

R-Case Rule Changes: There and Back (and Back) Again

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Introduction

Prior to 2014, the basic procedures of the National Labor Relations Board's representation elections had been largely stable for decades.¹ Over the past nine years, however, both employers and unions have dealt with the shifting tides of representation case rules issued by the National Labor Relations Board. Most recently, on December 18, 2019, the National Labor Relations Board finalized rules (2019 Rules) making changes to the procedures it follows prior and subsequent to conducting a secret ballot election to determine if employees wish to be represented for purposes of collective bargaining.² These rules were originally expected to apply to all petitions filed on or after April 16, 2020, or 120 days after being published in the Federal Register.³ On May 30, 2020, the United States District Court for the District of Columbia issued an injunction prohibiting the implementation of certain provisions of the 2019 Rules.⁴ The remaining rules went into effect.⁵

The 2019 Rules, in large part, reverse the 2014 amendments to representation election procedures. The 2014 amendments, also known as the "quickie election" rule or the "ambush election" rule, eliminated pre-election evidentiary hearings and requests for review, resulting in significantly reduced time periods between the filing of a petition and the election.⁶ In publishing the 2019 Rules, the NLRB declared that the changes were needed to "better balance the interest in expeditious

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1. Jeffrey M. Hirsch, *NLRB Elections: Ambush or Anticlimax?*, 64 EMORY L.J. 1647, 1649 (2015).

2. Representation-Case Procedures, 84 Fed. Reg. 69,524 (Dec. 18, 2019).

3. *Id.*; see Order at 1 n.1, Hearst Mags. Media, No. 02-RC-252592 (NLRB Jan. 22, 2020), <https://apps.nlr.gov/link/document.aspx/09031d4582f57045>.

4. *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. NLRB*, 466 F. Supp. 3d 68, 74 (D.D.C. 2020); see Section III, *infra*.

5. *NLRB to Implement All Election Rule Changes Unaffected by Court Ruling*, NLRB (June 1, 2020), <https://www.nlr.gov/news-outreach/news-story/nlr-to-implement-all-election-rule-changes-unaffected-by-court-ruling> [<https://perma.cc/7342-G4AJ>].

6. Timothy M. McConville, *Final NLRB "Ambush Election" Rule Will Boost Union Organizing*, NAT'L L. REV. (January 7, 2015), <https://www.natlawreview.com/article/final-nlr-ambush-election-rule-will-boost-union-organizing> [<https://perma.cc/RDT5-ZVAY>].

processing of questions of representation with the efficient, fair and accurate resolution of [such] questions.”⁷ Dissenting Board Member Lauren McFerran argued that the changes place an “unjustified burden . . . on workers seeking to exercise their fundamental workplace rights.”⁸ Whether the new rules are an improvement depends on whether one represents unions or employers. How long they remain in effect probably depends on the speed with which President Biden’s NLRB begins the process of reversal. Either way, the timing and procedures for union representation elections under the National Labor Relations Act (NLRA) are bound to give rise to a spirited dialogue between practitioners and academics alike.

I. The 2014 Amendments

On June 21, 2011, the National Labor Relations Board (NLRB) first proposed “reforms” for its representation election procedures.⁹ The 2011 proposal was a precursor to the 2014 rule changes. The then-proposed amendments were “intended to reduce unnecessary litigation, streamline pre- and post-election procedures, and facilitate the use of electronic communications and document filing.”¹⁰ The amendments failed, however, because of legal challenges.¹¹

In February 2014, the National Labor Relations Board announced a second attempt to modify the procedures. In announcing the proposed changes, then-Chairman Mark Pearce argued: “Unnecessary delay and inefficiencies hurt both employees and employers.”¹² He added that the new proposals would help the process for workers who want union representation or for unionized workers trying to decertify a union.¹³ The then-proposed regulations substantially affected the election process rules in effect at the time. Most significantly, the period between a petition and the election was shortened, arguably making it difficult for employers to communicate with employees about potentially rele-

7. Representation-Case Procedures, 84 Fed. Reg. 69,524 (Dec. 18, 2019).

8. *Id.* at 69,560.

9. *Background to Election Procedures Rulemaking*, NLRB (June 21, 2011), <https://www.nlr.gov/how-we-work/national-labor-relations-act/rules-regulations/background-election-procedures-rulemaking> [<https://perma.cc/G3LM-8SUF>]; see also Representation-Case Procedures, 79 Fed. Reg. 74,308, 74,311–15 (Dec. 15, 2014) (“On November 30, 2011, the Board members engaged in public deliberations and a vote about whether to draft and issue a final rule, and, on December 22, 2011, a final rule issued.”).

10. *Background to Election Procedures Rulemaking*, *supra* note 9.

11. *Chamber of Com. v. NLRB*, 879 F. Supp. 2d 18, 35 (D.D.C. 2012) (ruling that rules were invalid because the NLRB failed to follow proper voting procedures); Jeffrey M. Hirsch, *NLRB Voluntarily Dismisses Election Rules Appeals*, WORKPLACE PROF BLOG (Dec. 10, 2013), http://lawprofessors.typepad.com/laborprof_blog/2013/12/nlr-voluntarily-dismisses-election-rulesappeals.html [<https://perma.cc/Q6TT-CXQK>].

12. Sam Hananel, *Labor Board Tries Again to Change Union Rules*, WASH. EXAM’R (Feb. 05, 2014, 12:00 AM), <https://www.washingtonexaminer.com/labor-board-tries-again-to-change-union-rules> [<https://perma.cc/TWF2-UKSQ>].

