UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF LABOR – CONGRESS OF INDUSTRIAL ORGANIZATIONS,	
Plaintiff,	
v.	**Case No. 20-cv-000675-KBJ**
NATIONAL LABOR RELATIONS BOARD,	**Motion hearing set for 5/14/2020 at 10:30 a.m.**
Defendant.	

DEFENDANT NATIONAL LABOR RELATIONS BOARD'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY PLAINTIFF AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutions

Regulations

Other Authorities

The National Labor Relations Board ("NLRB" or "Board") submits the following Opposition to the Motion for Summary Judgment filed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") [Doc. 23]. To avoid repetition, this targeted Opposition will primarily address AFL-CIO's arguments that were not already addressed in the Board's Memorandum in Support of Summary Judgment [Doc. 22-1, "Board MSJ Memo", p. --]. In response to arguments in AFL-CIO's Motion that are not addressed in the instant Opposition, the Board refers the Court to the Board's Memorandum in Support.

I. The Board Properly Determined that the 2019 Amendment Is Procedural, Not Substantive

1. There is no merit to AFL-CIO's contention that the Board's action, *Representation-Case Procedures*, 84 Fed. Reg. 69,524 (Dec. 18, 2019) ("2019 Amendment"), required notice and comment because the changes are substantive. [Doc. 23-1, "AFL-CIO MSJ Memo", pp. 12-13]. The procedural exception to the notice-and-comment requirement "covers agency actions that do not themselves alter the rights or interests of parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency." *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980). "[A]n otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties." *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000). Rather, when assessing whether a procedural change is so burdensome that it is really a substantive change, the question is whether the rule "creat[es] extreme procedural hurdles that foreclose fair consideration of the underlying controversy." *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983). A rule, then, is substantive where it has "the intent and effect of changing substantive outcomes." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1048 (D.C. Cir. 1987).

Here, none of the changes challenged by AFL-CIO in the 2019 is so burdensome that they either foreclose fair consideration of the underlying controversy or have the intent or effect of changing the substantive outcome of the elections. 84 Fed. Reg. at 69,528-829. For that matter, the Board's 2014 election case amendments also had no such effect upon substantive outcomes either. *Representation-Case Procedures,* 79 Fed. Reg. 74,308, at 74,326 n.83 (Dec. 14, 2014) ("2014 Rule") (Board specifically disavowed any such objective to "stack the deck"). In fact, it is undisputed that the 2014 Rule changes to the Board's election rules had *no effect on union win rates*. 84 Fed. Reg. at 69,528 & n.17. Accordingly, there is no evidence and can be no valid argument that the 2019 Amendment changes, which largely revert back to pre-2014 Rule procedures, will change the substantive outcome of elections or foreclose fair consideration of the underlying controversies. The question for the Board concerning the 2014 Rule and the 2019 Amendment has been how to best balance speed against accuracy and fairness in decisionmaking in representation cases. The current Board has simply made a different "judgment about what mechanics and processes are most efficient," accurate and fair than its predecessor. *Hurson*, 229 F.3d at 282. Specifically, it has determined that permitting, for instance, additional disputed issues to be resolved at pre-election hearings, provides a fairer and more accurate "consideration of the underlying controvers[ies]." *Lamoille Valley,* 711 F.2d at 328. This does not mean that the current Board or its predecessor were attempting to "encode[] a *substantive* value judgment" designed to change substantive outcomes. *Bowen*, 834 F.2d at 1047 (emphasis added).

2. AFL-CIO contends that the 2019 Amendment, specifically Amended Section 102.64(a), is substantive insofar as it adds additional factors "to what may be litigated and what must be decided by the [Regional Director] prior to directing an election." [AFL-CIO MSJ Memo, p. 15]. But for the reasons explained in the Board's motion for summary judgment

[Board MSJ Memo, p. 11], questions about the scope of the unit and the eligibility of voters must be decided at some point in the process; moving those decisions from after the election to before it does not change the elements required for a union to obtain a certification of representative. Thus, this case poses a clear contrast with *Mendoza v. Perez*, 754 F.3d 1002, 1024 (D.C. Cir. 2014) [AFL-CIO MSJ Memo, p. 12], where the D.C. Circuit found that where the agency effectively relaxed legal requirements for employers to sponsor a particular kind of employment visa, that change was substantive and required notice and comment.

