United States House of Representatives
Education and the Workforce Committee
Subcommittee on Health, Employment, Labor and Pensions
March 4, 2015
Hearing regarding H.J.RES.29
Providing for Congressional Disapproval Under Chapter 8 of Title 5, United States Code of the Rule Submitted by the National Labor Relations Board Related to Representation Case Procedures

Testimony of the Retail Industry Leaders Association (RILA)

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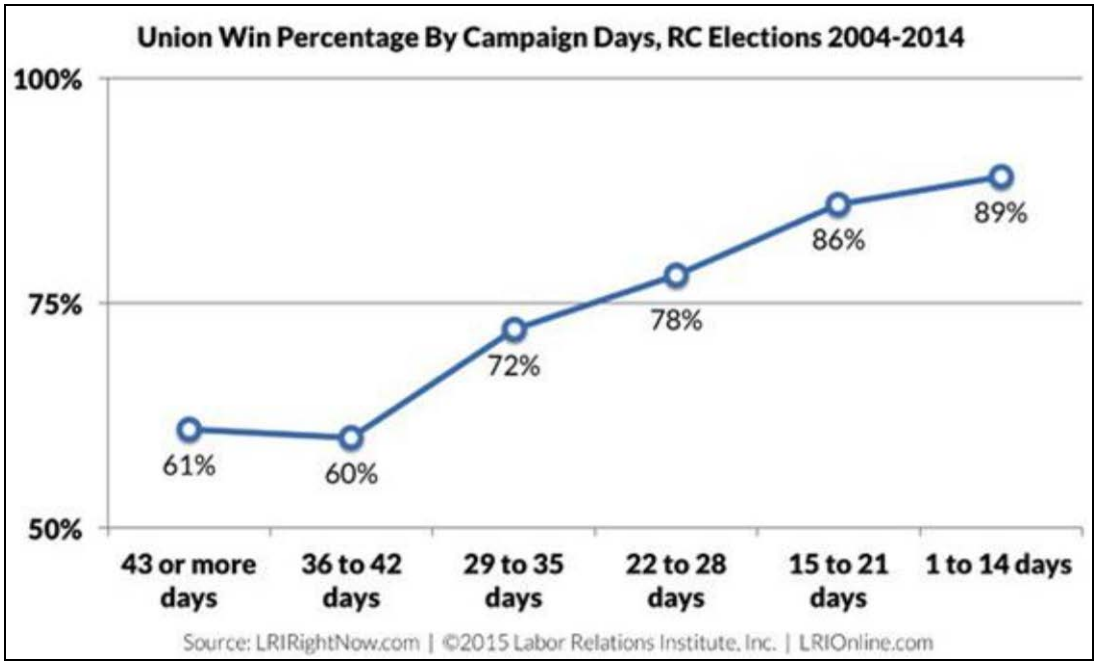
Chairman Roe, Ranking Member Polis and Members of the Subcommittee. Thank you again for inviting me to testify before this Subcommittee. I appear here today on behalf of the Retail Industry Leaders Association (RILA). RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

Mr. Chairman and Members of the Subcommittee, RILA fully supports H.J.Res. 29, and commends the leadership of the House and this Committee for introducing this legislation. RILA and many other employer organizations are encouraging both members of the House and Senate to vote to approve this initiative under the Congressional Review Act (CRA). There are eight (8) key points that RILA would like to emphasize to the Subcommittee today regarding the National Labor Relations Board's (NLRB's) new election Rule:

1. **The Board's new Rule is fundamentally unfair to employees and employers and is an unprecedented partisan policy initiative favoring organized labor.** Mr. Chairman and Members of the Subcommittee, are you aware of any election process that permits an individual or party to campaign for months, if not years, then unilaterally decide when to start the election process, unilaterally determine who gets to vote, and then trigger an election in as little as 11 to 14 days after requesting the election? I had never heard of any election procedures that fit the above description until the NLRB's recent actions. Indeed, the NLRB's new election Rule -- when combined with the Board's new overwhelming community of interest test -- appears to provide a process exactly as I described above. A union can campaign for months, if not years, file a petition with the NLRB at a time of its own choosing (generally when it reaches a certain level of support), carve out or gerrymander who gets to vote (including micro or fragmented voting units), and under the new Rule have an election in a period as short as 11 to 14 calendar days after it has filed its petition.