13. *Id.*

vant issues before the vote, and arguably making it easier for unions to organizing by eliminating longer periods of time for the employer to campaign against the union.

On December 12, 2014, after a lengthy process during which the Board considered tens of thousands of public comments and held hearings with live questioning by Board Members, the NLRB adopted a final rule (the 2014 Rule) amending its representation-case procedures to modernize and streamline the process for resolving representation disputes.¹⁴ The 2014 Rule was published in the Federal Register on December 15, 2014,¹⁵ and took effect on April 14, 2015.

Not surprisingly, the vote to adopt the final rule was split along party lines. Democrat Chairman Mark Gaston Pearce, and Members Nancy Schiffer and Kent Hirozawa, who voted to issue the final rule, characterized the changes as simply modernizing, streamlining, and standardizing Board procedure, increasing transparency, and reducing unnecessary litigation.¹⁶ Republican Members Harry Johnson and Philip Miscimarra voted against the rule.¹⁷ In a joint dissent, the Members characterized the new rules as being “[m]assive in scale and unforgiving in its effect.”¹⁸ Among the many issues that they had with the new rules, one of their main concerns was that the primary purpose of the rule—to have representation elections as quickly as possible—addressed a problem that did not exist, while “fail[ing] to provide adequate protection of employee rights of free choice and privacy and of all employees’ and parties’ rights of free speech and procedural due process.”¹⁹

While a number of changes were made to the representation election procedures,²⁰ the streamlined election rules were the most prominent component. Before issuance of the final rule, the time between the filing of an election petition and the election was estimated to be about forty-two days.²¹ The final rule did not specify a maximum or minimum period, but it was then expected that the effect of other provisions to

14. *NLRB Issues Final Rule to Modernize Representation-Case Procedures*, NLRB (Dec. 12, 2014), <https://www.nlr.gov/news-outreach/news-story/nlr-issues-final-rule-modernize-representation-case-procedures> [<https://perma.cc/XM7F-AQRR>].

15. 79 Fed. Reg. 74,308; see also Notice of Proposed Rulemaking, Representation-Case Procedures, 79 Fed. Reg. 7318, 7318 (Feb. 6, 2014) (noting that 2011 and 2014 rules were very similar).

16. *NLRB Issues Final Rule*, *supra* note 14.

17. *Id.*

18. 79 Fed. Reg. 74,308, 74,430.

19. *Id.* at 74,460.

20. *Id.* at 74,308.

21. Tim Gould, *They're Here: NLRB's "Quickie Elections" Rules Are Now Official*, HR MORNING (Apr. 15, 2015), <https://www.hrmorning.com/articles/theyre-here-nlrbs-quickie-elections-rules-are-now-official> [<https://perma.cc/F82R-S43U>]; see also Hirsch, *supra* note 1, at 1652 & nn.24, 25 (indicating that the median time for elections in 2015 was thirty-seven to thirty-nine days, with some taking as long as seventy days) (citing *Median Days from Petition to Election*, NLRB (May 9, 2015), <http://www.nlr.gov>).

result in “compression” of that time frame to about thirteen to twenty-one days, a prediction that has proved to be substantially accurate.²²

In this regard, the Board’s most significant change was to eliminate the requirement that contested elections must incorporate an automatic delay of least twenty-five days after the direction of election.²³ The purpose of this waiting period was to allow the Board to act on any requests for review.²⁴ The 2014 Rule codified previous practice by not allowing parties to file post-hearing briefs without regions’ permission.²⁵ The parties were now afforded a “reasonable period” of time to make oral arguments at the end of pre-election hearings.²⁶

The other changes were broadly characterized by the NLRB as (1) modernizing board procedures; (2) increasing transparency and standardizing board process; and (3) streamlining board procedure and reducing unnecessary litigation.

A. *Modernizing Board Procedures*

The 2014 Rule made two changes to “modernize” the Board’s rules in light of modern communications technology:

- ***Electronic Filing/Communications***—Following the changes, the parties were permitted to file documents, such as petitions, electronically, rather than being required to use “slower or more expensive forms of communications, such as mail or express delivery services,”²⁷ and
- ***Election Voter List***—The employer was also required to include available personal email addresses and phone numbers of voters on the voter list in order to permit non-employer parties to

/news-outreach/graphsdata/petitions-and-elections/median-days-petition-election (link no longer active).

22. *Id.*; see also NLRB, FY 2016 PERFORMANCE AND ACCOUNTABILITY REPORT 13 (2016), <https://www.nlr.gov/sites/default/files/attachments/pages/node-130/15184-nlr-2016-par508.pdf> (indicating that during fiscal year 2016, the median days for a representation election dropped to 23); NLRB, FY 2017 PERFORMANCE AND ACCOUNTABILITY REPORT 10 (2017), <https://www.nlr.gov/sites/default/files/attachments/pages/node-130/nlr-2017-par-final.pdf> (indicating that during fiscal year 2017, the median days for a representation election remained at twenty-three); NLRB, FY 2018 PERFORMANCE AND ACCOUNTABILITY REPORT 15 (2018), <https://www.nlr.gov/sites/default/files/attachments/pages/node-130/nlrpar2018v3.pdf> (indicating that during fiscal year 2018, the median days for a representation election remained at twenty-three).