What's more, AFL-CIO incorrectly contends that the Amendment is substantive because it grants parties the "right to an RD decision" on unit scope and voter eligibility. [AFL-CIO MSJ Memo, p. 15 n.12]. This is wrong, because Regional Directors remain authorized to defer voter-eligibility and supervisory-status issues to post-election proceedings, now when up to ten percent of a bargaining unit is in question:

> [W]e are not imposing a requirement that, absent agreement of the parties to the contrary, all eligibility issues must be resolved prior to an election . . . as a general rule, when regional directors consider the need to defer some properly-raised eligibility and inclusion issues, they should adhere to the general pre-2014 practice of limiting deferral of inclusion and exclusion issues to 10 percent of the proposed unit.

84 Fed. Reg. at 69,541. Moreover, Amended Section 102.64(a) is not framed in mandatory terms for all elections ("Disputes concerning unit scope, voter eligibility and supervisory status *will normally* be litigated and resolved by the Regional Director before an election is directed.") (emphasis added), and thus creates no "right" to anything.[1]

[1]AFL-CIO cites to *Nat'l Ass'n of Waterfront Emp'rs v. Solis*, 665 F. Supp. 2d 10, 17 (D.D.C. 2009), to support its position that this portion of the 2019 Amendment creates "informational rights" that render the rule "substantive." [AFL-CIO MSJ Memo, p. 18]. In that case, however, the agency's rule categorically *excluded* certain information, the names of claimants, from the public domain. The court, in finding the rule substantive, relied largely on the policies promoting public access to administrative records. *Id.* The 2019 Amendment is distinguishable—it merely changes the *order* in which certain determinations (specifically, eligibility issues) are made by the Agency. Further,

3. AFL-CIO's renewed claim that Amended Section 102.67(b) is substantive also has no merit. [AFL-CIO MSJ Memo, pp. 18-20]. That provision states that "unless a waiver is filed, the Regional Director will normally not schedule an election before the 20th business day after the date of the direction of election."[2] 84 Fed. Reg. at 69,595. To reiterate, Amended Section 102.67(b) is a procedural rule not just because its *justification* is procedural (although that is true); rather, the *actual effect* does not alter what a representation case determines—namely, the answer to a question of representation. 29 U.S.C. § 159(c)(1)(B). This provision merely changes dates and timelines; no electioneering activity is made legal which was previously illegal, or vice versa. The Amendment is thus not meaningfully distinguishable from the altered case timelines upheld by the D.C. Circuit as procedural in *Lamoille Valley*, 711 F.2d at 326-28.[3]

II. The Board's 2019 Amendment Is Not Arbitrary and Capricious as a Whole

4. Perhaps the most significant flaw in AFL-CIO's argument is that it has failed to confront the Supreme Court's consistent direction that the Board possesses "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330

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no information is being *withheld* from the public, and therefore the Amendment does not implicate the policy concerns animating the court's decision.

[2] AFL-CIO analogizes this provision to changing the dates of federal elections from November to October. [AFL-CIO MSJ Memo, p. 20]. But political-election dates are set by statute, and Congress could alter Election Day at any time by duly passing and enacting such a statute. U.S. CONST. art. I, § 4, cl. 1; art. II § 1, cl. 4. Statutes are not required to undergo notice and comment under any circumstances; thus, there is no legal distinction between "procedural" and "substantive" statutes analogous to the APA's distinction between procedural and substantive rules. Asking whether a statute is "procedural" makes about as much sense as asking whether colorless green ideas really do sleep furiously. NOAM CHOMSKY, SYNTACTIC STRUCTURES 15 (1957).