   The Board's new election Rule lacks even a scintilla of elementary fairness. Imagine, for example, if the tables were turned and a Republican NLRB adopted a new election Rule prohibiting an election until at least three months after the union filed its petition. There would be a great number of protests from organized labor and substantial opposition to such a rule from their supporters.

It is well established that the shorter the time period between a petition filing and the election date, the higher the union win rate. The chart below clearly shows this correlation.



At its core, the Board's new election Rule is just a regulatory codification of the results shown in the above chart. It is an "irrational need for speed" as noted by NLRB Republican members Phil Miscimarra and Harry Johnson, who dissented from the adoption of the new Rule. There can be no question that the underlying objective of the new Rule is to increase union win rates in NLRB elections.

Finally, I should stress that union elections have lasting consequences. When a union wins such an election, the certified bargaining unit often remains in place for decades if not for the entire life of the business where the unit is located. Scholars of labor law will readily admit that it is very difficult in most situations to decertify or remove a bargaining unit. Unions don't stand for election on an ongoing basis. Unlike Congressional elections and virtually any other election process where candidates for parties must periodically face the electorate, once a union is certified to represent a bargaining unit, it is virtually immune from removal. Therefore, the question workers face of whether to unionize presents them with a very serious decision, not only for them but for employers because although the employees who voted for a union can leave the employer, the employer may well have to contend with the union for the lifetime of the business. Accordingly, NLRB elections should only be held in an environment and in a timeframe where all parties have a full and fair opportunity for discussion and debate, and reasoned decision-making. The Board's new Rule prohibits in a number of ways any of these important objectives from being achieved.

2. **The new Rule is a legal and procedural "landmine" for employers and violates employer due process rights.** The new Rule, which is scheduled to go into effect on April 14, 2015, is contained in a 733-page document. Even experienced labor lawyers are challenged to understand all of the provisions in the new Rule. Indeed, this regulatory overkill will be even more difficult for employers, particularly for small business entities, to understand and comply with in all respects.

   For example, an employer who fails to "immediately" post (including electronically) the new Notice of Petition for Election Form transmitted to it by the NLRB can suffer the consequence of having the results of an election set aside. Further, an employer has only seven (7) days to prepare for a hearing and must file by noon the day before the hearing a newly created Statement of Position (SOP) pleading with the NLRB. Failure to timely file such pleading and to include in such pleading all potential issues that the employer desires to raise in the hearing will result in the employer being foreclosed from raising any such omitted issue in the future. Such a strict pleading requirement and its waiver and preclusion effect is extremely onerous and violates employer due process rights. In addition to its legal infirmities, this provision will be difficult for many employers to follow. A list of the potential issues that the Statement of Position may need to address is outlined in Appendix D, paragraph 3.

   Additionally, an employer will only have two (2) working days to compile substantial information regarding employees who will vote in a Board-conducted election. Failure of the employer to timely and accurately file such information again could be a basis for setting aside the election results.

   Finally, the hearing procedure provided for under the new Rule substantially limits the rights of employers to present evidence regarding voter eligibility issues and also precludes parties from filing post hearing briefs. Again, if an employer fails to properly and thoroughly raise an issue in the hearing, it is precluded under the new Rule from raising such issue at a latter point.

3. **The new Rule significantly curtails employee and employer free speech rights.** As noted above, the new Rule substantially shortens the time period from the filing of a union petition to an election, to as little as 11 to 14 calendar days. There is no factual or legal record to support this new approach. Presently, Board-conducted elections occur in a time frame on an average of 38 to 42 days from the filing of a union petition. By eliminating or substantially shortening the critical pre-election time period for all parties – employees, employers and unions – to engage in meaningful debate, the new Rule violates the free speech rights of all parties. Specifically, the elimination of the long established 25 to 30 day period, from date of issuance of the direction of an election to the election date, is one of the primary deficiencies of the new Rule and one of the primary reasons that the free speech rights of all parties have been significantly and materially curtailed.

