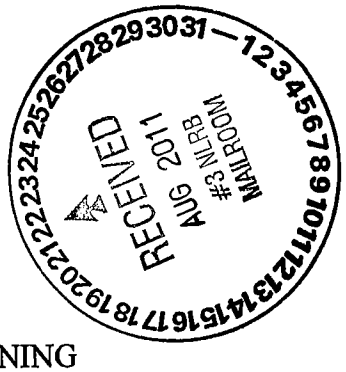

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

PROPOSED AMENDMENTS TO THE NLRB'S RULES GOVERNING EMPLOYEE REPRESENTATION ELECTIONS (RIN 3142-AA08)

COMMENTS OF THE
RETAIL INDUSTRY LEADERS ASSOCIATION

The Retail Industry Leaders Association ("RILA"),[1] on behalf of itself and its member companies, submits the following comments in response to the NLRB's proposed amendments to its rules governing employee representation elections.[2] RILA strongly objects to the NLRB's proposal and agrees with the specific objections raised in Member Hayes's dissent and at the NLRB's hearing on July 18–19, 2011. Our comments draw from the experiences of our member companies to elaborate on four reasons why the NLRB should not adopt its proposed amendments: (1) Requiring employers to develop their legal position in only seven days would be infeasible and unfair; (2) Shortening the time between petition and election would result in employees being critically uninformed; (3) Deferring issues affecting less than 20% of the proposed unit would lead to inaccurate election results and unnecessary confusion; and (4) Providing employee phone numbers and email addresses to unions would result in unwarranted invasions of privacy and interferences with normal business operations. Considered as a whole, the NLRB's proposed amendments would have the effect of silencing employers and helping unions win elections through unfair—and often misleading—"ambush" tactics.

Before turning to our specific objections, we briefly take issue with the NLRB's general premise. As noted in Member Hayes's dissent—and as made

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1 RILA is a trade association whose membership includes top retailers, product manufacturers, and service suppliers, including nine of the top ten U.S. retailers, as ranked by annual revenue. Together, RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

2 *See* 76 Fed. Reg. 36812.

explicit in the Department of Labor's concurrently-proposed "persuader rule"[3]—the NLRB believes that *the employer community* is uniformly responsible for delaying union representation elections. In RILA members' experience, this is categorically untrue. As the Board itself has noted, representation cases are generally processed quickly.[4] And when they are not, it is often the Board's or the union's fault rather than the employer's. One member company provided an example in which 18 of the 27 months in a heated election contest were spent simply waiting for the Board to make a unit determination.[5] Another member offered examples of unions purposefully sending their certification petitions to incorrect Board locations and filing before holidays to obtain additional time for campaigning. In addition to considering the specific objections discussed below, RILA exhorts the NLRB to reexamine the basic assumptions driving its proposal.

I. It Is Not Possible For Retail Employers To Develop An Informed Position On A Union Organizing Campaign In Only Seven Days.

The most fundamental problem with the NLRB's proposed rule is the provision requiring Regional Directors to schedule a pre-election hearing within seven days of a union's certification petition: The employer would have to state most of its objections during that hearing or else waive them in all subsequent proceedings. For a number of reasons, it is not possible for retail employers to develop an informed opinion about an organizing campaign in only seven days.

Unions typically organize retail employers on a covert basis over the course of several months. In RILA members' experience, organizers contact retail employees out of the employer's sight, such as by visiting them at home or approaching them in the common areas of malls where members' stores may be located. "Salting," in which union employees apply for work in retail stores as a means of talking with retail employees on the job, is also very common. To maintain their secrecy, unions tell employees not to notify the employer about their organizing efforts; there have been reports of unions coupling such instructions with an implied or explicit threat that the employer would meet any notification with adverse employment actions. It is because of these practices that retail

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3 *See* 76 Fed. Reg. 36190 (describing the "deleterious effect" of "consultant-led anti-union campaigns and their resulting disruptions").