[3] As for AFL-CIO's arguments that the Amendment's provisions concerning the time frame to produce the voter list (Amended Section 102.67(l)), the selection of observers (Amended Section 102.69(a)(5)), and the issuance of election certifications (Amended Section 102.69(b) and (c)) are substantive [AFL-CIO MSJ Memo, pp. 21-26], the Board relies on the arguments set forth in its memorandum in support of its own Motion for Summary Judgment [Board MSJ Memo, pp. 14-17].

(1946). The "broad" and "general" statutory requirements in Section 9 reflect Congress's understanding that the Board has "great latitude concerning procedural details." *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 706 (1945). Thus, the Board may make "such formal rules of procedure [it] may find necessary to adopt in the sound exercise of its discretion." *A.J. Tower*, 329 U.S. at 333; *see also NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940) ("The control of election proceedings, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone."). And the D.C. Circuit's law is consistent with this wide discretion. *See Union of Concerned Scientists v. NRC*, 920 F.2d 50, 54 (D.C. Cir. 1990) (where the process is uniquely discretionary, greater deference is required). The fact that AFL-CIO has not, at least as of yet, cited to this key case law speaks volumes.

5. And so, instead of addressing this larger context in which the Board promulgates its election rules, AFL-CIO erroneously claims that "'the [Board] offers no evidence suggesting' the problem its rule seeks to address exists," [AFL-CIO MSJ Memo, p. 30], quoting *Sorenson Commc'ns, Inc. v. FCC*, 755 F.3d 702, 707–08 (D.C. Cir. 2014). *Sorenson* involved a series of FCC rules designed to prevent fraud. The court struck down these rules as arbitrary and capricious because there was "no evidence of [existing] fraud" nor "anything in the record" showing how the rules would deter fraud. 755 F.3d at 707.

Here, by contrast, the Board identified specific problems with the existing rules, and explained its duty under *A.J. Tower* to provide not only for the speedy resolution of questions of representation, but the accurate and efficient resolution of those issues as well. 84 Fed. Reg. at 69,524; *see A.J. Tower Co.*, 329 U.S. at 331. This case is nothing like *Sorenson*, because the Board carefully provided reasoned explanations as to how its 2019 Amendment addresses those concerns. As one example, the Board exhaustively examined its existing precedent regarding

election observers, and determined that this approach had created a body of caselaw "riddled with inconsistencies." 84 Fed. Reg. at 69,552. To address the confusion created by this conflicting precedent, the 2019 Amendment adopted more of a bright-line approach, strongly favoring the use of employees in the bargaining unit. *Id.* In short, the Board identified a problem, supported it with specific examples, and provided a rational explanation how the Amendment would address this problem. *See also, e.g., id.* at 69,529 & nn.19-20 (identifying cases where deferring determination of status issues until after election had caused unnecessary delay).

AFL-CIO's citation to *Natural Resources Defense Council, Inc. v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985) [AFL-CIO MSJ Memo, p. 30], proves equally unhelpful to its cause. There, the D.C. Circuit approved the Department of Energy's use of a particular predictive model in its regulation of energy-efficient appliances. Although an agency "may not tolerate needless uncertainties in its central assumptions when the evidence fairly allows investigation and solution of those uncertainties," the D.C. Circuit nonetheless upheld that predictive model because the underlying information was "'fragmentary,' . . . conflicting, and ultimately susceptible to different interpretations." *Id.* at 1387. Further, the agency committed to updating its position in the face of new information. *Id.* at 1390. The Board here attempted to balance sometimes conflicting goals, and the Agency's past experience is similarly susceptible to different interpretations. *See* 84 Fed. Reg. at 69,524 (explaining that the Board made its latest revisions based on stakeholder concerns as well as its own independent review of the 2014 Rule). Therefore, it has made the same commitment to update its rule in light of its ongoing experience and expertise, 84 Fed. Reg. at, 69,534 n.48, and the Board's 2019 Amendment should likewise be upheld.