Proponents of the new Rule argue that employers regularly educate their employees about unions and therefore are well prepared to respond if a union files a petition for an election. Indeed, some argue that employers have an unfair advantage over a union given their continued access to their employees and also have a considerable advantage to influence employee thinking regarding the unions. Proponents of the Rule argue therefore that a union should be permitted to select when the election process starts and have a short time period before an election is held. While some retailers communicate with employees about unions, this communication is necessarily more abstract to employees than when they are faced with making a critical decision about whether to vote in favor or participating in a very specific bargaining unit organized by a particular union. Often the key issues do not crystallize in a meaningful way until the petition is filed and employees and employer have a chance to assess what the impact will be. While employers and employees can discuss unions in theory, this cannot replace the debate and discussion regarding the potential impact of unionization that can occur during the period from a petition's filing until the election is held. The Board's new Rule for all practical purposes eliminates this time period and substantially infringes upon employee and employer free speech.

4. **The Board's new Rule is not consistent with the legislative history of the National Labor Relations Act and violates the appropriate hearing requirement of the Act.** The concept of "election first and hearing later" is not new. This concept was considered in 1959 and rejected by the Congress during debate leading to the passage of the Landrum-Griffin Amendment (CS.1555,86 Cong. 1 Sess. 705 (as passed by the Senate on April 25, 1959). The Senate-passed version of the Landrum-Griffin Amendment in fact adopted the "election first and hearing later" approach. Interestingly, however, even proponents of the Senate-passed billed insisted on a minimum waiting period between the filing of the petition and the election. As noted in the dissent to the new Rule by NLRB Members Miscimarra and Johnson, then Senator John F. Kennedy – who chaired the Conference Committee regarding the legislation and who was a proponent of the "election first and hearing later" concept -- repeatedly stated that at least 30 days were required between the petition filing and an election to "safeguard against rushing employees into an election where they are unfamiliar with the issues". Senator Kennedy went on to state that "there should be at least a 30 day interval between the request for an election and the holding of the election." He opposed proposals that, in his words, failed to provide "at least 30 days in which both parties can present their viewpoints" See 105 Cong. Rec. 5770 (1959).

   The Congress in 1959, did not adopt the Senate-passed "election first and hearing later" concept. In fact, the Congress specifically rejected this approach. Representative Graham Bardan, who was the Chairman of the House Committee on Education and Labor and the ranking House Conference Committee Manager described the rejection of the Senate-passed bill in the following manner "Hearings have not been dispensed with. There is not any such thing as reinstating authority or procedure for a quicky election". Some were disturbed over that and

the possibility of that is out. The right to a formal hearing before an election can be directed is preserved without limitation or qualification". (105 Cong. Rec. 16629 (1959)) (emphasis added)

Previous decisions of the NLRB have also held that the "election first hearing later" concept violates section 9(c) (1) of the NLRA. Those decisions clearly conclude that an appropriate hearing is required in every representation case. See, e.g., *Angelica Healthcare Services,* 315 N.L.R.B. 1320 (1995) and *Barre National, Inc.,* 316 N.L.R.B. 877 (1995).

5. **The new Rule is an unwarranted intrusion into employee privacy rights.** For the first time in the history of the NLRA, employers will be required to furnish, if available, personal email addresses, personal cell phone numbers and personal home telephone numbers of eligible voters in Board-conducted elections. In adopting the new Rule, the Board majority unfortunately rejected the idea of permitting employees to opt-out of furnishing such information. The opt-out requirement was originally proposed in the Workforce Democracy and Fairness Act, which was sponsored by Chairman Kline and passed the House on a bipartisan vote. However, the Board's Rule neglected to include an opt-out option to give employees a choice. This unwarranted invasion of privacy by the Board majority is directly at odds with legislative initiatives of various states to protect employees from having to furnish such information.

   Further, the Board majority ignored the recent examples of privacy breaches by the Federal government and other entities, and the unfortunate consequences of such breaches.

   Finally, the Board rejected proposals from many employer groups including RILA, that there should be sanctions for any inappropriate use by unions of employee personal information. This was yet another example of the Board failing to give serious consideration to employer comments regarding the new Rule when it was in a proposal status.

