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April 18, 2018

The Honorable John Ring  
Chairman  
U.S. National Labor Relations Board  
1099 14<sup>th</sup> Street, NW  
Washington, DC 20570

RE: RIN 3142-AA12: Representation Election Rules, Request for Information

Dear Chairman Ring:

We are the Independent Electrical Contractors (“IEC”), a non-profit trade association with 50 chapters nationwide. IEC represents over 3,300 member companies which employ more than 80,000 electrical and systems workers throughout the United States. IEC also educates over 11,000 electricians and systems professionals each year through our world-class apprenticeship program. IEC member companies handle over \$8.5B in gross revenue annually and include many of the premier firms in the industry. Our members are primarily small businesses who don’t have the resources that some larger employers may have available to them. This is critical when considering the harm the 2014 Rules have posed to small businesses like our members.

The mission of IEC is to enhance the success of independent electrical contractors by providing opportunities to develop and retain a professional workforce through educational programs, communicating with government, promoting ethical business practices, and providing leadership for the electrical industry. IEC is committed to providing its member companies with innovative education, products and services that enhance productivity, profitability and competitiveness through IEC chapters and strategic partnerships.

We are writing to provide responses to the National Labor Relations Board’s (NLRB or Board) December 14, 2017 Request for Information (RIN 3142-AA12) regarding its 2014 representation election rules (the “2014 Rules”).

#### IEC’s Position

IEC supports rescinding the 2014 Rules and reverting to the representation election procedures in place before the 2014 Rules. Frankly, the 2014 Rules were promulgated as a “solution looking for a problem.” There was no demonstrable reason or empirical data supporting the changes in 2014 – especially when it comes to dramatically shrinking the time-frame for elections and invading the privacy rights of employees. There are multiple concerns our members have expressed about the 2014 Rules, which we outline below.

Our concerns flow from member experiences as well as from the clear intent and plain language of Section 7 of the National Labor Relations Act (Act), which provides employees "the 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," as well as the right "to refrain from any or all such activities." All too often, government and labor unions emphasize the first part (the right to organize and bargain collectively) and completely ignore the second, but it's clearly stated that there's a statutory right NOT to engage in such activities. It is this balance in the statutory language of the Act itself that is the foundation for our comments.

### Summary of the 2014 Rules

On December 12, 2014, the National Labor Relations Board implemented the long-threatened "quickie" or "ambush" union representation election rules. The effective date for the rules was April 14, 2015. The rules were enacted by a 3-2 vote. Approved by Board Chairman Mark Gaston Pearce and Members Kent Y. Hirozawa and Nancy Schiffer, Board Members Philip A. Miscimarra and Harry I. Johnson, III, dissented. The Rules included detailed explanations regarding the impact on prior procedures and the views of the majority and dissenting members.

The Board then believed the 2014 Rules would enable it to more effectively administer the Act by using modern technology, making its procedures more transparent and uniform across Regions, and eliminating unnecessary litigation and delay. With these amendments, the Board claimed it would be better able to fulfill its duty to protect employees' rights by fairly, efficiently and expeditiously resolving questions of representation.

The most notable changes to the NLRB's election procedures and our concerns are outlined below.

#### 1. The Petition

The 2014 Rules altered several aspects of a union's petition for election and the petition process. The 2014 Rules allow petitions to be filed electronically – a departure from the prior requirement of in-person filing or filing by facsimile. The 2014 Rules require that the petition be served "on all other interested parties" including the employer.

The required contents for a petition are also modified slightly. The 2014 Rules require the petitioner to designate the individual who will serve as the petitioner's representative (e.g., for service of papers) and require the petitioner to state the following in the petition:

- Type of election requested (e.g., manual, mail, or mixed manual/mail);
- Date(s) of election;
- Time(s) of election; and
- Location(s) of election.

Requiring more details will likely result in a considerable advantage for petitioning unions because the union will essentially have a rebuttable presumption that all their requested specifics of the election are proper. These election specifics can be manipulated by the union to provide them with a considerable advantage (i.e., scheduling voter times in a manner that make it more difficult for employer supporters to reach the polls, etc.).