4 *See* General Counsel Memorandum 11–03 at "Introduction" (Jan. 10, 2011), *available at* http://www.nlrb.gov/publications/general-counsel-memos (describing as "outstanding" the NLRB's accomplishment in obtaining the existing average timeframes for union elections).

5 This employer ultimately prevailed in its objections to the proposed unit.

employers usually do not learn about union organizing drives until after a certification petition is filed.

Having learned about an organizing campaign, employers need considerable time to gather the facts and information that are essential to developing an informed opinion. It takes at least two to three weeks to gather general information about the union, such as its LM-2 financial report, its bylaws, its strike history, its past- and current- contracts with other employers, and its record of unfair labor practices. Moreover, just as unions spend months planning their organizing campaigns, it takes time for employers to identify the specific allegations and promises driving those campaigns. Gathering this information is particularly time consuming, in RILA members' experience, because unions do not share any of it on a voluntary basis; instead, employers must spend time searching union and government websites, and conferring with employees, as well as other employers who have experience with the union. It then takes additional time for the employer to fact-check the union's claims, decide whether to oppose or support unionization, and articulate the reasons for its opposition or support.

The current Board procedures allow adequate (but by no means ample) time for retailers to gather information and develop a position. But as a simple matter of logistics, it is not possible for retail employers to accomplish all of the above steps *and* to develop their legal arguments in only seven days. These difficulties are amplified by the seasonal nature of retail sales. Under the current system, unions have been known to file certification petitions during the holiday season to catch employers off guard during a time when their stores are especially busy. A holiday-season petition coupled with a seven-day turnaround would amount to a complete and utter ambush.

II. Shortening The Amount of Time Between Petition And Election Would Result In Employees Being Critically Uninformed.

Another problematic aspect of the NLRB's proposed rule is that employees would lack adequate time to develop an informed opinion about the question of workplace representation. It has been estimated that the amended rule could result in elections being held in as little as ten days after a union files its certification petition.[6] On such a tight schedule, retail employees will not have time to ask important questions or fully explore their options. This is especially true for the many retail employees who work multiple jobs or balance work and school. And

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6 *See* Transcript of NLRB Public Meeting on Proposed Election Rule Changes, at 54, 254, 391, 423.

many teenage and other first-time employees will be experiencing workplace democracy for the first time.

Further, the nature of the retail industry makes it difficult for employers to quickly communicate information to employees, including but not limited to their position on unionization. The need to maintain a fully-staffed sales floor and checkout area, and to provide other services to customers on an ongoing basis, makes it infeasible for numbers of employees to gather in a break area for meetings. A substantial number of retail employees are part-time, moreover, and many of these employees are not available for meetings outside of their scheduled working hours because (1) they have other obligations like school or a second job, and (2) they rely upon public transportation or car-sharing and cannot travel at their convenience.[7] Also, a sizable number of retail employees are recent immigrants, who do not speak English and have little or no understanding of U.S. labor laws and union practices.[8] Because of these factors, employers need several meetings with different shifts of supervisors to train them on communicating the employer's position and avoiding unfair labor practices. In turn, those supervisors need several more meetings to communicate with hourly employees. The whole process easily takes 30-42 days.

Given the above difficulties, the Board's amendments would largely silence employers and require employees to vote having only heard information that the *union* was willing to share. To the extent an employer is able to communicate with employees at all under the new procedures, it would only be able to take a wholly-defensive posture, rebutting specific claims made by the union and not having time to articulate a coherent statement in favor of its position. The inability of employers to communicate their position would deprive employees of critical information. In the interest of currying employees' favor, unions sometimes make false claims or hide unflattering information about the union that could sway employee opinions. The employer's informed participation is therefore necessary to foster transparency. RILA member companies provide the following examples:

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7 For these same reasons, many employees could not accommodate a last-minute change in their scheduled working hours, *e.g.* a change meant to help the employer communicate its position during the amended rule's shortened time period.

