Revised R-Case Rules, National Labor Relations Board (Apr. 20, 2016), <https://www.nlrb.gov/news-outreach/news-story/annual-review-revised-r-case-rules>.

⁵⁴ Request for Information, 82 Fed. Reg. at 58787.

⁵⁵ 29 C.F.R. § 102.63(a)(1); *see also* Representation-Case Procedures, 79 Fed. Reg. at 74309, 74424.

circumstances, and may postpone for more than two business days if a requesting party presents extraordinary circumstances.⁵⁶ The dissent to the Final Rule argued that “it is predictable that employers in other circumstances...will legitimately require more time.”⁵⁷

To test whether the dissent’s claim has any empirical support, Congress’s December 21, 2017 letter requested “the number and percentage of cases in which the employer requested a continuance” of the pre-election hearing, the “number and percentage of cases in which the employer’s request...was granted,” and “the range, mean, and median number of additional days granted by each [such] continuance.”⁵⁸ The letter also sought the same information regarding continuances requested by labor organizations.⁵⁹ When the Board alleged that it did “not have data elements that track” the requests in its February 15, 2018 response,⁶⁰ Members of Congress specifically requested that the Board conduct specific queries of the Board’s own Next Generation (“NxGen”) electronic case management system, which stores every Board case file, and “specifically identifies Motions to Postpone/Reschedule Hearings.”⁶¹

The Board on April 13 partially responded to four of Congress’s six items regarding requests for “a continuance of the originally-scheduled pre-election hearing date.”⁶² When it tracked documents identified as Motions to Postpone/Reschedule Hearings, it found that the number of motions actually decreased after the 2014 Election Rule: 455 such motions to postpone a pre-election hearing had been filed between July 6, 2012 and April 13, 2015; 242 had been filed between April 14, 2015, the day the 2014 Election Rule became effective, and December 31, 2017.⁶³ Accordingly, the percentage of election petitions where a party moved for a postponement decreased from 6.5 percent in the same time period prior to the 2014 Election Rule, to 3.8 percent in the same time period after.⁶⁴

In producing this data, the Board noted a significantly higher number of Orders Rescheduling Hearing, with 2,380 such orders in the time period prior to the 2014 Election Rule and 1,018 after.⁶⁵ It offered two speculative explanations for this discrepancy: “First, a Region could have rescheduled the case *sua sponte* due

⁵⁶ *Id.*

⁵⁷ Representation-Case Procedures, 79 Fed. Reg. at 74442 (Members Miscimarra and Johnson, dissenting).

⁵⁸ Dec. 21 Letter from Congress, Request Nos. 3-5; *see also* Request for Information, 82 Fed. Reg. at 58787 n.6 (“[T]o assess the success of some of the Rule’s intended new efficiencies, it would be useful to have quantitative data on[] motions for extensions...”) (Member McFerran, dissenting).

⁵⁹ Dec. 21 Letter from Congress, Request Nos. 6-8.

⁶⁰ Feb. 15 Letter from Board, Responses to Requests Nos. 3-8.

⁶¹ Mar. 28 Letter from Congress (citing Public Documents, National Labor Relations Board, <https://www.nlr.gov/open/public-documents?page=12>).

⁶² The Board partially responded to Request Nos. 3 and 6 by providing the “number...of cases in which” the employer or the union “requested a continuance of the originally-scheduled pre-election hearing date,” but it did not provide the percentages of relevant cases. The Board partially responded to Request Nos. 4 and 7 by providing the “number...of cases in which” the employer or the union’s “request...was granted,” but did not provide the percentages of relevant cases. The Board did not respond to Request Nos. 5 and 8, seeking the “range, mean, and median number of additional days granted by each continuance...”

⁶³ Apr. 13 Letter from Board (identifying 392 such motions filed by employers and 63 motions filed by unions before the date of effectiveness, and 242 such motions filed by employers and 45 filed by unions after). The table in the Apr. 13 Letter misidentifies “Group A” as beginning July 16, 2012, but the Congressional request and the first page of the Apr. 13 Letter identify Group A as beginning July 6, 2012.

