

April 7, 2014

Via Electronic Submission: <http://www.regulations.gov>

Mr. Gary Shinnars
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: Representation-Case Procedures; RIN 3142-AA08 (Docket No. NLRB—2011-0002)

Dear Mr. Shinnars:

The National School Transportation Association submits the following comments to the National Labor Relations Board (NLRB or the Board) in response to the above-referenced notice of proposed rulemaking (NPRM) published in the *Federal Register* on February 6, 2014 at 79 Federal Register 7318.

About the National School Transportation Association

The National School Transportation Association (NSTA) is the membership organization for school bus companies engaged primarily in transporting students to and from school and school-related activities under contract to public school districts. Our members offer a range of services to our school district partners, from full turn-key service to management operations and specialized transportation. NSTA members range from small family businesses serving one district to large corporations operating thousands of buses across many states, all committed to the safe, efficient, and economical transportation of America's children.

Comments in Response to the NLRB's Proposed Rule

On June 22, 2011, the NLRB issued a proposed rule that would have made substantial, unnecessary and harmful changes to its long-standing union representation election procedures. Specifically, the Board proposed:

- Permitting electronic filing of election petitions, and potentially electronic showing of interest (in other words, dispensing with employee signatures on union cards);

- Requiring pre-election hearings be held in as few as seven days of the union filing the petition for election;
- Requiring employers draft a “Statement of Position” to be presented at that hearing, which sets forth their position on all relevant legal issues while waiving forever any issue that is not addressed in the Statement;
- Limiting the issues that may be litigated prior to an election, such as determining which employees are eligible to vote, including whether certain employees qualify as supervisors;
- Requiring employers provide union organizers with names, home addresses, phone numbers, email addresses, work locations, shifts and job classifications of all employees eligible to vote; and
- Eliminating pre-election Board review of a Regional Director’s decision.

After receiving over 65,000 comments on the proposal, on December 22, 2011 the Board issued its final regulation. The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace immediately challenged the final rule in court. On May 15, 2012, the federal district court in DC struck down the rule because Member Hayes did not participate in the issuance of the final rule and therefore the Board lacked the quorum necessary to issue the final rule.

The NLRB eventually withdrew the 2011 rule, but on February 6, 2014 issued a new NPRM identical to its June 2011 proposal. The Board’s proposal has not improved with age and is just as flawed in 2014 as it was in 2011. The NLRB fails to provide reasonable justification for the changes, the net effect of which would be to substantially reduce the time between a union’s filing of a petition for election with the Board and the election itself.

As described in detail below, our primary concern is the proposed rule would not allow sufficient time prior to an election for a full, fair and informed debate of the pros and cons of union representation. We also have serious concerns with the proposal requirement that employers disclose private employee information, the lack of due process associated with the new Statement of Position and issue waiver provisions, and the restrictions placed on pre-election hearing procedures. In summary, we believe the proposed changes are wholly unnecessary, unfairly burdensome on employers, and certain to interfere with the ability of employees to understand their rights and the many complex issues involved in deciding whether or not to vote for union representation. For these reasons, we urge the Board to withdraw the NPRM.

I. The Proposed Changes Are Unnecessary, Would Violate Due Process and Free Speech Rights, and Deprive Employees of Crucial Information About Elections

While the proposed changes do not set a specific time frame for the holding of elections, the overall intent of the proposal is crystal clear: to conduct elections as quickly as possible. Yet, the NLRB does not offer any evidence that current process fails employees generally or that the current median time for elections, which is 38 days, is inconsistent with ensuring employee free choice or other provisions of the National Labor Relations Act (NLRA or Act). At the same time, the Board ignores the harm its proposal could cause to employees and employers.