23. See 29 C.F.R. § 101.21(d) (2020); 79 Fed. Reg. at 74,410.

24. Hirsch, *supra* note 1, at 1651–52 & n.18.

25. 79 Fed. Reg. at 74,484 (proposing 29 C.F.R. § 102.66(h)); see also *id.* at 74,401–03 (rejecting call for fourteen-day maximum time to submit briefs).

26. *Id.* at 74,484.

27. *NLRB Representation Case-Procedures Fact Sheet*, NLRB, <https://www.nlr.gov/news-publications/publications/fact-sheets/nlr-representation-case-procedures-fact-sheet> [<https://perma.cc/PDJ7-DR56>]; see also 79 Fed. Reg. at 74,478, 74,489 (proposing 29 C.F.R. §§ 102.113, 102.60). The regulations also provided that employers must e-mail employees Notices of Election if e-mail is a customary mode of communication at the workplace. *Id.* at 74,486 (proposing 29 C.F.R. § 102.67(k)).

communicate with prospective voters about the upcoming election using modern forms of communication.²⁸

B. Increasing Transparency and Standardizing Board Process

The 2014 Rule provided for the following to “increase transparency” and to “standardize board process”:

- **Earlier and More Complete Information to the Parties**— Under the 2015 rules, the non-petitioning parties were required to respond to the petition for an election (generally the day before the hearing opens) by filing with the regional director and serving on the other parties a Statement of Position identifying the issues they have with the petition.²⁹ As part of its Statement of Position, the employer is also required to provide all other parties with a list of prospective voters, their job classifications, shifts, and work locations.³⁰
- **Earlier and More Complete Information to Employees**— The employer is required to post a Notice of Petition for Election containing more detailed information on the filing of the petition and employee rights within two business days of the region’s service of the petition.³¹ The Notice of Election will provide prospective voters with more detailed information about the election and the voting process.
- **Scheduling of Hearings**—Except in cases presenting unusually complex issues, pre-election hearings will generally be set to open eight days after a hearing notice is served on the parties.³² Post-election hearings will generally open twenty-one days after the tally of ballots.³³

28. 79 Fed. Reg. at 74,480, 74,486 (proposing 29 C.F.R. §§ 102.62; 102.67(1)).

29. *Id.* at 74,481–82 (codified at 29 C.F.R. § 102.63(b)(1), (b)(2), (b)(3) (2015)); *see also id.* at 74,362–64 (arguing that one-day rule will help spur negotiations and narrow the scope of pre-election hearings and noting that the time frame is similar to current practices). The Statement of Position should also include parties’ preference for the date, time, and location of the election. *Id.* at 74,481–82 (codified at 29 C.F.R. § 102.63(b)(1)(i) (2015)).

30. *Id.* at 74,481 (codified at 29 C.F.R. § 102.63(b)(1)(i) (2015)).

31. 29 C.F.R. § 102.63(a)(2) (2015).

32. 79 Fed. Reg. at 74,480 (codified at 29 C.F.R. § 102.63 (2015)).

33. *Id.* at 74,487 (codified at 29 C.F.R. § 102.69(c)(1)(ii) (2015)); *see also id.* at 74,479. The Board codified the current practice of regions’ determining whether substantial and material factual issues that warrant a postelection hearing, which should occur in twenty-one days. *Id.* at 74,487 (codified at 29 C.F.R. § 102.69(c)(1)(ii) (2015)) (allowing extension to “as soon as practicable”); *see also id.* at 74,414–16 (discussing decision not to decrease period to fourteen days). Following the hearing, a hearing officer issues recommendations and parties have fourteen days to file exceptions with the regional director, who issues a decision. *Id.* at 74,487 (codified at 29 C.F.R. § 102.69(c)(1)(iii) (2015)).

C. *Streamlining Board Procedure and Reducing Unnecessary Litigation*

The 2014 Rule provided for the following to “streamline board procedures” and to “reduce unnecessary litigation”:

- **Identifying Disputed Issues**—The 2014 Rule required to non-petitioning parties to respond to the petition and state their positions generally the day before the pre-election hearing opens, which was set on the eighth day after the petition was filed.³⁴ Under the rules, the petitioner is required to respond to the issues raised by the non-petitioning parties at the opening of the hearing.³⁵ In addition, the rules provided that litigation inconsistent with the positions taken by the parties would generally not be allowed.³⁶
- **Litigation of Eligibility and Inclusion Issues**—Generally, only issues necessary to determine whether an election should be conducted are currently allowed to be litigated in a pre-election hearing.³⁷ The rules also provided that the 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 to determine if an election should be held.³⁸ In many cases, the NLRB contended that those issues do not need to be litigated because they have no impact on the results of the election.³⁹
- **Post Hearing Oral Argument and Briefs**—All parties are provided with an opportunity for oral argument before the close of the hearing.⁴⁰ Written briefs will be allowed only if the regional director determines that they are necessary.⁴¹
- **Review of Regional Director Rulings**—The parties may seek review of all regional representation-case rulings through a single post-election request, if the election results have not made those rulings moot.⁴² The election will no longer be stayed after

34. *Id.* at 74,480 (codified at 29 C.F.R. § 102.63 (2015)) (excluding federal holidays; exempting cases with “unusually complex issues”; and permitting two additional days based on “special circumstances” and two more days based on “extraordinary circumstances”). Parties must file a Statement of Position one day before the hearing, although those forms may be amended for good cause. *Id.* at 74,473. *But see id.* at 74,444 (dissenting members criticizing good cause standard as too strict).

35. *Id.* at 74,483 (codified at 29 C.F.R. § 102.66(b) (2015)).