⁶⁴ Feb. 15 Letter from Board, Summary Table (reporting 6,988 petitions filed between July 6, 2012 and April 13, 2015, and 6,401 petitions filed between April 14, 2015 to December 31, 2017); Apr. 13 Letter from Board.

⁶⁵ Apr. 13 Letter from Board.

to scheduling conflict or other circumstances. Second, one or both parties could have made a request for postponement that was not in writing.”⁶⁶

Regardless of the questionable nature of these suppositions, the data demonstrates that employers have not filed a greater number or percentage of motions to postpone pre-election hearings. In representation cases (“RC cases”), employers filed motions to postpone a hearing in 247 cases, or 4.4 percent, between July 6, 2012 and April 13, 2015, but filed motions to postpone in 161 cases, or 3 percent, between April 14, 2015 and December 31, 2017.⁶⁷ The information provided by the Board rather clearly demonstrates that the hypothetical situations posed by the dissent to the 2014 Election Rule have not been borne out in practice.

The 2014 Election Rule Protects Employees’ Free and Fair Choice of Bargaining Representative by Updating the Voter Eligibility List

The Board is also without evidence to justify a reconsideration of the 2014 Election Rule’s provisions governing the employer’s production of the voter eligibility list. Prior to the 2014 Election Rule, the rules governing the voter eligibility list had not been updated since the Board decided *Excelsior Underwear* in 1966.⁶⁸ As a result, the pre-Rule list failed to advance its purpose of encouraging “an informed employee electorate” and providing “unions the right of access to employees that management already possesses.”⁶⁹ The 2014 Election Rule modernized the list by requiring the list to be produced within two business days of the direction of election, instead of seven.⁷⁰ In addition to eligible voters’ names and home addresses, this list must now include their work locations, shifts, job classifications, and, if available to the employer, their personal email addresses and home and cell phone numbers.⁷¹

Without the union’s access to a voter eligibility list, the employer has far greater access to the employees than the union does.⁷² The 2014 Election Rule merely updated the requirements to facilitate employees’ exercise of Section 7 rights by making possible meaningful communication between individual, unorganized workers and their prospective representatives. The requirement that employers produce the list in two days, rather than seven, accounts for advances in recordkeeping.⁷³ Similarly, the requirement that the list include phone numbers and email addresses accounts for the rapid growth of communications technology since 1966.⁷⁴ Even the dissent to the 2014 Election Rule did not dispute that the list should be expanded to include work locations, shifts, and job classification.⁷⁵

⁶⁶ *Id.*

⁶⁷ See Feb. 15 Letter from Board, Summary Table (providing data sufficient to find that 5624 RC petitions were filed in the first time period, and 5353 RC petitions in the second); Apr. 13 Letter from Board, MPP Pre-Election Hearings, available at <http://democrats-edworkforce.house.gov/download/congressional-response-mpp-preelection-hearings> (providing data sufficient to find that 247 motions to postpone a pre-election hearing were filed by employers in RC cases during the first time period, and that 161 such motions were filed in the second).

⁶⁸ Representation-Case Procedures, 79 Fed. Reg. at 7323.

⁶⁹ *Wyman-Gordon Co.*, 394 U.S. at 767.

⁷⁰ 29 C.F.R. § 102.67(l).

⁷¹ *Id.*

⁷² Representation-Case Procedures, 79 Fed. Reg. at 74335.

⁷³ *Id.* at 74353.

⁷⁴ *Id.*

⁷⁵ *Id.* at 74427.