The current election process works for both employers and employees in the vast majority of cases. According to the NPRM, the Board has reduced the time between the filing of a petition and the holding of an election from a median of 50 days in 1975, to a median of 37-39 days over the last 10 years.¹ Also, for the last decade, the Board held over 90 percent of all elections within 56 days of the filing of the petition.² Recent numbers are even better—in fiscal year 2013, the Board held 94.3 percent of all elections within 56 days.³ This record is not only admirable, but, as the dissent to the NPRM points out, it is comfortably in line with Congressionally-mandated time limits applicable to other significant employment-related decision-making⁴ and consistent with the 30-day minimum election time frame Senator John F. Kennedy said was necessary to “safeguard against rushing employees into an election where they are unfamiliar with the issues.”⁵ Furthermore, under the current procedure, approximately 90 percent of all elections are conducted pursuant to an agreement or stipulation.⁶ This is another admirable figure and further evidence the current procedures are effective.

Despite the Board’s proven success, it is nonetheless determined to tamper with current procedures in an effort to force elections in the shortest possible time frame. This will harm both employers and employees. Most concerning is that the agency, in its quest for speed, threatens to dampen, if not kill, any exchange of information between employers and employees about the merits of union representation generally or in the particular situation at hand. This runs contrary to the First Amendment, Section 8 (c) of the NLRA⁷ and decades of court decisions that have uniformly held communication and debate over such issues are integral parts of both the Act and ensuring employee choice.⁸ Unfortunately, it appears the silencing of debate is not a byproduct

¹ NPRM at 7320.

² Id.

³ From <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections>.

⁴ See NPRM at 7344, discussing requirements of at least 30 days to opt out of a federal class action lawsuit, 45 days to decide whether to sign a release of potential age discrimination claims, and at least 60 days for notice of a plant closure.

⁵ NPRM at 7341; Senator Kennedy made these statements when he was chair of the Conference Committee on the 1959 amendments to the National Labor Relations Act.

⁶ NPRM at 7324.

⁷ 29 U.S.C. Section 158 (c) states, "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

⁸ In *Chamber of Commerce of United States v. Brown*, 554 U.S. 60, 67-8 (2008), the Court discusses Section 8 (c), its roots in the First Amendment and Congress’ desire to allow free debate: “From one vantage, § 8(c) "merely

of the proposed rule, but rather its primary purpose, and part of an overall scheme by the NLRB to reverse the decline in union density without regard to the cost to employees, employers and the U.S. economy.

In its rush to the ballot booth, the Board also intends to sacrifice employer due process and basic elements to a fair election, such as ensuring parties know who is and who is not eligible to vote prior to the election; allowing parties the right to seek Board review of Regional Directors' decisions prior to the election; and providing parties a fair opportunity to find legal counsel before having to file a binding Statement of Position.

Under the proposed rule, employers would have only seven days after union files a petition for an election to find counsel, analyze and understand the petition and proposed bargaining unit, and investigate any factual and legal issues for inclusion in its Statement of Position. If the employer fails to identify and raise an issue in the Statement, it risks waiving the ability to argue that issue forever. This process would be problematic for large and small employers alike. Small employers are unlikely to have the kind of expertise needed to respond properly, ensure employees' rights are protected, and engage in the kind of dialogue that courts have uniformly held to be essential to the process of deciding how to vote in a union election. Large employers may be more likely to have expertise with the NLRA, but they will have difficulty in responding to a petition within the time frames allowed because of the innate complexity of their workforce.

With no pre-election recourse to the Board, no ability to deal with potential inclusion of supervisors in a proposed unit before an election, the waiver of any issues not properly raised in a hastily prepared Statement of Position, and not even the opportunity to submit briefs absent permission from the hearing officer, the proposed rule would trample on the due process rights of all concerned parties.

These requirements will increase rather than decrease litigation. By requiring hearings to begin seven days after the service of a hearing notice, the NLRB leaves no time for parties to reach a voluntary agreement.⁹ Moreover, in fear of waiving any issue, employers are likely to present *all*

implements the First Amendment," *NLRB v. Gissel Packing Co.*, 395 U. S. 575, 617 (1969), in that it responded to particular constitutional rulings of the NLRB. See S. Rep. No. 80-105, pt. 2, pp. 23-24 (1947). But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management." *Linn v. Plant Guard Workers*, 383 U. S. 53, 62 (1966). It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB." *Letter Carriers v. Austin*, 418 U. S. 264, 272-273 (1974).

