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NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

Special Procedural Rules With Respect to Representation Cases Governing Periods When the National Labor Relations Board Lacks a Quorum of Members

AGENCY: National Labor Relations Board.

ACTION: Final Rule.

SUMMARY: The National Labor Relations Board (the Board or the NLRB) is revising its rules governing the processing of representation cases during periods when the Board lacks a quorum of Members. This revision is being adopted to facilitate, insofar as it is possible, the normal functioning of the Agency when the number of Board Members falls below three, the number required to establish a quorum of the Board. See 29 U.S.C. 153(b); *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010). The effect of the revision is to enable the Agency to process some representation cases to the certification of a representative or the certification of the results of the election, while deferring Board consideration of parties' requests for review until a quorum has been restored.

DATES: Effective [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street, NW, Room 11600, Washington, DC 20570. Telephone (202) 273-1067 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: The National Labor Relations Board is revising its rule requiring the automatic impoundment of ballots in representation cases when a party files a request for review. This rules revision is an addendum to the Board's December 14, 2011 rules revisions, which added a new Subpart X to the NLRB's Rules and Regulations (29 CFR 102.178 - 102.181; see 76 FR 77699). The December 14 revisions covered the consideration of certain pleadings in unfair labor practice cases that require a quorum of Board Members for final action, during periods when the number of Board members falls below three, the number required to establish a quorum of the Board. See 29 U.S.C. 153(b); *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010). In representation cases, final action on requests for review by the Board also requires a three-member quorum. The instant rule revision, which adds 29 CFR 102.182 to the NLRB's Rules and Regulations, is being adopted to facilitate, as far as possible, the expeditious processing by the Agency of representation cases during periods in which the Board lacks a quorum. No Notice of Proposed Rulemaking (NPRM) is required with respect to this rules revision, as it falls under the Administrative

Procedure Act's exception to the NPRM requirement for regulatory actions involving agency *organization, procedure, or practice*. See 5 U.S.C. 553. In addition, the Agency finds that notice and comment would be impracticable within the meaning of 5 U.S.C. 5553(b)(3)(B) before the Board loses a quorum on January 3, 2012, as now appears possible.

At present, the NLRB's Rules and Regulations provide only for the adjudication of representation cases and the issuance of decisions on review by the Board when it is composed of three or more members, which constitutes the Congressionally-designated quorum of the Board. In *New Process Steel v. NLRB*, supra, 130 S. Ct. 2635, the Supreme Court held that Congress empowered the Board to delegate its powers to no fewer than three members, and that, to maintain a valid quorum, a membership of three must be maintained. *Id.* at 2640. It can be anticipated that, from time to time, the number of individuals appointed by the President and confirmed by Congress to serve as members of the Board may fall below three. Current Section 102.67(b) of the NLRB's Rules and Regulations requires that all ballots cast in a representation election be impounded whenever the Board has not acted on a pending request for review, thus halting the processing of the representation case at the end of the voting, but before the ballots are counted. During periods when the Board lacks a quorum, the effect of the current rule would be to withhold information concerning the results of the election from employees and employers, who are usually eager to know the results, until the Board regains a quorum and rules on

the request for review. The investigation and adjudication of objections and determinative challenges would be delayed during the same period. And in all likelihood the request for review would ultimately be denied, as are about 85% of requests for review currently filed. If the request for review is denied, the delay of the tally and any ensuing proceedings would have served no purpose whatsoever.

The Board has determined that the purposes of the National Labor Relations Act will best be served, and the Board's Congressional mandate will best be carried out, if its rules are revised to suspend, during any period the Board lacks a quorum, the second proviso of Section 102.67(b) of the NLRB's Rules and Regulations. Section 102.67(b) provides that a decision by the Regional Director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the Regional Director shall be final: *Provided, however,* That within 14 days after service thereof any party may file a request for review with the Board in Washington, D.C. The Regional Director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be

segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.

Thus, suspension of the automatic impoundment of ballots during periods in which the Board lacks a quorum will permit Regional Directors promptly to tally the ballots cast by bargaining unit employees. The Board anticipates that the suspension of the automatic impoundment of ballots will serve the interests of the public and the parties in the speedy resolution of representation cases by avoiding extended and unnecessary delays in the tally of ballots. In addition, the Board anticipates that, in some cases the prompt tallying of ballots and recording the results of the election will cause parties to determine that it is unnecessary to pursue a request for review. In such cases, the choice of the bargaining unit employees will be effectuated expeditiously. Thus, the instant rules revision will provide the parties the opportunity to pursue numerous representation cases through to certification, while deferring consideration of requests for review by the Board until a quorum has been restored. The rules revision expressly preserves the Board's authority, based on a properly filed request for review, to revise or revoke any certification issued by a regional director. Member Brian E. Hayes voted against the rules revision

Executive Order 12866

The regulatory review provisions of Executive Order 12866 do not apply to independent regulatory agencies. However, even if they did, the proposed changes in the Board's rules would not be classified as "significant rules" under Section 6 of Executive Order 12866, because they will not result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or foreign markets. Accordingly, no regulatory impact assessment is required.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for procedural rules, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) pertaining to regulatory flexibility analysis do not apply to these rules. However, even if the Regulatory Flexibility Act were to apply, the NLRB certifies that these rules will not have a significant economic impact on a substantial number of small business entities as they merely provide parties with avenues for expeditiously resolving certain representation cases before the Board.

Paperwork Reduction Act

These rules are not subject to Section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501) since they do not contain any new information collection requirements.

Small Business Regulatory Enforcement Fairness Act

Because these rules relate to Agency procedure and practice and merely modify the Agency's internal processing of ballots in representation cases, the Board has determined that the Congressional review provisions of the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801) do not apply.

List of Subjects in 29 CFR Part 102

Administrative practice and procedure; Labor-management relations.

Accordingly, the Board amends 29 CFR part 102 as follows:

PART 102 – RULES AND REGULATIONS, SERIES 8

1. The authority citation for 29 CFR part 102 continues to read as follows:

Authority: Section 6, National Labor Relations Act, as amended (29 U.S.C. 151, 156). Section 102.117 also issued under Section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)). Sections 102.143 through 102.155 also issued under Section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C.504(c)(1)).

Subpart X—Special Procedures When the Board Lacks a Quorum

2. Add § 102.182 to subpart X to read as follows:

§ 102.182 Representation Cases Should Be Processed to Certification.

During any period when the Board lacks a quorum, the second proviso of § 102.67(b) regarding the automatic impounding of ballots shall be suspended. To the extent practicable, all representation cases should continue to be processed and the appropriate certification should be issued by the Regional Director notwithstanding the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review filed in accordance with this subpart.

Signed in Washington, DC, December 28, 2011

Mark Gaston Pearce

Chairman

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