36. *Id.* at 74,483–84 (codified at 29 C.F.R. § 102.66(d) (2015)).

37. *Id.* at 74,483 (codified at 29 C.F.R. § 102.66(b) (2015)).

38. *Id.* at 74,387–88 (codified at 29 C.F.R. § 102.66 (2015)).

39. *Id.* at 74,385–86 (codified at 29 C.F.R. § 102.66 (2015)).

40. *Id.* at 74,484 (codified at 29 C.F.R. § 102.66(h) (2015)).

41. *Id.*

42. *Id.* at 74,485 (codified at 29 C.F.R. § 102.67(c) (2015)).

the regional director issues a decision and direction of election, in the absence of an order from the Board.⁴³

- **Review Standard for Post-Election Issues**—The Board will have the discretion to deny review of regional director post-election rulings, under the same standard that has governed Board review of regional director pre-election rulings for many years.⁴⁴

An analysis of elections that have taken place since the passage of the rules shows that between 2016 and 2019, the median number of days per election were between twenty-three and twenty-four days.⁴⁵ In the two years preceding the rule change, 2013 and 2014, the median days per election were forty and thirty-nine days, respectively.⁴⁶ The net effect of the “quickie election” rules also show a moderate increase in Union win rates.⁴⁷ A look at elections that took place after the new Rules were in place showed that Unions were more successful in elections that lasted fourteen days or fewer (eighty-five percent average win rate) and less successful in elections that lasted over sixty days (sixty-six percent average win rate).⁴⁸ This data certainly suggests that Unions are more successful in shorter elections.⁴⁹

II. The 2019 Rules

On December 13, 2019, the National Labor Relations Board announced the 2019 Rules, a series of fifteen modifications to its representation case procedures.⁵⁰ The 2019 Rules retain the essentials of the Board’s existing representation rules, but the Board majority asserted that the “selective changes create a fairer and more-efficient election

43. *Id.*

44. *Id.* (codified at 29 C.F.R. § 102.62(b) (2015))

45. Ian Kullgren, *Union Elections Took Longer in 2020, but Virus Not Only Factor*, BLOOMBERG L. NEWS (Jan. 4, 2021, 4:55 AM), <https://news.bloomberglaw.com/daily-labor-report/union-elections-took-longer-in-2020-but-virus-not-only-factor> [<https://perma.cc/GJ3Z-8NA5>].

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *NLRB Announces Modifications to Representation Case Procedures*, NLRB (Dec. 13, 2019), <https://www.nlr.gov/news-outreach/news-story/nlr-announces-modifications-representation-case-procedures> [<https://perma.cc/2PD4-6ZDP>]. In changing the 2019 Rules, the Board did not undergo a public notice and comment period. Although the Board held a notice and comment period for the 2014 Rules change, the then-Board noted that prior Boards had not done so, albeit with criticism in so doing. *See, e.g.*, 79 Fed. Reg. 74,308, 74311 (Dec. 15, 2014) (“As the NPRM explains, the Board has amended its representation case procedures repeatedly over the years as part of a continuing effort to improve the process and eliminate unnecessary delays. Indeed, the Board has amended its representation case procedures more than three dozen times without prior notice or request for public comment. In fact, the Board has seldom acted through notice-and-comment rulemaking on any subject. The Board typically makes substantive policy determinations in the course of adjudication rather than through rulemaking, although this practice has occasionally drawn the ire of academic commentators and the courts.”).

process.”⁵¹ According to the press release: “The modifications include clarifications to procedures prior to an election that better ensure the opportunity for litigation and resolution of unit scope and voter eligibility issues. The changes also permit parties additional time to comply with the various pre-election requirements instituted in 2014.”⁵²

Chairman John F. Ring described the purposes of the changes as “common sense changes to ensure expeditious elections that are fair and efficient. The new procedures will allow workers to be informed of their rights and will simplify the representation process to the benefit of all parties.”⁵³

As with the 2014 Rule, the votes were along party lines. Republican Chairman Ring was joined by Republican Board Members Marvin E. Kaplan and William J. Emanuel in issuing the proposed rulemaking. Democrat Board Member Lauren McFerran dissented.⁵⁴

The following are the significant changes in the 2019 Rules:

- ***The Pre-Election Hearing Changed***—The pre-election hearing now will generally take place fourteen *business* days from the notice of hearing. The 2014 Rule calls for the hearing to take place in eight *calendar* days.⁵⁵
- ***The Notice of Election Posting Changed***—The employer’s time for posting and distributing the Notice of Election is extended from two business days to five business days after service of the notice of hearing.⁵⁶
- ***The Statement of Position Deadline Changes***—The time for filing a statement of position in response to the petition is extended from one day prior to the hearing date (which, typically, means seven *calendar* days) to eight *business* days after service of the notice of hearing.⁵⁷
- ***The Response to the Statement of Position***—The petitioner must file a written response to the issues raised in the statement

51. NLRB *Announces Modifications to Representation Case Procedures*, *supra* note 50.

52. *Id.*

53. *Id.*

54. *Id.*

55. 84 Fed. Reg. 69,524, 69,533 (Dec. 18, 2019) (codified at 29 C.F.R. § 102.63(a)(1) (2020)).

56. 84 Fed. Reg. at 69,538 (codified at 29 C.F.R. § 102.63(a)(2) (2020)). The majority noted in their explanation of the amendments that “inasmuch as the failure to timely post the Notice of Petition may be grounds for setting aside the election, providing an extra few days for the employer to comply with this requirement will hopefully minimize the occurrence of objectionable noncompliance.” *Id.* Member McFerran argued in dissent that the majority provided no reasoned explanation for changing the notice period and that its assertion that some larger employers “may face” logistical difficulties posting and distributing the Notice of Petition is “sheer speculation.” *Id.* at 69,572.