⁹ NPRM at 7354: "The regional director shall set the hearing for a date 7 days from the date of service of the notice absent special circumstances." Compare to the current rule that "absent unusual circumstances or clear waiver by the parties, [they] shall receive notice of a hearing not less than 5 days prior to the hearing, excluding intervening

possible arguments into the Statement of Position, which will unfortunately add to any tension between the parties, and to the scope of potential litigation. The proposed changes would therefore inevitably result in more hearings, more litigation and more elections by direction, rather than agreement. The Board thus proposes to sacrifice a 90 percent agreement rate for the sake of purported improvements that would affect a handful of cases.

To the extent any changes to existing procedure are advisable, the dissent provided by Members Johnson and Miscimarra offers a reasonable alternative. It proposes, in essence, that the NLRB closely examine the small percentage of elections where unreasonable delay has occurred and attempt to identify the possible causes and other potential problems in union elections. Rather than attempting to hold all elections as quickly as possible, the dissent advocates a thoughtful analysis of time periods but without “rushing employees into an election where they are unfamiliar with the issues.”¹⁰ The dissent also advises examining the specific reasons for delay, including the Board’s own internal procedures; pursuing unlawful conduct in elections more aggressively; and dealing more effectively with employee privacy issues. We suggest this thoughtful and inquisitive approach might lead the Board to conclude that no procedural changes are necessary. In any event, the dissent’s proposal would be far better than re-hashing the vague and unwise proposed changes from 2011.

In short, the NPRM is a not only a solution in search of a problem, but a problem disguised as a solution. In the vast majority of cases, the current election procedures work for all involved parties and the Board. They allow enough time for communication, education, and informed decision-making by employees, and provide employers with due process. There is simply no reason for the NLRB’s ill-considered changes, and we respectfully suggest the Board withdraw its proposal.

II. The Proposed Changes Calling for Electronic Filing and Service—Including Shortening the Time for Producing and Expanding the Content Required in the *Excelsior* List—Would Harm Employee Interests in a Fair Election and Violate their Privacy.

The proposed rule would allow unions to file petitions electronically with the NLRB as well as serve the employer electronically.¹¹ The proposal would also require the employer to file and serve on other parties an electronic “*Excelsior*” list¹² within only two days—rather than the current seven days—of the Board ordering an election. In addition to the currently-required

weekends and holidays.” NPRM at 7328. Thus, the Board plans to go from an effective *minimum* of 7 days, to *exactly* 7 days, absent special circumstances.

¹⁰ NPRM at 7347, *quoting* statement of Senator John F. Kennedy, 105 Cong. Rec. 5361 (1959).

¹¹ NPRM at 7325-7326; 7363. Service is also allowed in person, or by regular or certified mail, all with no explanation as to who exactly is an acceptable recipient on behalf of an employer.

¹² In *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), the Board established a general rule that employers must provide a list of names and addresses of employees eligible to vote.

name and home address, the new lists must contain employees' telephone numbers, email addresses, work locations, shifts and classifications.¹³

The new proposed filing, service and list changes pose several problems for employers and employees. While the proposal says a union could file and serve a petition on the employer electronically, there is little guidance as to what would constitute proper service in this context. Could the union email anyone in management? The CEO? The head of human resources? What if an email with a petition gets treated as an unexpected solicitation and blocked by the employer's "spam" filter? Given that service would trigger legally significant deadlines and obligations, the NLRB should have provided fair and detailed guidance on what constitutes proper service, so stakeholders could provide meaningful feedback. Unfortunately, the Board failed to do so.