6. AFL-CIO asserts that the Board did not "address *any* empirical data concerning the impact of the current rule." [AFL-CIO MSJ Memo, p. 31] (emphasis added). The Board, however, permissibly relied on its expertise and judgment in promulgating the 2019 Amendment; it explained that the data pointed out by dissenting Member McFerran was irrelevant to the issues the Board sought to address, such as increasing the rate of stipulated elections, and giving employers more time to compile voter lists, in order to make those lists more accurate and thereby decrease the chances of rerun elections. [Board MSJ Memo, p. 23 (citing *Chamber of Commerce of U.S. v. Sec. & Exch. Comm'n,* 412 F.3d 133, 142 (D.C. Cir. 2005)].

Moreover, it is simply untrue that the Board ignored *all* empirical data, as AFL-CIO claims. For example, the Board analyzed the rate of election agreements following the 2014 Rule and noted that the 2014 Rule had effected essentially no change in that rate. 84 Fed. Reg. at 69,528 & n.16. Determined to do better, the Board promulgated certain changes to facilitate more election agreements, including by extending the period of time between the filing of the petition and the pre-election hearing, and by requiring petitioning parties to submit a responsive Statement of Position. 84 Fed. Reg. at 69,525, 69,533, 69,537. The Board is also permitting parties to agree that employees whose eligibility status is disputed may vote subject to challenge, thereby deferring (and potentially mooting) litigation about such disputes until after the election. *Id.* at 69,525, 69,541; Amended Section 102.64(a). "Given the Act's fundamental interest in promoting agreement between the parties," the Board revised its election procedures to achieve this statutory goal. 84 Fed. Reg. at 69,530 n.21. These election agreements, as the Board explained, also conserve the resources of parties and the agency by avoiding the costs associated with unnecessary hearings. 84 Fed. Reg. at 69,533. Put simply, the Board "examine[d] the

relevant data," and gave reasoned explanations for the decisions it made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

7. AFL-CIO further contends that the Board's "categorical refusal to consider evidence about the operation of the current rule leads [it] to make assertions that are demonstrably false," citing the Board's decision to permit litigation of eligibility and supervisory status issues at pre-election hearings. [AFL-CIO MSJ Memo, p. 33]. Again, AFL-CIO misses the mark. The Board *did* consider evidence regarding how the 2014 Rule has operated, citing to several examples of cases where a speedier election did not result in finality or the most efficient resolution of the question of representation. 84 Fed. Reg. at 69,529, nn.19-20; *see U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 626 (D.C. Cir. 2016) (agency need only "provide a reasoned explanation for discounting the importance of the facts that it had previously relied on"). As discussed above, the Board also cited to the statistics on the effect on the substantive outcome of elections of these type of procedural changes. 84 Fed. Reg. at 69,528 & n.17. The Board accordingly balanced several competing policies and determined that the benefits gained in finality and certainty outweighed the costs to speed with no effect on substantive outcome.[4] *Id.* at 69,529-30. AFL-CIO's disagreement with the Board's balancing of these policies does not make the Board's actions "demonstrably false"— rather, it is simply an attempt to substitute its own preferred result for the Board's reasoned judgment.

8. AFL-CIO's true objection appears not to rest on the Board's use of information, but rather, on the substantive conclusions it has drawn from this information and its collective experience. AFL-CIO's disagreement here falls far short of establishing that the 2019

[4] Citing to a study it commissioned from Professor John-Paul Ferguson, AFL-CIO contends that the 2014 Rule is "associated with a significant decrease in the time between . . petition and the closing of cases." [AFL-CIO MSJ Memo, p. 34, citing Ferguson Report at 1]. The Board did not quarrel with this finding and recognized that the 2019 Amendment would lengthen the timeline of many cases. 84 Fed. Reg. at 69,528.

Amendment is arbitrary and capricious as a whole. Where, as here, the Board is balancing competing objectives in its policymaking, the agency's regulatory decision is valid if it "reasonably advances at least one of those objectives and its decisionmaking process was regular." *U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227, 233 (D.C. Cir. 2000) (internal quotations omitted). As discussed above at pp. 1-4, the Board permissibly exercised its procedural rulemaking authority under the APA. And it carefully explained its balancing of competing policy considerations that guided the Board's promulgation of the 2019 Amendment. 84 Fed. Reg. at 69,528. Especially considering the heightened deference the Board is granted in promulgating election rules [*see above* at pp. 4-5*; see also* Board MSJ Memo, pp. 4, 18, 20], the Amendment is not arbitrary and capricious.