   It is hard to understand the Board's rationale in this area. Hopefully, privacy advocates will note this unwarranted intrusion into employee privacy rights and join in on the opposition to this new Rule.

6. **The Board's new Rule will further erode its credibility as a neutral arbiter of labor relation issues in the workplace.** As the Subcommittee is well aware, the Board and its General Counsel have issued numerous decisions and are pursuing various initiatives that either have, or will have a considerable impact on federal labor law and adversely impact the interests of employees and employers. The Board's new Rule is just the latest step in that direction and continue the erosion of the Board's credibility that these initiatives have begun.

For example, as noted above, the Board's new overwhelming community of interest test also overturns decades of Board law and permits unions to establish "micro" bargaining units and fragmented units in the workplace. RILA is particularly concerned with this development as retail employers have already been subjected to micro and fragmented Board election decisions. In the recently decided *Macy's* case, the Board found a small unit of fragrance and cosmetics selling employees appropriate and permitted the union to carve out this small unit from the remaining selling employees in the department store. If the Board continues to follow this approach, some retailers could see bargaining units in the double-digits in each location. This approach fails the test of basic common sense, conflicts with decades of Board precedent, and will undermine the potential for a sound and productive employer-employee labor relations climate.

Other initiatives by the Board and its Counsel, include the mandatory access of employees to employer email systems for union activity, substantial negative changes to the deferral to arbitration process, excessive regulatory intrusion with respect to the wording of employer handbook, social media and other policies, and the current initiative to substantially change the law in the joint employer area. Indeed, under the theory of the Board's General Counsel virtually every relationship between non-business related entities could result in a joint employer relationship under the NLRA.

Presidential elections can substantially influence policy decisions by federal regulatory agencies, such as the NLRB. The scope and number of such changes that the current Board and its General Counsel have undertaken, however, far exceeds the actions of previous Republican and Democrat Boards. The Board's new election Rule far exceeds the reasonable boundaries of expected "policy oscillation".

7. **The Board's new Rule is an irresponsible rejection of Board Members' responsibility and accountability.** Board Members are nominated by the President and serve subject to Senate confirmation. The Board's new Rule removes Board Members from decision-making in many election-related disputes and transfers such authority to NLRB regional directors, hearing officers and other staff not subject to Congressional or public scrutiny. For example, regional directors and hearing officers under the new Rule have virtually unchecked authority to make evidentiary rulings and also to decide whether parties can present issues for review before an election is held. Moreover, decisions of such Board staff in many instances will not be subject to any review, especially before the election. Even after the election, parties will be precluded from obtaining Board review on critical issues such as in employee voting eligibility and unit composition. The Board majority's only answer to this is for the parties to work out any unit composition issues at the bargaining table.

   Simply stated, the new Rule removes those officials who were nominated by the President and confirmed by the Senate from making important election-related

decisions and places such decision making in the hands of individuals that have virtually no public or congressional accountability. This is poor public policy.

Finally, as a practical matter, leaving important election-related issues for decision by individuals in different regions will in all likelihood result in different decisions being issued in factually identical circumstances.

8. **The new Rule presents a dangerous precedent for future Boards.** The Board's extraordinary policy bias in favor of unions with respect to the new Rule only invites future Boards to respond in kind. This type of potential "pendulum swing" in Board law and procedure is poor public policy. The continued politicization of the Board strongly calls for enactment of NLRA reform legislation. Hopefully, this Subcommittee will undertake such an effort in the near future.

Mr. Chairman, attached to my testimony, as Exhibit A, is a copy of RILA's letter to the Members of the House of Representative in support of House Joint Resolution 29. Attached, as Appendix B, is a timeline of how the current NLRB Election process works. Attached, as Appendix C, is a timeline of how the NLRB election process is expected to be implemented under the new Rule. Attached, as Appendix D, is an outline of various provisions of the new election Rule. I ask that these Appendices be made a part of the record of my testimony.

Mr. Chairman and Members of the Subcommittee, this concludes my testimony. I will be happy to respond to any questions the Subcommittee may have regarding the Board's new election Rule.