57. *Id.* at 69,534 (codified at 29 C.F.R. § 102.63(b)(1) (2020)).

of position three business days prior to the hearing date.⁵⁸ Under the 2014 Rule, the petitioner needs only respond orally at the hearing to the issues raised in the statement of position.⁵⁹

- **Standards for Adjournments and Extensions Are Loosened**—Regional Directors may postpone hearings and/or extend time for submitting Statements of Position for an unlimited amount of time upon a showing of good cause.⁶⁰ Under the current rule, regional directors can grant a request to postpone a hearing and/or extend the time to submit a Statement of Position for up to two business days upon a showing of special circumstances, or for more than two days upon a showing of extraordinary circumstances.⁶¹
- **Unit Issues Will Usually Be Resolved Before Election**—While regional directors maintain some discretion to defer individual eligibility issues until after an election, the parties may generally litigate issues of unit scope and voter eligibility (such as supervisory status) at the pre-election hearing and receive a ruling on those issues prior to the direction of election.⁶²
- **Post-Hearing Briefs Are Back**—Parties may file a post-hearing brief within five business days after the close of the hearing. Currently, briefs are allowed upon special permission of the regional director only.⁶³

58. *Id.* (codified at 29 C.F.R. § 102.63(b)(3)(ii) (2020)).

59. *Id.* at 69,536.

60. *Id.* at 69,534 (codified at 29 C.F.R. § 102.63 (2020)).

61. *Id.*

62. *Id.* at 69,539 (codified at 29 C.F.R. § 102.64(a) (2020)). The majority noted that permitting litigation of issues of eligibility and inclusion at the pre-election hearing and resolving those issues prior to the direction of an election, will better serve the interests of certainty and finality about the voting process. *Id.* at 69,540. For example, failing to resolve supervisory status issues prior to an election can lead to post-election litigation where the putative supervisors engage in conduct that is objectionable when engaged in by a supervisor, but is unobjectionable when engaged in by an employee. *Id.* Resolution of supervisory issues up front can provide the parties with better guidance for the remainder of the election campaign and reduce the possibility of objectionable conduct. *Id.* Likewise, as the majority states, “Having eligibility and inclusion issues litigated and generally resolved before a direction of election will assist the parties in knowing who is eligible to vote and who speaks for management.” *Id.* But see Member McFerran in dissent, arguing that the change is harmful because (1) it will result in unnecessary expense and delay when pre-election hearings are involved; (2) it will delay in litigated cases that do not involve pre-election hearings—approximately ninety percent of the representation cases filed—because the election dates employers are willing to agree to in a stipulated election agreement will be influenced by how long it will take the board to hold an election if the case went to a pre-election hearing; and (3) “some parties will use the threat of protracted litigation to extract other concessions concerning the election details, including the definition of the unit itself, thereby disenfranchising employees.” *Id.* at 69,576–77.

63. *Id.* at 69,543 (codified at 29 C.F.R. § 102.66(h) (2020)).

- ***The Election Date***—The earliest date for an election to be scheduled twenty business days after the direction of election absent agreement of the parties to a shorter period.⁶⁴ The 2014 amendments had eliminated the minimum time period between direction of election and the election.⁶⁵
- ***Right to Post-Election Review***—If either party files a request to review the direction of election within ten business days, and the request has not been ruled upon or granted prior to the election date, all ballots whose validity might be impacted by the request will automatically be impounded.⁶⁶
- ***Employers Have a Longer Time to Submit Voter Lists***—The time for the employer to furnish the voter list is increased from two business days to five business days.⁶⁷
- ***Certifications Will Not Issue If a Request for Review Is Pending***—Certifications will only issue after the time for filing a request for review has expired and/or the Board has ruled on any requests for review.⁶⁸ Under the 2014 Rule, regional directors were empowered to issue certifications notwithstanding pending appeals.⁶⁹
- ***Rules Regarding Observers Have Changed***—Election observers must be members of the voting unit or a current, non-supervisory employee of the employer. This change is designed to clarify the Board's intent, and to overrule any contrary precedent, that non-employee observers should not be permitted.⁷⁰

III. The Legal Challenge to the 2019 Rules

On March 26, 2020, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) filed suit against the NLRB challenging the 2019 Rules in the District Court for the District of Columbia.⁷¹ The AFL-CIO alleged that the NLRB's 2019 Rules

64. *Id.* (codified at 29 C.F.R. § 102.67(b) (2020)).

65. *Id.* at 69,545. The explanation of the amendments states that “[t]he regional director will continue to schedule the election for the earliest date practicable, but—absent waiver by the parties—normally will not schedule an election before the 20th business day after the date of the direction of election.” *Id.* at 69,525.

66. *Id.* at 69,547 (codified at 29 C.F.R. § 102.67(c) (2020)). A party can still file a request for review at a later time, but the pendency of such a request for review will not require impoundment of the ballots. *Id.*

67. *Id.* at 69,590 (codified at 29 C.F.R. § 102.62(d) (2020)).

68. *Id.* at 69,598 (codified at 29 C.F.R. § 102.69(c)(1)(iii) (2020)).

69. *Id.* at 69,596.

70. *Id.* at 69, 551 (codified at 29 C.F.R. § 102.69(a)(5) (2020)).