The NPRM is equally vague with respect to the new list requirements, which fail to specify whether employers must provide the union with employees' personal or work phone numbers and email addresses. The Board's failure to do address this in its proposal is stunning, given the tens of thousands of comments it received in 2011 seeking clarification on this very issue. In either case, requiring such information would be problematic.

Requiring employers to release employees' personal phone numbers and email addresses to the union is a violation of employees' privacy. The Board points to technological advances in the almost 50 years since *Excelsior* was decided in order to justify requiring information beyond name and address.¹⁴ While communication technology certainly has changed, it is worth noting telephones were common in 1966, and Board did not require the disclosure of phone numbers as part of the rule established in the *Excelsior* case. There are several reasons this made sense then and now. Many people have unlisted phone numbers and register with "do-not-call" lists. Sometimes they do so to avoid unsolicited calls and sometimes for very serious reasons related to past harassment or threats of violence. In either case, it is irresponsible for the government to require employers to release this information to a third party.

With respect to email, many individuals use "spam" filters, because unsolicited messages are a huge annoyance and a source of computer viruses. Further, people often use personal email addresses in connection with online banking and shopping. Requiring disclosure of personal email addresses, along with home addresses, phone numbers, and information about work locations and shifts is more than just a personal intrusion; it is a virtual invitation for identity theft.

¹³ NPRM at 7326.

¹⁴ NPRM at 7323.

If, on the other hand, the Board intends to require release of work email addresses and phone numbers, an entirely different set of problems arise. Among the most basic principles of Board law for many decades is the belief that employers have the right to maintain lawful “no-solicitation” policies, prohibiting non-business activities like union solicitations and no-distribution policies prohibiting non-business distribution of written material in work areas during work time. Similarly, the reason employee home addresses are provided is so employers are not required to allow union organizers to enter the workplace or use company equipment. Providing work phone numbers and email addresses would essentially destroy an employer’s ability to ensure solicitation does not take place during work time. Allowing unions to organize using work emails is the virtual equivalent of allowing free access to the entire workplace at will.

Further, most employers have policies governing the use of company-provided email systems, and the company usually has complete control over the storage and retrieval of its electronic information as well. Having email correspondence between union organizers and employees on company systems would inevitably lead to litigation over alleged unlawful surveillance, likely opening up confidential and proprietary business communications to examination and potential disclosure.

Supplying work email addresses and work telephone numbers to union representatives would also amount to a breach of the Board’s obligation of neutrality in the election process and would provide unions an additional weapon to use against employers and employees who oppose unionization. Phone numbers and email addresses are powerful communication tools that would not only allow unions to communicate at will during work time but also allow unions to harass unresponsive employees and to adversely affect employers’ business operations and relationships. Unions often resort to “corporate campaign” activities, which have the overt purpose of causing injury to the employer’s business and other relationships. By supplying unions with employees’ work email addresses and phone numbers, the Board would provide them with additional means to interfere with the employer’s business operations, including potential harassment of employees during work hours via phone and email. Moreover, many companies have extensive and complex computer systems, and engage in extraordinary efforts and go to great expense to limit external risks to these systems. Requiring disclosure of business email addresses for all unit employees during a representation campaign would significantly increase the vulnerability of these systems to attacks by unions and other third parties. Such attacks could involve overwhelming individuals’ emails or entire systems with spamming, or attacking systems by sending malicious software and viruses via email. This presents problems for all employers, but especially small businesses. Such incidents would also contribute to the problem of increased election-related litigation, outlined above.

Requiring employers to serve the *Excelsior* list electronically is also problematic. The NPRM shifts the burden of serving the *Excelsior* list from regional offices to employers, and the Board

justified the move by stating “this two-step process has caused needless administrative burden, avoidable delay in receipt of the list, and unnecessary litigation when the regional office, for a variety of reasons, has not promptly made the list available to all parties.”¹⁵ First, this “needless administrative burden” is the NLRB’s responsibility—not an employer’s. Second, the cases the Board cites to illustrate the “problem” range from 1976 to 2000. Relying on cases fourteen to thirty-eight years old hardly supports the notion this is an issue of any contemporary importance. More basically though, the Board’s logic on this point is backwards.