8 One member indicated that, given the large number of its employees who are recent immigrants with little or no English skills, basic training on simple tasks like cleaning and operating a cash register takes an extended period of time. These employees would be *severely* prejudiced by an expedited election schedule involving complex issues presented to them in a language they cannot easily understand.

1. One Northeast retailer first learned about a union's organization campaign when it received a petition for state-wide representation. Over the two to three weeks preceding the election, the company researched the union on LexisNexis and other news databases. The company learned that a Local official had been linked to an organized crime syndicate and that a judge had issued a significant monetary judgment against him for failing to provide union members with promised benefit books. Based upon this information, the employees flatly rejected the union. But they would not have had the benefit of the company's thorough research under the NLRB's amended procedures.

2. At the same retail store, a different union promised during its organization campaign to provide members with medical insurance benefits that exceeded those offered by the company. The company could not immediately address the union's claims because the union did not provide the details of its plan to the company. Over the course of approximately one month, however, the company learned that the union's medical plan required members to pay premiums for several months before receiving *any* medical coverage. The employees voted against the union upon learning this information. But once again, they would not have received this information under the NLRB's amended procedures.

3. One Midwest grocer agreed to recognize a union on the basis of a showing that more than 50% of employees had signed authorization cards. Following certification, however, several employees revealed that the union told them they *needed* to sign authorization cards, that not signing would result in higher initiation fees after the union was certified, and/or that signing a card would result in an up-or-down vote.[9] While this example speaks more directly to the dangers of card-check recognition, it emphasizes why employers need sufficient time to develop their own positions and (if necessary) counter the union's claims.

The fundamental unfairness of requiring employees to make a decision about workplace representation in as little as ten days is highlighted by comparison to other timeframes that are familiar to retail employees. RILA member companies typically offer their employees approximately 60 days to make benefits elections, for example. The typical general-merchandise return policy among RILA member companies allows several months to make a return. RILA has no reason to believe that these time periods are unique to the retail industry. To the contrary, RILA believes these timeframes are indicative of broader workplace norms. If employees have come to expect 60 days to choose a health plan that they

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9 *See* Kevin Leininger, "In support of secrecy," *The News Sentinel*, Nov. 29, 2008, *available at* www.news-sentinel.com.

will subsequently have many chances to alter, and if customers have come to expect several months to decide whether or not to return merchandise (however inexpensive), then employees should certainly have more than ten days to decide whether a union is properly qualified *to speak for them in all matters affecting their terms and conditions of employment.*[10] Employees need time to consult their families, gather facts, and make informed decisions. In other contexts where their basic rights are at stake, employees typically have much greater time than the NLRB's amendments would provide. The closest analog to a union election that most employees will have experienced is a *political* election involving months of time to collect information and reach a decision. The NLRB's rushed procedure effectively assumes that employees would prefer unionization. In doing so, it ignores the lessons from the above examples and denies employees a voice.

III. Deferring The Resolution Of Issues Affecting Less Than 20% Of The Proposed Unit Would Create Inaccurate Election Results And Unnecessary Confusion.

RILA is also deeply troubled by the NLRB's proposed amendment that would require Regional Directors to defer resolution of all questions affecting less than 20% of a proposed unit until after the representation election. The pre-election resolution of these issues does not have any shown propensity to delay representation elections under the current system. Yet, deferring these issues would inevitably create inaccurate election results and unnecessary confusion. And these problems are especially salient in the retail industry, where *most* objections to union election petitions concern less than 20% of the proposed unit.