71. *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. NLRB*, 466 F. Supp. 3d 68, 74 (D.D.C. 2020).

violated the Administrative Procedures Act (APA)⁷² because certain provisions of the 2019 Rules were not merely procedural (which would have exempted them from the APA’s notice-and-comment requirement), but rather, substantive, requiring a notice-and-comment period.⁷³ The AFL-CIO also challenged the 2019 Rules as arbitrary and capricious, “both as a whole, and with respect to specific parts.”⁷⁴ The AFL-CIO also maintained that the 2019 Rules were “inconsistent with the NLRA.”⁷⁵

Three days after filing the lawsuit, the AFL-CIO moved for an injunction against the NLRB, based on the then-pending April 16, 2020, effective date of the 2019 Rules.⁷⁶ At the court’s request, the NLRB delayed effective date of the 2019 Rules to May 31, 2020.⁷⁷

As an initial matter, the NLRB argued that the district court lacked jurisdiction over the APA claims under section 160(f) of the NLRA;⁷⁸ accordingly, the NLRB moved to transfer venue to the D.C. Circuit Court of Appeals.⁷⁹ The AFL-CIO responded that section 160(f) was inapposite. The district court denied the NLRB’s motion, ruling that “section 160(f)’s direct-review provision does not divest the district court of subject matter jurisdiction”⁸⁰

Turning to the merits of the claims, the district court observed that the parties’ “vehement” disagreement as to whether the 2019 Rules were “procedural” or “substantive” was hardly surprising: “the D.C. Circuit, too, ‘ha[s] struggled with the distinction between ‘substantive’ and ‘procedural’ rules.”⁸¹ The district court observed that the distinction between ‘substantive’ and ‘procedural’ rules was “[o]ne of degree[,] rather than kind.”⁸²

Turning to the central issue, the court observed that the APA “separates legislative [or substantive] rules, which have the force and effect

72. *Id.* at 73 (citing Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended 5 U.S.C. §§ 551–59, 701–06.)).

73. *Id.* at 80.

74. *Id.* (citations omitted).

75. *Id.*

76. *Id.*

77. *Id.*; see also Rule Changes in Representation Cases—Effective May 31, 2020, NLRB (May 20, 2020), <https://www.nlr.gov/news-outreach/news-story/rule-change-in-representation-cases-effective-may-31-2020> [<https://perma.cc/TF32-YC6F>].

78. 29 U.S.C. § 160(f) (“Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.”).

79. *Am. Fed’n of Lab. & Cong. of Indus. Orgs.*, 466 F. Supp. 3d at 80.

80. *Id.* at 82.

81. *Id.* at 88 (citing *JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994)).

82. *Id.* (citing *Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 653 F.3d 1, 5 (D.C. Cir. 2011)).

of law, from three types of rules that do not: interpretive rules, general statements of policy, and procedural rules.”⁸³ Then, the court observed that “procedural rules” are “the hardest to define”⁸⁴

Noting that “notice-and-comment rulemaking is *the default* when an agency promulgates a rule, while ‘the various exceptions’ are to ‘be narrowly construed and only reluctantly countenanced,’”⁸⁵ the district court also held that “no fair assessment of the regulatory provisions leads to the conclusion that the challenged parts of the 2019 Election Rule are merely procedural rules.”⁸⁶ Accordingly, the court’s order granted summary judgment in favor of the AFL-CIO as to the following five provisions contained in the December 2019 amendments:

- Reinstitution of pre-election hearings for litigating eligibility issues;⁸⁷
- Timing of the date of election;⁸⁸
- Voter list timing;⁸⁹
- Election observer eligibility,⁹⁰ and
- Timing of regional director certification of representatives.⁹¹

Both sides filed for reconsideration of the ruling. The AFL-CIO objected to the portions of the 2019 Rule that the district court found valid, and the NLRB objected to the portions of the 2019 Rule that the district court enjoined. Specifically, the AFL-CIO asked that the court of appeals uphold the district court’s decision that the five provisions were not procedural and thus, were unlawfully promulgated under the APA and that the court of appeals reverse the district court’s decision that the 2019 rules as a whole were not arbitrary and capricious.⁹² The Board requested that the court of appeals overrule the district court’s findings, conduct a direct review and find that the five challenged provisions fall within the procedural exception.⁹³ According to the docket available on Westlaw, oral arguments were heard on May 14, 2021,

83. *Id.* at 87 (citing *Planned Parenthood of Wis., Inc. v. Azar*, 316 F. Supp. 3d 291, 304 (D.D.C. 2018), *vacated as moot*, 942 F.3d 512, 519 (D.C. Cir. 2019)).

84. *Id.* (citing *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)).

85. *Id.* at 89 (citing *N.J. Dep’t of Env’t Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)).

86. *Id.* at 82.

87. *Id.* at 94.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 93.

92. Principal and Response Brief of Appellee/Cross-Appellant American Federation of Labor and Congress of Industrial Organizations at 60, *NLRB v. Am. Fed’n of Lab. & Cong. of Indus. Orgs.*, Nos. 20-5226, 20-5223, 2021 WL 1056437 (D.C. Cir. Mar. 19, 2021).

93. Principal Brief of Appellant/Cross Appellee at 68, *NLRB v. Am. Fed’n of Lab. & Cong. of Indus. Orgs.*, Nos. 20-5223, 20-5226, 2021 WL 1102575 (D.C. Cir. Mar. 19, 2021).

before the Court of Appeals for the D.C. Circuit, and a transcript of the oral arguments was entered on June 7, 2021.