The 2014 Rules also require the petitioner to file its showing of interest (signed authorization cards/petitions) with the election petition which replaces the prior 48-hour requirement. Interestingly, the 2014 Rules opened the door for the future use of electronic signatures as evidence for a showing of interest – electronic signatures have long been on the unions' wish list. The Board has specifically tasked the NLRB General Counsel with determining whether, when, and how electronic signatures can be accepted as evidence of showing of interest.

## 2. Notice Posting

The 2014 Rules require employers to post a "Notice of Petition for Election" following a union's petition. The notice provides employees with notice that the petition has been filed, the name of petitioner, the type of petition, the proposed unit, the basic election procedures, a summary of basic rights of employees, and the NLRB's website address. The posting will be mandatory (unlike prior Form 5492, which is similar to the new required notice posting, but posting Form 5492 is not mandatory). The 2014 Rules require the notice to be posted in conspicuous places. Employers who "customarily communicate" with employees using electronic forms of communication are required to distribute this notice electronically. The notice must be posted within two (2) business days after service of the Notice of Hearing. The failure to timely post can be a valid basis for objections to an election. The employer is required to maintain the posting until the petition is dismissed, withdrawn, or the Notice of Petition is replaced by the Notice of Election.

## 3. Voter List

The 2014 Rules expand the voter information that must be provided by the employer in the *Excelsior* List. The rules make the *Excelsior* list due sooner - 2 business days (not 7) after the Regional Director's approval of an election agreement or issuance of a Decision and Direction of Election. The rules require the employer to furnish the list to the NLRB Regional Director, as well as directly to the union. Previously, the employer was simply required to send the voter list to the Region. The Region would then send the list to the union. The rules require the employer to file a Certificate of Service with the Regional Director when the *Excelsior* list is furnished to the union. The list must be served on the union and filed with the Region in an electronic format (unless the employer certifies it does not have the capacity to do so).

Under the previous rules, the employer was only required to provide the names and addresses of eligible voters. The new rules drastically expand this requirement to include each eligible voter's:

- Full name
- Home address

- Personal (not work) email address (if available)
- Available home and personal cellular telephone numbers (if available)
- Work locations
- Shifts
- Job classifications

If the employer does not maintain personal email and/or home/mobile phone numbers, the employer is not required to ask employees for them. If the employer has personal email and home/mobile phone numbers for some, but not all, employees, the employer must provide the information that it does possess. The Rules do not require work email or work phone number.

The employer is also required to provide all of the same information for individuals voting subject to challenge. The Rules describe the above as a minimum to be produced, leaving open the possibility that future Boards may require more or different forms of contact information (based on peculiar circumstances) by adjudication or rule making (examples could include social media contact information – Facebook, Instagram, Twitter, etc.).

The Board majority reviewed, but rejected, privacy concerns that were articulated by many during the comment period (e.g., harassment). The Board simply declared that if such problems arise, they will provide an appropriate remedy.

#### 4. Hearing

The pre-election Representation Case Hearing has been the accepted method for resolving the numerous issues that often and legitimately arise in the petition and election process (e.g., eligible voters, supervisory issues, multi-facility issues, etc.). Under the 2014 Rules, most disputes over voter eligibility and bargaining unit inclusion/exclusion will not be resolved until after the election. The NLRB's "Representation Case Fact Sheet" states:

Generally, only issues necessary to determine whether an election should be conducted will be litigated in a pre-election hearing. A regional director may defer litigation of eligibility and inclusion issues affecting a small percentage of the appropriate voting unit to the post-election stage if those issues do not have to be resolved in order to determine if an election should be held. In many cases, those issues will not need to be litigated because they have no impact on the results of the election.

Leaving important issues unresolved, such as supervisory status and whether certain employees are part of the voting unit, undermines the ability of employees to make an informed decision and hinders all employers' ability to present an effective campaign.