The staff in the NLRB’s regional offices administers the Act as their profession. Employers do not. Often, company officials have never before seen a representation petition when they first learn one has been filed. It simply defies reason to think whatever issues regional offices have had in the past will be magically solved by shifting the responsibility to employers. The proposed change would inevitably lead to more litigation, not less—with the difference being employers would be blamed rather than the Board *and* with the prospect of setting aside an election for the slightest flaw in producing the list.¹⁶ Any problems with service by regional offices should be addressed internally rather than imposing a new and unreasonable administrative responsibility on employers.

The NLRB has also specifically asked for comments on the issue of allowing a showing of interest by electronic signatures. Again, it is unclear how electronic signatures would work. If the Board is contemplating use of an employer’s computer and email systems, all of the problems described with respect to email would also apply here as well. Finally, the potential for fraud and abuse is obvious. At a time when online mischief ranges from unsolicited ads for pills to the theft of massive amounts of credit card information from even the most sophisticated systems, allowing some sort of electronic means of signing authorization cards would be completely irresponsible.

III. The Board Fails to Recognize the Negative Effects its Ruling in *Specialty Healthcare* is Already Having on the Election Process

In the NPRM, the Board contends *Specialty Healthcare* will not impact the processing of representation cases.¹⁷ Unions have wasted no time in taking advantage of *Specialty Healthcare* in attempting to organize small groups of employees that under previous law would have been added together with other employees to form an appropriate unit. This has led to litigation involving retailers Bergdorf Goodman and Macy’s, both of which are dealing with attempts to organize fragmented groups of retail employees (women’s shoe department workers at Bergdorf and fragrance department workers at Macy’s) rather than wall-to-wall units of all retail workers.

¹⁵ NPRM at 7327.

¹⁶ NPRM at 7354: “Failure to file or serve the list within the specified time and in proper format shall be grounds for setting aside the election whenever proper objections are filed.”

¹⁷ NPRM at 7335.

In addition to the likelihood petition volume will increase as unions organize fractions of a workplace at a time, *Specialty Healthcare*'s imposition of an "overwhelming community of interest" standard for expanding the scope of a proposed unit adds additional complexity to the issues involved in such cases. In the face of more volume and complexity, the Board proposes to significantly speed up the process while restricting procedural rights and requiring all issues be raised in a compressed time frame. Simply put, *Specialty Healthcare* makes representation cases more complicated, and the proposed rules would hamstring employers' ability to deal with the issues.

IV. The Proposed Rule Would Subject Voters to Uncertainty as to the Makeup of a Proposed Unit and Potential Intimidation by the Inclusion of Supervisors

As the dissent correctly points out, the NPRM as a whole can be characterized as "vote now, understand later," and "election now, hearing later."¹⁸ The NLRB spends a great deal of time arguing that any issue about eligibility to vote can be straightened out after an election.¹⁹ There are numerous reasons such an approach is inadvisable.

Among the first questions any employee would naturally ask upon learning a union election is to take place are, "Am I part of the unit?" "Who else is in the unit?" and "Who's not in the unit?" The answers to those questions might very well influence how an employee votes or whether the employee votes at all. Debate among employees about whether to seek union representation is often emotional, as is the moment when employees learn the results of an election. Going through the process with uncertainty about the scope of a proposed unit forces employees to make a crucial decision without some of the most important facts is inherently unfair.

The possibility that supervisors might be allowed to vote along with those they supervise is even more troubling. Regardless of whether any given employee is for or against a union, the presence of a supervisor at the next voting booth is intimidating. And, contrary to the Board's position that its proposal will streamline the process, going through the election only to have a union victory later overturned due to supervisory taint with a re-run election to follow, clearly is not a smooth process. The Board also appears not to have given a thought to the turmoil such a course of events creates in the workplace.