On June 1, 2020, the NLRB announced that it would implement the all the rules unaffected by the district court's order. In so announcing, the NLRB observed: "While the Court's order prevents the Board from implementing five provisions of the December 2019 amendments, the Court did not vacate the majority of the rule."⁹⁴ Those rules included the following:

- Scheduling the hearing at least fourteen days from issuance of the notice of hearing;
- Posting the notice of election within five days instead of two days;
- Changes in timeline for serving the non-petitioning party's statement of position;
- Requiring petitioner to serve a responsive statement of position;
- Reinstatement of Post-Hearing Briefs;
- Reinstating Regional Director discretion on the timing of a notice of election after the direction of an election;
- Ballot impoundment procedures when a request for review is pending;
- Prohibition on bifurcated requests for review;
- Certain changes in formatting for pleadings and other documents; and
- Terminology changes and defining days as "business" days.⁹⁵

Contemporaneously with the NLRB announcement, the NLRB's General Counsel issued a GC Memorandum providing additional details to the regional offices regarding implementation of the rules.⁹⁶

IV. Future Rule-Making

On July 28, 2020, the NLRB published a Notice of Proposed Rulemaking in which it proposed two additional amendments to its representation rules.⁹⁷

The first proposed amendment would eliminate the requirement from the 2014 Rules that employers provide the regional director and

94. NLRB to Implement All Election Rule Changes Unaffected by Court Ruling, NLRB (June 1, 2020), <https://www.nlr.gov/news-outreach/news-story/nlr-to-implement-all-election-rule-changes-unaffected-by-court-ruling> [<https://perma.cc/CBF7-NNMP>].

95. *Id.*

96. NLRB GC MEMORANDUM 20-07 (2020), <https://apps.nlr.gov/link/document.aspx/09031d458311d384>.

97. Notice of Proposed Rulemaking, 85 Fed. Reg. 45,553, 45,553 (July 29, 2020).

the parties with eligible voters' personal email addresses, home phone number, and personal cell phone number.⁹⁸ The Board, which was then comprised only of Republican-appointed members,⁹⁹ believed that the current voter list requirement "affords insufficient weight to employee privacy interests, and that eliminating the required disclosure of personal email addresses and personal telephone numbers will redress this imbalance."¹⁰⁰

The second proposed amendment would provide for absentee ballots for employees on military leave.¹⁰¹ The Board believed that it should maximize the opportunity for otherwise-eligible voters on military leave to participate in Board-conducted elections."¹⁰² Currently, no employees are permitted to vote in an NLRB election via absentee ballot, and the Board did not propose extending this right to any employee other than those on military leave. The Board invited public comments on both proposed rules.

Conclusion

Regardless of perspective, the Trump Board's modifications to NLRB representation case procedures through rule-making are sure to be one of the its most significant developments. No doubt that legal challenges will continue, and no doubt that the Biden Board, once fully in place, will revert to the 2014 Rules.

98. *Id.* at 45,554

99. *Members of the NLRB Since 1935*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/the-board/members-of-the-nlr-since-1935> [https://perma.cc/GV9T-8BSS].

100. 85 Fed. Reg. at 45,554.

101. *Id.*

102. *Id.*

Appendix A¹⁰³

Procedures Before April 14, 2015	Procedures Effective April 14, 2015
Parties cannot electronically file election petitions. Parties and NLRB regional offices do not electronically transmit certain representation case documents.	Election petitions, election notices and voter lists can be transmitted electronically. NLRB regional offices can deliver notices and documents electronically, rather than by mail.
The parties and prospective voters receive limited information.	Parties will receive a more detailed description of the Agency’s representation case procedures, as well as a Statement of Position form, when served with the petition. The Statement of Position will help parties identify the issues they may want to raise at the pre-election hearing. A Notice of Petition for Election, which will be served with the Notice of Hearing, will provide employees and the employer with information about the petition and their rights and obligations. The Notice of Election will provide prospective voters with more detailed information about the voting process.
The parties cannot predict when a pre- or post-election hearing will be held because practices vary by Region.	The Regional Director will generally set a pre-election hearing to begin eight days after a hearing notice is served and a post-election hearing twenty-one days after the tally of ballots.
There is no mechanism for requiring parties to identify issues in dispute.	Non petitioning parties are required to identify any issues they have with the petition, in their Statements of Positions, generally one business day before the pre-election hearing opens. The petitioner will be required to respond to any issue raised by the non-petitioning parties in their Statements of Positions at the beginning of the hearing. Litigation inconsistent with these positions will generally not be allowed.
The employer is not required to share a list of prospective voters with the NLRB’s regional office or the other parties until after the regional director directs an election or approves an election agreement.	As part of its Statement of Position, the employer must provide a list of prospective voters with their job classifications, shifts and work locations, to the NLRB’s regional office and the other parties, generally one business day before the pre-election hearing opens. This list will help the parties narrow the issues in dispute at the hearing or enter into an election agreement.

103. Reprinted with minor modifications from *NLRB Representation Case-Procedures Fact Sheet*, NLRB, <https://www.nlr.gov/news-publications/publications/fact-sheets/nlr-representation-case-procedures-fact-sheet> (last visited Feb. 17, 2022).