In the experience of RILA members, the most-disputed aspect of pre-election proceedings is the practice by unions of including front-line managers in the proposed unit, even though these employees are properly excluded from the Act's coverage as "supervisors." Since retail employers typically have multiple

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10 The NLRB's election proceedings are already incredibly streamlined by comparison to other judicial norms. In 2010, according to the NLRB's Acting General Counsel, the median time from petition to election was 38 days. *See* www.nlrb.gov. By contrast, the median federal court case takes seven and a half months, not counting appeals, *see* 2010 Annual Report of the Director, Administrative Office of the United States Courts, *available at* www.uscourts.gov, and the defendant has 21 days (compared with the NLRB's proposed seven days) to file its Answer, *see* Fed. R. Civ. Pro. 12(a). The 21-day period for filing an Answer under the Federal Rules is automatically extended to 60 days if service is waived, *see id.*, and it is also frequently extended by agreement or court order. Moreover, unlike the Board's envisioned procedure, the Federal Rules provide many opportunities for parties to revise or amend their positions throughout the course of litigation.

storefronts—often hundreds or thousands of them—and since individual stores are the most common target of retail unionization efforts, retail employers depend upon front-line managers to communicate their messages to employees. The ability of retail employers to promptly challenge the inclusion of managers in a proposed unit is therefore of heightened importance: If a manager is even arguably within the unit, the employer cannot rely upon him or her to interface with employees and provide information. Otherwise, the employer would run the risk of committing unfair labor practices insofar as such reliance could be construed as unlawful interference.

The proposed rule would uproot retail employers' ability to rely upon front-line managers, who typically comprise between 10% and 20% of the personnel at individual stores. Unions, recognizing the opportunity to seize an advantage, could purposefully include such managers in their proposed units. The employer would consequently have to gather the necessary facts and develop its position through persons typically located outside the targeted store and unfamiliar with its unique issues. This would render any response less informed and effective: The employer's viewpoint could not properly take into account the perspective of those managers closest to the terms and conditions immediately at issue. And individual employees would learn their employer's point of view from unfamiliar faces rather than from the managers who work with them on a daily basis and are best positioned to understand and respond to their specific concerns. The problem of responding from afar would exacerbate the already-discussed difficulties of developing a coherent position and rebutting false claims within a seven- or ten-day timeframe.

Another RILA member has revealed that a contingent of confidential administrative employees makes up less than 20% of its workforce. These employees could present yet another opportunity for unions to hinder day-to-day operations through strategic unit proposals. Faced with uncertainty about whether the individuals who handle their non-public financial information will wind up across the table from them in bargaining, employers would need new ways to accomplish everyday accounting tasks. Many could be pressured into concessions, including but not limited to card-check recognition, even if they would otherwise wish to oppose unionization or there are good reasons to doubt the union's majority showing. Even assuming the truth of the Board's flawed assumptions about employers' negative influence on election procedures, this fundamental rearrangement of economic leverage goes well behind what is necessary to reduce the perceived inefficiency of the current rules.

The practice by many RILA members of hiring seasonal workers during the winter holiday season would create additional unit issues. Typically, these workers make up less than 20% of a retailer's total work force. Thus, by including them in a proposed bargaining unit, a union could create substantial uncertainty that would not be resolved until a certification decision had been made and the employees-at-issue had long since ceased employment. Unions could also "salt" a retail employer with seasonal employees to create a skewed picture of employees' preferences and prompt a certification election.

The unfairness of deferring issues affecting less than 20% of the proposed unit is heightened by the NLRB's proposed amendments that would obligate employers to counter a union's proposal with the "most similar" acceptable unit. Since the union is "master" of the initial petition, it can describe the unit however it wants, no matter how nonsensical or infeasible the description is in practice. One member provided an example of a union whose proposed unit was based upon a fundamentally inaccurate understanding of the company's basic job structure; it took several days of hearings for the union to understand why its unit crossed existing classifications and would have been impossible to administer. Forcing employers to work from the union's proposed unit—and to do so while deferring objections affecting less than 20% of the unit—would prevent the parties and the hearing officer from having a constructive dialogue informed by real-world conditions at the employer's workplace. It is a recipe for further problems down the road.