The better approach for all concerned is proposed by the dissent: Provide a mechanism for appropriate unit determination *before* holding elections.

¹⁸ NPRM at 7338.

¹⁹ NPRM at 7335-7337.

V. 2011 All Over Again

While the Board contends that it has not reached any final decision with respect to the proposed changes and plans to re-consider all comments and testimony submitted in response to the NPRM proposed in 2011 as well as any new comments and testimony,²⁰ issuing a proposal identical to the original one from 2011 strongly suggests an intent to implement the new rule as proposed.

As the Board has pointed out, more than 65,000 written comments were submitted in 2011, along with 438 transcript pages of oral testimony before the Board.²¹ In December 2011, the Board implemented a limited number of the originally-proposed changes in a final rule that was soon struck down on procedural grounds. In its December 21, 2011 announcement of the final rule, the Board noted that the final rule represented:

“amendments to the election case procedures in the new rule . . . drawn from a more comprehensive proposal put forward by the Board in June. More than 65,000 comments were submitted following publication of the broader proposal in the Federal Register. In a discussion introducing the new rule, the Board majority explained that it was holding for further deliberation parts of that proposal that had generated the most debate while moving ahead with parts considered relatively “less controversial.”²²

One can only conclude that by going back to the original 2011 proposed changes, the NLRB has bided its time with the intention of implementing the more “controversial” provisions after having allowed the controversy to die down. What is more unfortunate this time around is the Board has simply let the input of tens of thousands of concerned organizations and individuals gather dust, re-issuing the same set of proposed changes with no consideration of the points made two and a half years ago. One of the most frustrating factors for these organizations is that the proposal continues to leave unanswered direct questions posed in the 2011 comments—such as whether it intends to require as part of the new *Excelsior* list employees’ personal or work phone numbers and email addresses. This is just one example of how impossible it is to make well-reasoned comments without at least some repetition, despite the Board’s request that new comments not repeat what was said in 2011.

Simply put: The current proposed changes are just as unclear and ill-advised now as they were in 2011. The Board has put little to no effort or analysis into re-issuing the NPRM.

²⁰ NPRM at 7335.

²¹ NPRM at 7319.

²² NLRB Announcement dated December 21, 2011 at NLRB.gov.

VI. Underestimated costs and overestimated benefits

The NLRB concludes the proposed rule will not have a significant economic impact on a substantial number of small entities.²³ The stated reasoning is that although the Small Business Administration estimates there are approximately six million small entities, nearly all of which are subject to the Act, fewer than 3,300 election petitions have been filed per year over the last five years with about 1,800 elections conducted per year, and this represents a very small percentage of all small entities.

While the Board's analysis might sound reasonable based on the surface, it discounts a number of cost factors. For those employers receiving petitions, the new rules would be virtually impossible to navigate without hiring specialized legal counsel on an emergency basis. Between preparation of a Statement of Position, dealing with required notice posting and managing the tasks necessary to prepare for an election, small entities will be running up significant legal fees at an alarming rate. Despite the NLRB's repeated contention the proposed rule would reduce litigation, its lack of clarity, compressed time frame, and shifting of administrative burdens to employers is much more likely to increase litigation and, therefore, expense.

The Board also ignores the question of what employers are likely to do to understand and prepare for dealing with an election under the new rules. The answer, whether an employer hires attorneys or consultants, sends managers to seminars in preparation, or simply devotes administrative time to attempting to understand the rules, is that employers will spend money.

Conclusion

By recycling its 2011 proposed rule, the NLRB has again demonstrated there is no real need for any election changes. Furthermore, the Board has failed to show the NPRM would accomplish anything other than the holding of elections at lightning speed, while reducing employees' chances of making informed decisions about the issues. The proposed changes are vague, likely impossible to comply with, and destructive of due process and free speech rights.

For all these reasons, the National School Transportation Association urges the Board to withdraw the rulemaking. Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,



Ronna Sable Weber, Executive Director

²³ NPRM at 7350.