Critics of the 2014 Election Rule, including the dissent to the Final Rule, have contended that these changes infringe on employee privacy by enabling unions to misuse the information.⁷⁶ The 2014 Election Rule prevented this from happening, as the Board's current regulations state in no uncertain terms that "[t]he parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters."⁷⁷ The alleged privacy concerns were also rejected by the courts.⁷⁸

The prediction that the voter eligibility list would open the door to abuses of privacy by union organizers has been proven unfounded. In Congress's December 21, 2017 data request to the Board, it sought the "number of charges, objections, or complaints of any kind concerning labor organization's misuse of any form of list of employees provided pursuant to the NLRB's election procedures."⁷⁹ In response, the Board admitted that not a single such case exists.

We conducted a document search of our electronic case file records for charges, complaints, or objections to the conduct of election that contained language referring to 'misuse' or 'abuse' of voter lists. In addition, we also inquired among the 26 Regional Offices to see if they recalled any such cases. No charges, objections, or complaints relating to misuse of the list of voters have ever been received by any office since" the date the Rule became effective.⁸⁰

Because the Board conceded that no employees' rights have been violated by the expansion of the voter eligibility list, allegedly or in fact, the Board has no rational, evidence-based grounds on which to reconsider the procedures governing the voter eligibility list.

The Board is Without Basis to Reconsider the 2014 Election Rule Because It Refuses to Quantify Data Necessary to Determine Whether Reconsideration is Reasonable

In response to the Board's RFI, members of Congress requested from the Board "comprehensive data regarding the Rule's implementation" on December 21, 2017.⁸¹ As the letter explained:

The RFI does not supplement its questions with any empirical evidence or internal data suggesting a need to reconsider the Rule, let alone provide any factual or legal justification or overhauling or modifying the current election procedures. Further, the NLRB has not indicated whether it has initiated any effort to conduct an internal review of cases processed pursuant to the Rule.⁸²

The Board's rulemaking would be arbitrary and capricious under the Administrative Procedure Act if it fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection

⁷⁶ *Id.* at 74453-54.

⁷⁷ 29 C.F.R. § 102.67(l).

⁷⁸ *Associated Builders and Contractors*, 826 F.3d at 226 ("The Board extensively considered the burden on employers and the privacy concerns of employees when determining the necessity of the expanded disclosure requirements."); *Chamber of Commerce*, 118 F. Supp. 3d at 213 (noting "the Board's consideration of the comments it received raising employees' privacy concerns" and "its reasoned analysis as to why the expanded disclosure requirement was necessary.").

⁷⁹ Dec. 21 Letter from Congress, Request No. 23.

⁸⁰ Feb. 15 Letter from Board, Response to Request No. 23.

⁸¹ Dec. 21 Letter from Congress.

⁸² *Id.*

between the facts found and the choice made.”⁸³ In doing so, the Board cannot be found to engage in reasoned decision-making if it “fail[s] to consider an important aspect of the problem.”⁸⁴ To date, the Board has left eight of Congress’s 23 requests totally or partially unanswered.⁸⁵

As explained in Congress’s March 28, 2018 letter, the information sought in the outstanding requests is highly relevant to the RFI and within the Board’s possession.⁸⁶ The outstanding requests focus on data regarding the contention that the Rule, by eliminating opportunities for employers to secure pre-election delays, imposes undue burdens on employers.⁸⁷ As noted above, the Board produced data regarding four of the 12 requests that had been outstanding as of April 13. However, the Board did not respond to or even address Congress’s request for the remaining outstanding production.⁸⁸

Listed below are information requests that remain unanswered that are relevant to a review of the 2014 Election Rule.

