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EPI comment on the National Labor Relations Board's updated Election Rule

Public Comments By [Celine McNicholas](#) April 17, 2018

Submitted via www.regulations.gov

Marvin E. Kaplan, Chairman
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: Notice of Proposed Rulemaking (NPRM), *Representation-Case Procedures*, 82 Fed. Reg. 58783 (December 14, 2018), Docket Number: 2017-26904; RIN 3142-AA12

Dear Chairman Kaplan,

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-income workers, and assesses policies with respect to how well they further those goals.

On December 15, 2014, the National Labor Relations Board (the “Board”) published the Election Rule (“the Rule”), which modernized the Board’s prior Election Regulations, taking a modest step toward making workplace representation elections more democratic.¹ The amendments to the NLRB’s election procedures represent modest and common-sense changes in the processing of petitions for representation elections. The Rule streamlined the election process, reduced or eliminated unnecessary litigation, and made it possible for employees seeking to vote on union representation to cast their votes in a timelier manner.

The Board enacted the rule pursuant to its statutory authority in the National Labor Relations Act (NLRA or the “Act”), which protects employees’ “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]”² When employees seek to hold an election for the purposes of determining whether to be represented by a union for the purposes of collective bargaining, Section 9 of the Act gives the Board authority to resolve questions of representation.³

As the United States Supreme Court has explained, “Congress has entrusted the Board with a wide

degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). “The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.” *NLRB v. Waterman Steamship Co.*, 309 U.S. 206, 226 (1940); see also *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 37 (1942).

The Board’s representation case procedures are established by the Act, the Board’s regulations, and Board case law, based on the foundational principle that representation cases should be resolved quickly, fairly, and efficiently. As the Supreme Court has explained, “[T]he Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *A.J. Tower Co.*, 329 U.S. at 331.

The Board adopted the Rule after considering tens of thousands of public comments that were received during an open commenting period.⁴ The Rule became effective April 14, 2015, and has applied to all representation cases filed since. The U.S. Chamber of Commerce and the Associated Builders and Contractors of Texas challenged the rule in federal court, and the rule was upheld in both cases, by the U.S. Court of Appeals for the Fifth Circuit and the District Court for the District of Columbia.⁵

The NLRB’s election system is working well under the new rules

In promulgating the final Rule, the Board sought to codify “best practices developed over the years,” thereby promoting greater uniformity, transparency, and efficiency in union elections.⁶ Accordingly, the final Rule sought to eliminate procedures in representation cases that had resulted in unnecessary delays, such as by phasing out the use of outdated technology and by ending internal review procedures of Regional Director’s decisions that shifted the Board’s focus to disputes that did not need to be resolved at the time.⁷ Many of the amendments simply made the NLRB’s rules simpler and easier for employees, union representatives, and employers to understand. The amendments modernized the NLRB’s procedures by requiring electronic filing and other noncontroversial, commonplace technological practices. The Board’s Rule codified modest but important steps toward making workplace elections more transparent, efficient, and democratic.

Moreover, the election system is working well under the new rules, which have been in place for three years. Employers, employees, unions, and the NLRB’s regions are now accustomed to operating under the new rules. Employers and unions reach stipulation agreements (meaning the parties agree to the terms and conditions of an election) in approximately 92 percent of the election petitions filed—the same percentage as before the amendments were adopted.⁸ The new rules have also reduced the median number of days the parties must wait for the election to be held. Under the old rules, parties had to wait a median of 38 days between the time the petition was filed and the election was held, but under the new rules the median wait time is only 23 days.⁹ This reduction in unnecessary delays has made NLRB elections more efficient, and should be applauded as a positive step for a federal law enforcement agency with limited resources. Thus, the amendments have had their desired effect of streamlining the process and allowing employees to vote on a timelier basis.

Nothing in the new Rule prevents employers from communicating with employees regarding unionization

When the NLRB's election Rule took effect on April 14, 2015, the U.S. Chamber of Commerce and other corporate interests immediately charged the NLRB with creating an "ambush" or "quickie" election rule that favors unions. In reality, the corporate interest groups committed to rescinding the Rule and having Congress codify a mandatory waiting period for a union election simply want employers to have more time to defeat an organizing campaign. Nothing in the Rule addresses the erosion of collective bargaining rights; rather the Rule is aimed at modernizing the election process to include the use of electronic communications and also seeks to reduce unnecessary litigation by streamlining the hearing process. Again, the courts have upheld the Rule where it was challenged.

Nothing in the amendments to the Board's election process prevents employers from communicating with employees regarding unionization. Employers can, and do, mount vigorous anti-union campaigns just as they did before the amendments were adopted. The United States Department of Labor (DOL) has found that approximately 71 to 87 percent of employers hire union-avoidance consultants to manage counter-organizing campaigns.¹⁰ During an election process, it is standard practice for workers to be subjected to threats, interrogation, harassment, surveillance, and retaliation for union activity.¹¹ Publicly available records on the Office of Labor-Management Standard (OLMS) website reveal that employers have continued to spend significant resources on union-avoidance campaigns after the Board's election Rule went into effect in April 2015.¹² For example, during 2015–2016 alone major companies that are household names spent hundreds of thousands of dollars on union-avoidance consultants to attempt to persuade their employees to reject unionization.¹³

Conclusion

The Board's election Rule was a result of a 3-1/2 year process, including consideration of tens of thousands of comments, and four days of hearings with live questioning by the Board members. The Rule simplified representation-case procedures, increased transparency in union elections and uniformity across NLRB regions, eliminated unnecessary litigation, and modernized rules for document submission and communication to utilize modern technology. The Rule should not be overturned.

Endnotes

^{1.} [79 FR 74308](#) (December 15, 2014).

^{2.} 29 U.S.C. § 157.

^{3.} 29 USC § 159.

^{4.} [82 FR 58783](#) (December 17, 2017).

^{5.} See *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2015), affg. No. 1-15-CV-026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015); *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).

^{6.} [79 FR 74308](#) (December 15, 2014).

[7. 79 FR 74308](#) (December 15, 2014).

[8. National Labor Relations Board, “Annual Review of Revised R-Case Rules,” April 2016; National Labor Relations Board, “Percentage of Elections Conducted Pursuant to Election Agreements in FY17.”](#)

[9. National Labor Relations Board, “Median Days from Petition to Election: FY08 to FY17.”](#)

[10. U.S. Department of Labor, Labor-Management Standards Office, Interpretation of the “Advice” Exemption in Section 203\(c\) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 15933 & n.10 \(citing studies\).](#)

[11. Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Economic Policy Institute and American Rights at Work Education Fund, May 20, 2009.](#)

[12. In 1959, Congress passed the Labor Management Reporting and Disclosure Act \(LMRDA\), which charged the Office of Labor-Management Standards \(OLMS\) with enforcing reporting and disclosure requirements for unions, employers, and union-avoidance consultants, who must all file reports under the LMRDA. Employers and hired union-avoidance consultants, for example, are required to file “Persuader Reports,” in which they must disclose their agreements. These reports are publicly available on the OLMS website.](#)

[13. EPI analysis of Employer Reporting \(Form LM-10\) reports, publicly available at the U.S. Department of Labor, Office of Labor-Management Standards, <https://www.dol.gov/olms/regs/compliance/ecr.htm#prelm10>.](#)