Under 2014 Rules, a hearing on unit and voter eligibility has been typically set to open eight (8) days after service of the Notice of Hearing unless the case presents unusually complex issues. The rules state that the Regional Director will serve notice of the hearing as "soon as is practicable" but do not provide a specific time requirement. If the Notice of Hearing is served on the same day that the union's petition is filed, the hearing will open on the 8th day following service by the Region. The Regional Director retains the unilateral discretion to postpone the hearing beyond the 8th day without motion if the Regional Director identifies complex issues. Also, the Regional Director may postpone the opening of the hearing for two (2) days based on a moving party's showing of "special circumstances." The Rules do not specifically provide examples of what may constitute special circumstances. The rules state that the Regional Director may only postpone for longer than two (2) days based on "extraordinary circumstances" for which the Regional Director has complete discretion. The rules fail to specifically provide examples of what may constitute extraordinary circumstances.

## 5. Statement of Position

The 2014 Rules impose a significant new requirement on employers. Employers must file a Position Statement with the Regional Director and serve it on all parties by noon on the business day before the hearing is set to open. The Regional Director may require the Position Statement to be filed earlier than the day before if the hearing is set to start more than eight (8) days after service of the Notice of Hearing. According to the Board, the purpose of the Statement of Position is to facilitate an election agreement and narrow the scope of any hearing issues.

If the employer takes the position that the unit proposed by the union is not an appropriate unit, the employer will be required to set forth in the Position Statement:

- The basis for that contention (state the precise objections to the appropriateness of the proposed unit); and
- A list of prospective voters, their job classifications, shifts and work locations.

If the employer does not take a position on the appropriateness of the union's requested unit, the petitioner will be allowed to present evidence on that point (without opposition from the employer). The employer would not be allowed to offer evidence or cross-examine witnesses.

The employer must identify any individuals in classifications in the petitioned-for unit whose eligibility to vote the employer intends to contest. Additionally, the employer must outline all other issues the employer intends to raise at the hearing.

One advantage for unions has been the Board's new requirement that the employer include a list containing the full names, work locations, shifts, and job classifications of all employees in the union's proposed unit and all employees that the employer contends must be included/excluded in any appropriate unit. Failure to provide this information will limit the employer's ability to litigate certain issues and any inaccuracies in the information may be a basis to file objections to an election.

Another important component of the Position Statement is the Board's requirement that the employer take a position on the election details including: (1) the type of election (manual, mail, or mixed); (2) the date(s) the election should be held; (3) the election time(s); and (4) the location(s) where the election should be held. The union has the first opportunity in the petition itself to state its preference on these issues. This requirement for the Position Statement is the employer's opportunity to rebut the union's preferences.

Perhaps most importantly from an employer's perspective is that any issue not identified in the Position Statement will be waived, except the Board's statutory jurisdiction.

### Impact of the 2014 Rules

The 2014 Rules imposed by the Board are technical in nature and may appear on their face to address legitimate goals. However, our members believe the rules amount to a "solution in search of a problem" and represent a concerted effort to give labor unions an advantage in their organizing efforts to reverse their decades of steady declines in membership. The Rules have tilted the playing field dramatically in favor of unions by creating an environment in which many union elections have occurred in just 10 to 21 days after the union requests a vote – the former average was around 42 days. The Rules essentially eliminated most employer rights during the representation case process and made it easier for unions to successfully organize all employers, in all industries. Employers have been blindsided by petitions and denied the time necessary to effectively communicate with employees about unions and unionization.

### Conclusion

As outlined above, the Board's 2014 Rules drastically altered the representation case procedures. Our members have been faced with extremely tight timeframes and have had to navigate through substantially more red tape creating numerous legal trip wires. These Rules have left no room for error when employers are targeted by union organizing. Because the rules of the game have been so drastically changed to advantage unions, IEC respectfully requests the Board rescind the 2014 Rules in their entirety.

Sincerely,

Jason E. Todd  
Vice President, Government Affairs  
Independent Electrical Contractors