1. The December 21 letter sought information regarding when employers have “requested an extension of time to file and serve the voter eligibility list.”⁸⁹ The 2014 Election Rule requires the employer to produce the list within two business days of the direction of election, whereas previously the employer had been required to produce this list within seven days.⁹⁰ The Board explained that this “will help the Board to expeditiously resolve questions of representation,” and because “the list will be produced electronically from information that is stored electronically.”⁹¹ The 2014 Election Rule’s dissent argued that the “2-business-day maximum time limit...is far too short a time period.”⁹² This argument was rejected in court.⁹³ To measure whether any empirical support for this argument exists, the December 21 letter requested the “number and percentage of cases in which the employer requested an extension of time to file and serve the” list, the “number and percentage of [such] cases ... in which the request was granted,” and the “range, mean, and median number of additional days granted by each extension.”⁹⁴ The Board should not reopen an issue that has already been resolved in court if it lacks any evidence.⁹⁵
2. The December 21 letter also inquired into whether the dissent was correct in alleging that the 2014 Election Rule foreclosed parties’ abilities to litigate pre-election disputes that were material to the outcome of the election.⁹⁶ The dissent objected to the 2014 Election Rule’s requirement that an employer waive any argument it did not include in its position statement, which is due the day before the

⁸³ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see also 5 U.S.C. § 706(2)(A).

⁸⁴ *Id.*

⁸⁵ Request Nos. 5, 8, 10, 14, 15, 16, 17, 18 remain wholly or partially unfulfilled.

⁸⁶ Mar. 28 Letter from Congress.

⁸⁷ *Id.*

⁸⁸ Apr. 13 Letter from Board.

⁸⁹ Dec. 21 Letter from Congress, Request Nos. 16-18.

⁹⁰ 29 C.F.R. § 102.67(l); Representation-Case Procedures, 79 Fed. Reg. at 74353.

⁹¹ Representation-Case Procedures, 79 Fed. Reg. at 74353.

⁹² Representation-Case Procedures, 79 Fed. Reg. at 74454.

⁹³ *Associated Builders and Contractors*, 826 F.3d at 225.

⁹⁴ Dec. 21 Letter from Congress, Request Nos. 16-18.

⁹⁵ See Request for Information, 82 Fed. Reg. at 58787 n.6 (“[T]o assess the success of some of the Rule’s intended new efficiencies, it would be useful to have quantitative data on[] motions for extensions and motions to file a document out-of-time...”) (Member McFerran, dissenting).

⁹⁶ Dec. 21 Letter from Congress.

scheduled hearing.⁹⁷ Challenge to this rule was rejected in court.⁹⁸ To measure whether any research could possibly support the dissent's contention, the December 21 letter requested the "number and percentage of cases" where "the Regional Director or Board refused to permit a party to litigate an issue on the grounds that it was not identified or contended in its position statement."⁹⁹ Despite a reminder in Congress's March 28, 2018 letter, the Board has failed to answer this request, which it first received on December 21, 2017.

3. The December 21 letter further requested information regarding the 2014 Election Rule's postponing litigation that the election results could otherwise render moot.¹⁰⁰ The 2014 Election Rule does this by limiting pre-election hearings to their statutory purpose, but the dissent to the Final Rule characterized this amendment as prioritizing speed over the parties' right to a hearing.¹⁰¹ This contention was rejected in court.¹⁰² "The statute does not demand a hearing on all issues affecting the election, or even all substantial issues affecting the election. Section 9 specifies that the purpose of the pre-election hearing is to determine whether a question of representation exists, which is a different inquiry from the question of which specific individuals will vote in the ensuing election."¹⁰³ In case the Board decides to reopen a settled issue, the December 21 letter requested the "number and percentage of cases" where "a dispute that was deferred by permitting employees to vote subject to challenge was mooted by the election results."¹⁰⁴

As Congress noted in its March 28, 2018 letter:

The Board's [NxGen] system stores every case file. The Board implemented NxGen in 2011 and has consistently updated and improved it since that time. It is our understanding that all case related documents are required to be uploaded to the NxGen electronic case file to ensure completeness Given that the Board has the ability to transfer all of the information on NxGen to its website, it also has the ability to compile data responsive to all of our requests. Therefore, merely lacking the data elements in a computer system does not warrant a refusal to comply with a Congressional request.¹⁰⁵

While the Board "must examine the relevant data" to engage in reasoned rulemaking,¹⁰⁶ it cannot do so if it refuses to produce such data. The Board does not even dispute that it has the ability to produce responses to Congress's outstanding requests. It simply declines to analyze relevant files from NxGen because doing so is

⁹⁷ Representation-Case Procedures, 79 Fed. Reg. at 74442-44 (objecting to 29 C.F.R. § 102.63(b)(1)).