III. The Specific Provisions Challenged by AFL-CIO as Arbitrary and Capricious Do Not Satisfy This High Standard

A. Litigation of Eligibility and Inclusion Issues at Pre-election Hearing

9. AFL-CIO's arguments regarding litigating issues at the pre-election hearing echo those arguments that it made in support of its request for preliminary injunction and that the Board addressed in its opening Memorandum. For the reasons already addressed, the Board's decision to address eligibility and inclusion issues at the pre-election hearing was rational and struck an appropriate balance of the competing interests of speed, accuracy, finality, and efficiency. [Board MSJ Memo, pp. 25–30]. And, as recognized by AFL-CIO, this was the common practice of the Board for two decades prior to the 2014 Rule. [AFL-CIO MSJ Memo, p. 4].

B. Twenty-day Minimum Period Between the Decision and Direction of Election ("DDE") and the Actual Election

10. AFL-CIO's contention that the twenty-day minimum time frame between the issuance of the DDE and the election is arbitrary and capricious rests largely on grounds that

were contained in its request for a preliminary injunction and already discussed and rebutted in the Board's Memorandum in Support of Summary Judgment. [Board MSJ Memo, pp. 30-31]. As discussed previously, the Board has historically adjusted these timeframes, based on competing considerations of finality, certainty, and efficiency. 84 Fed. Reg. at 69,545 & n.88. The Board conducted a similar reasoned balancing here in determining the twenty-day minimum timeframe. *Id.*

11. AFL-CIO's only new contention is that this extension of time is somehow irrational because, consistent with the 2014 Rule, parties are not required to file a request for review prior to the election. [AFL-CIO MSJ Memo, p. 36]. This contention is meritless. AFL-CIO is correct that parties were required to file requests for review prior to elections under the pre-2014 Rule (when a similar required minimum time-period between the DDE and election was in effect) (29 C.F.R. § 102.21(d) (2014)); but this difference hardly renders the minimum twenty-day period between DDE and election arbitrary and capricious.

The Board explained its reasoning for this position, namely, that it wanted to provide all parties the flexibility to decide when and if to file requests for review. 84 Fed. Reg. at 69,545. The Board retained the 2014 Board's innovation of permitting two avenues for requests for review. First, a party may file a request for review *before* an election in order to seek a determination of contested issues, and thereby gain the benefits of "finality and certainty." *Id.* Or a party may wait until *after* the election to see if the issues that might be raised in a request for review would actually impact the election results.[5] And so, because the election results may "moot the arguments an aggrieved party would otherwise raise," the Board's considered choice to allow parties to file a request for review after the election promotes efficiency. 84 Fed. Reg. at

[5] A party has "10 business days after a final disposition of the proceeding by the Regional Director"—typically, a tally of ballots—in which to file a request for review. Amended Section 102.67(c).

69,547. The Board explicitly recognized that each request for review avenue serves different purposes and creates different advantages; consequently, allowing both options best serves "the project of balancing the competing policy interests." *Id.* at 69,549 n.99. These are clearly permissible policy choices by the Board and represent a rational balancing of interests. *U.S. Sugar Corp*, 830 F.3d at 626.