<p>Parties may insist on litigating voter eligibility and inclusion issues that do not have to be resolved in order to determine whether an election should be held.</p>	<p>The purpose of the pre-election hearing is clearly defined, and parties will generally litigate only those issues that are necessary to determine whether it is appropriate to conduct an election. Litigation of a small number of eligibility and inclusion issues that do not have to be decided before the election may be deferred to the post-election stage. Those issues will often be mooted by the election results.</p>
<p>Parties may file a brief within seven days of the closing of the pre-election hearing, with permissive extensions of fourteen days or more.</p>	<p>Parties will be provided with an opportunity to argue orally before the close of the hearing, and written briefs will be allowed only if the regional director determines that they are necessary.</p>
<p>Parties waive their right to challenge the regional director's pre-election decision if they do not file a request for review before the election. This requires parties to appeal issues that may be rendered moot by the election results.</p>	<p>Parties may wait to see whether the election results have made the need to file a request for review of the regional director's pre-election decision unnecessary and they do not waive their right to seek review of that decision if they decide to file their request after the election.</p>
<p>Elections are delayed twenty-five to thirty days to allow the Board to consider any request for review of the regional director's decision that may be filed. This is so even though such requests are rarely filed, even more rarely granted and almost never result in a stay of the election.</p>	<p>There will be no automatic stay of an election.</p>
<p>The Board is required to review every aspect of most post-election disputes, regardless of whether any party has objected to it.</p>	<p>The Board is not required to review aspects of post-election regional decisions as to which no party has raised an issue, and the Board may deny review consistent with the discretion it has long exercised in reviewing pre-election rulings.</p>
<p>The voter list provided to non-employer parties to enable them to communicate with voters about the election includes only names and home addresses. The employer must submit the list within seven days of the approval of an election agreement or the regional director's decision directing an election.</p>	<p>The voter list will also include personal phone numbers and email addresses (if available to the employer). The employer must submit the list within two business days of the regional director's approval of an election agreement or decision directing an election.</p>

Appendix B

Procedures Effective April 14, 2015	Procedures Effective April 16, 2020
Election petitions, election notices and voter lists can be transmitted electronically. NLRB regional offices can deliver notices and documents electronically, rather than by mail.	No Change.
Parties will receive a more detailed description of the Agency's representation case procedures, as well as a Statement of Position form, when served with the petition. The Statement of Position will help parties identify the issues they may want to raise at the pre-election hearing. A Notice of Petition for Election, which will be served with the Notice of Hearing, will provide employees and the employer with information about the petition and their rights and obligations. The Notice of Election will provide prospective voters with more detailed information about the voting process.	No Change, except that employers have additional time (five business, as opposed to two calendar, days to post the Notice of Petition for Election).
The Regional Director will generally set a pre-election hearing to begin eight days after a hearing notice is served and a post-election hearing twenty-one days after the tally of ballots.	The pre-election hearing now will generally take place fourteen business days from the notice of hearing.
Non petitioning parties are required to identify any issues they have with the petition, in their Statements of Positions, generally one business day before the pre-election hearing opens. The petitioner will be required to respond to any issue raised by the non-petitioning parties in their Statements of Positions at the beginning of the hearing. Litigation inconsistent with these positions will generally not be allowed.	Non-petitioning parties will have eight business days after service of the notice of hearing to file and serve their Statement of Position. Petitioners will also be required to file and serve a Statement of Position on the other parties responding to the issues raised by any non-petitioning party in a Statement of Position. The responsive Statement of Position will be due three business days before the hearing is scheduled to open (which is also three business days after the initial Statement(s) of Position must be received), at noon.
As part of its Statement of Position, the employer must provide a list of prospective voters with their job classifications, shifts and work locations, to the NLRB's regional office and the other parties, generally one business day before the pre-election hearing opens. This will help the parties narrow the issues in dispute at the hearing or enter into an election agreement.	No change. However, employer will have five business days to furnish the required voter list. Under the current rule, the employer has only two business days to provide the list.

<p>The purpose of the pre-election hearing is clearly defined, and parties will generally litigate only those issues that are necessary to determine whether it is appropriate to conduct an election. Litigation of a small number of eligibility and inclusion issues that do not have to be decided before the election may be deferred to the post-election stage. Those issues will often be mooted by the election results.</p>	<p>Challenged voters will be litigated at the pre-election hearing and generally resolved by the regional director before an election is directed. The parties can agree to permit disputed employees to vote subject to challenge and defer litigation until after the election.</p>
<p>Parties will be provided with an opportunity to argue orally before the close of the hearing, and written briefs will be allowed only if the regional director determines they are necessary.</p>	<p>Parties will be entitled to file post-hearing briefs with the regional director after pre-election and post-election hearings. Briefs will be due within five business days of the close of the hearing, although hearing officers may grant an extension.</p>
<p>Parties may wait to see whether the election results have made the need to file a request for review of the regional director's pre-election decision unnecessary and they do not waive their right to seek review of that decision if they decide to file their request after the election.</p>	<p>No Change.</p>
<p>There will be no automatic stay of an election.</p>	<p>If either party files a request to review the direction of election within ten business days, and the request has not been ruled upon or granted prior to the election date, all ballots whose validity might be impacted by the request will automatically be impounded.</p>
<p>The Board is not required to review aspects of post-election regional decisions as to which no party has raised an issue, and may deny review consistent with the discretion it has long exercised in reviewing pre-election rulings.</p>	<p>No Change.</p>
<p>The voter list will also include personal phone numbers and email addresses (if available to the employer). The employer must submit the list within two business days of the regional director's approval of an election agreement or decision directing an election.</p>	<p>The time for the employer to furnish the voter list is increased from two business days to five business days.</p>