⁹⁸ *Chamber of Commerce*, 118 F. Supp. 3d at 203-06.

⁹⁹ Dec. 21 Letter from Congress, Request No. 14; *see also* 82 Fed. Reg. at 58787 n.6 ("[T]o assess the success of some of the Rule's intended new efficiencies, it would be useful to have quantitative data on[] missed deadlines...") (Member McFerran, dissenting).

¹⁰⁰ Dec. 21 Letter from Congress, Request No. 15.

¹⁰¹ Representation-Case Procedures, 79 Fed. Reg. at 74436-38.

¹⁰² *Associated Builders and Contractors*, 826 F.3d at 222; *Chamber of Commerce*, 118 F. Supp. 3d at 195-96.

¹⁰³ *Associated Builders and Contractors*, 826 F.3d at 222.

¹⁰⁴ Dec. 21 Letter from Congress, Request No. 15; 82 Fed. Reg. at 58787 n.6 ("[T]o assess the success of some of the Rule's intended new efficiencies, it would be useful to have quantitative data on...eligibility issues deferred until after the election, and whether such issues were mooted by the election results.") (Member McFerran, dissenting). To understand how these changes impact the parties' pre-election agreements, Congress also requested the "number and percentage of cases" where "the only issues not agreed to...were the election date or details regarding the conduct of the election." Dec. 21 Letter from Congress, Request No. 10.

¹⁰⁵ Mar. 28 Letter from Congress.

¹⁰⁶ *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

more difficult than performing a series of keyword searches. However, “[t]hat a problem is difficult may indicate a need to make some simplifying assumptions, but it does not justify ignoring altogether a variable so clearly relevant and likely to affect” an agency’s rule.¹⁰⁷ Congress’s December 21 letter requested information that would verify whether key criticisms of the 2014 Election Rule have merit. This information was also sought in Member Lauren McFerran’s dissent to the RFI.¹⁰⁸ If the Board refuses to produce data that is relevant to analyzing important aspects of the 2014 Election Rule, it should not reopen the 2014 Election Rule at all.

Rescinding the 2014 Election Rule Would Be Inconsistent with the United States’ Commitments Under International Law

By rescinding procedures that streamline representation elections, the United States would fall short of its obligations to safeguard the internationally recognized right to freedom of association. The United States is a signatory to the International Labor Organization’s (“ILO”) Declaration on Fundamental Principles and Rights at Work,¹⁰⁹ and therefore has “an obligation” to “respect, to promote, and to realize...the principles concerning the fundamental rights [of] freedom of association and the effective recognition of the right to collective bargaining.”¹¹⁰

If the “obligation ... to respect, to promote and to realize” the principle of “freedom of association” means anything, it requires the Board to consider the effect of this regulatory overhaul on workers’ fundamental rights to freedom of association.¹¹¹ The Board would hamper freedom of association in the United States if it chose to impose unnecessary delays on representation elections. In interpreting principles governing freedom of association, the ILO has cautioned, “The free choice of workers to establish and join organizations is so fundamental to freedom of association as a whole that it cannot be compromised by delays.”¹¹²

Because the Board lacks any empirical justification for rescinding regulations that prevent unnecessary delays, the United States government would run afoul of its obligations under international law if it rescinds the 2014

¹⁰⁷ *Comcast Corp. v. FCC*, 579 F.3d 1, 7 (D.C. Cir. 2009) (internal citation omitted).