IV. Requiring Employers To Provide Employee Phone Numbers and Email Addresses Raises Privacy Concerns And Could Interrupt Normal Business Operations.

RILA also objects to the provisions in the NLRB's proposed rule that would require employers to provide a petitioning union with employees' phone numbers and email addresses. While it is not clear whether the NLRB anticipates that employers would provide *personal* or *work* phone numbers and email addresses, neither option is desirable. Requiring employers to provide phone numbers and email addresses would allow unions to intrude on employees' privacy and could interfere with employers' normal business operations.

First, allowing a union *carte blanche* authority to call and email employees is an invasion of employees' privacy interests. Many RILA members' employees have expressed consternation at the actions of union organizers in aggressively approaching them in public areas and in their homes. By way of example, one member's employees have complained about 11:00 p.m. home visits from five or more organizers who insisted on speaking with them. Requiring employers to

provide phone numbers and email addresses regardless of employees' wishes ignores the fact that many employees would strongly prefer to be left alone. Since it is not uncommon for people to share phones or maintain joint email accounts, moreover, the NLRB's rule would give unions an audience with people beyond the targeted employee: people whose right to privacy is unquestioned, and for whom the union's message will have little relevance or likely interest. Giving a union unfettered personal access to employees would also increase the covert spread of misinformation that the employer would have no chance to rebut. Presumably, unions have ample means to solicit phone numbers and email addresses from the employees they wish to organize; employees deserve the chance to say "no" and to draw elementary boundaries in their private lives.

Second, if the NLRB's rule requires employers to provide access to employees' *work* phone numbers and email addresses, then the agency is contradicting Supreme Court precedent and inviting union interference with normal business operations. The Supreme Court has clearly permitted employers to prohibit union organizers from soliciting employees in working areas during working time. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (except where unions lack reasonable access, employers may forbid nonemployee union organizers from soliciting employees on their private property); *see also UPS Supply Chain Solutions, Inc.*, 2010 WL 5099880 (NLRB Div. of Judges) ("The Board has held, almost since the Act's inception, that an employer may, in normal situations, make and enforce a rule prohibiting employees from engaging in solicitation during 'work time.'"). The Board lacks any authority to depart from the logic of this settled decisional law, and there is no good reason to attempt such a departure. With access to company phones and emails, unions could distract employees during working time and intentionally or unintentionally interfere with network speed and network space, limiting productivity and encumbering intra-office communications. Retail employers typically limit the use of work phones and work email addresses to company business. They should not have to make an exception for unions. And employees, meanwhile, should not have to sift through union emails when attempting to send and receive communications that are essential to the completion of their assigned work tasks.

As a practical matter, many RILA members do not assign phone numbers or email addresses to employees, nor do they require employees to provide personal email addresses. Thus, many retail employers would not have any additional information to provide to the NLRB. And to the extent the NLRB's proposal *would* require employers to obtain and/or provide additional information, it would

require employers to invade employees' privacy in a way that they are reluctant to do and may be legally prohibited from doing.[11]

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For the above reasons, RILA strongly opposes the NLRB's proposed rule. The existing rules provide a relatively-balanced (and if anything, pro-union) opportunity for employers and unions to present their views on unionization and to foster employees' informed decision making. Allowing unions to conduct an election by ambush while silencing employers, withholding information from employees, deferring important questions until after the election, and compromising both employee privacy and workplace productivity distorts the NLRA's basic statutory framework.

Respectfully submitted,

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11 Federal and state privacy and anti-spam laws may be implicated by the distribution of union materials via email, especially if those communications are deemed deceptive. See, for example, the federal CAN-SPAM Act, 15 U.S.C. § 7701, *et seq.*, the Washington Commercial Electronic Mail Act, RCW § 19.190.010–.070, and *Omni Innovations, LLC v. Impulse Marketing Group, Inc.*, 2007 WL 2110337 (W.D. Wash. July 18, 2007).