¹⁰⁸ Request for Information, 82 Fed. Reg. at 58787 (“I believe that any useful request for information would have to seek comprehensive information on the precise effects of the specific changes made by the Rule.”); *Id.* n.6 (“For example, to assess some of the Rule’s intended new efficiencies, it would be useful to have quantitative data on: motions for extensions and motions to file a document out-of-time; missed deadlines; motions for stays of election or other extraordinary relief; eligibility issues deferred until after the election, and whether such issues were mooted by the election results. This type of data would be valuable not only to the decision makers at the Agency, but also to the public in determining how to evaluate and comment on the effectiveness of the Rule.”) (Member McFerran, dissenting).

¹⁰⁹ International Labor Organization, Declaration On Fundamental Principles And Rights At Work, Section 2 (June 18, 1998), available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

¹¹⁰ *Id.* The United States has not formally ratified ILO Convention No. 87 Concerning the Application of the Principles of the Right to Organize and Bargain Collectively. 96 U.N.T.S. 257 (1949). However, the Declaration states “that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization” to “respect, promote, and realize” the principles concerning this Convention. ILO Declaration, Section 2.

¹¹¹ ILO Declaration, Section 2; *see also* International Labor Conference, Consideration of a Possible Declaration of Principles of the International Labor Organization Concerning Fundamental Rights and Its Appropriate Follow-Up Mechanism, 86th Sess. 1998, at 10-11, available at http://www.ilo.org/public/libdoc/ilo/1998/98B09_94_engl.pdf (noting that the purpose of the Declaration “is to remind ILO member States that even if they have not ratified particular Conventions and are thus not legally accountable for their implementation, they still have a duty, both towards themselves and with regard to the commitments which they have undertaken, to apply the principles of those Conventions which are the expression of values which they freely accepted by adhering to the ILO Constitution”).

¹¹² International Labor Office, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, P 312 (5th rev. ed. 2006).

Ms. Roxanne Rothschild

March 18, 2018

Page 14

Election Rule. As the ILO has noted with respect to legal proceedings, “the Committee [on Freedom of Association of the ILO] has recalled the importance it attaches to such proceedings being concluded expeditiously, as justice delayed is justice denied.”¹¹³ The Board’s Rule has improved the efficiency of the Board’s procedures by updating its filing practices, preventing unnecessary or frivolous litigation, and securing reasonable deadlines. If the Board rescinds procedures that secure this efficiency, such a move would frustrate workers’ freedom of association.¹¹⁴

Conclusion

For the reasons set forth above, we urge the Board not to rescind or amend the 2014 Election Rule. Thank you for your consideration of this comment. For any questions or further communication, please contact John_DElia@help.senate.gov and Kyle.deCant@mail.house.gov.

Sincerely,



PATTY MURRAY

Ranking Member
Senate Committee on Health, Education,
Labor & Pensions



ROBERT C. “BOBBY” SCOTT

Ranking Member
House Committee on Education and the
Workforce



ELIZABETH WARREN

U.S. Senator



JOE COURTNEY

U.S. Representative



FREDERICA S. WILSON

U.S. Representative



SUZANNE BONAMICI

U.S. Representative


¹¹³ *Id.* at P 104.

¹¹⁴ The ILO notes that, with regard to the establishment of unions, “The formalities prescribed by law ... should not be applied in such a manner as to delay or prevent the establishment of trade union organizations.” *Id.* at P 279. The Board has also acknowledged the importance of efficiency in its administration of the NLRA. Representation-Case Procedures, 79 Fed. Reg. at 74316 (“Section 9 [of the NLRA] is animated by the essential principle that representation cases should be resolved quickly and fairly. ‘[T]he Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently, and speedily.’”) (quoting *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946)).

Ms. Roxanne Rothschild

March 18, 2018


Page 15




MARK TAKANO
Ranking Member
Subcommittee on Workforce Protections



MARK DESAULNIER
U.S. Representative



DONALD NORCROSS
U.S. Representative



GREGORIO KILILI CAMACHO SABLAN
Ranking Member
Subcommittee on Health, Employment, Labor
and Pensions



CAROL SHEA-PORTER
U.S. Representative