C. Observers

12. AFL-CIO's arguments regarding the election observer changes repeat the same arguments already addressed in the Board's Memorandum in Support of Summary Judgment. As stated earlier, these changes rectify confusion created by the Board's disparate prior precedents and provide clear guidance going forward regarding who could serve as an election observer. [Board MSJ Memo, pp. 34–37].[6]

13. The only notable change from AFL-CIO's complaint and preliminary injunction memorandum is that AFL-CIO is no longer making its prior argument that the Board overruled this precedent "*sub silentio*." [Doc. 1, p. 12, ¶ 65 and PI Memo, p. 24 n.18]. Further, AFL-CIO now acknowledges that the Board's new observer regulation overruled "numerous Board decisions." [AFL-CIO MSJ Memo, p. 23; *see id.* p. 22]. As AFL-CIO is no longer pressing its *sub silentio* claim, that argument is now abandoned. *See Styrene Info. & Research Ctr., Inc. v. Sebelius*, 944 F. Supp. 2d 71, 83 (D.D.C. 2013) (claims in complaint abandoned when not raised in summary judgment briefs); *Noble Energy, Inc. v. Salazar*, 691 F. Supp. 2d 14, 23 (D.D.C. 2010) (same). And even if the argument has not been abandoned by AFL-CIO, the Board's

[6] AFL-CIO's citation to the NLRB Case Handling Manual as providing a "right" to select an observer [AFL-CIO MSJ Memo, p. 6] is incorrect. The General Counsel issues the Agency's internal Case Handling Manual only to "provid[e] nonbinding guidance for the agency's staff members." *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996); *see also Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182 (D.C. Cir. 2000).

recognition that it is changing policies, and its explanation of reasons for doing so, establish that these changes are not arbitrary and capricious. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

D. Ballot Impoundment

14. AFL-CIO calls "incredibl[e]" the Board's finding that impounding ballots '"promotes transparency.'" [AFL-CIO MSJ Memo, p. 39 (citing 84 Fed. Reg. at 69,526)]. AFL-CIO, however, ignores the Board's reasoned explanation for this change.

The Board explained, immediately following the provision quoted by AFL-CIO, that impoundment promotes transparency regarding the ballot tally because it removes the possibility that the Board's granting of a request for review would invalidate a tally. 84 Fed. Reg. at 69,526. This is patently reasonable. There is nothing truly "transparent" about issuing a tally of ballots that is relied on by the parties, only to later have that tally later invalidated. Indeed, as the Board explained, "impoundment of [] ballots will reduce the possibility of confusion where results are announced . . . but then the Board's subsequent ruling nullifies or alters the results." *Id.* at 69,548. Of course, if ballots are impounded, the parties will not know the results of the vote immediately, but this change removes the misleading transparency created by making public a tally that may ultimately be overturned. This is a reasonable choice, despite AFL-CIO's disagreement.

15. AFL-CIO next claims that the impoundment rule "places employers in an impossible position" because they will be unsure whether they are privileged to make unilateral changes while a request for review is pending. [AFL-CIO MSJ Memo, p. 40]. This is not, however, a consequence of the Board's impoundment rule; rather, it is the state of affairs *regardless of whether ballots are impounded.* AFL-CIO seemingly concedes this fact by acknowledging that "the employer's duty to bargain relates back *to the date of the election*" even

while a request for review is pending. [AFL-CIO MSJ Memo, p. 40 (quoting *Mission Foods*, 350 NLRB 336, 346 (2007) (emphasis in original))]. Employers place themselves in this position by virtue of exercising their right to file a request for review with its attendant uncertainty, regardless of whether the ballots are impounded. [*See* Board MSJ Memo, pp. 33-34].

Perhaps recognizing this weakness, AFL-CIO goes on to assert that the uncertainty created by the employer not knowing "whether employees vote for representation in the first instance[] raises that uncertainty to an entirely different level," thereby making it "more likely that the employer will guess wrong and make unilateral changes that will frustrate later collective-bargaining." [AFL-CIO MSJ Memo, p. 40]. Whether a union prevails in the vote, or the margin of its victory, however, simply does not change the ultimate determination of legal rights and obligations. If there is a pending request for review, an employer will act at its peril in making unilateral changes—*regardless of the impoundment procedure*. And, in any event, it is the employer's choice in this situation whether to trigger impoundment by filing the request for review within ten business days of the election, or whether to wait until later in the process and not trigger automatic impoundment. [Board MSJ Memo, pp. 33-34].

16. AFL-CIO further claims that a ballot impoundment requiring the Board to decide an issue that may be moot is irrational. [AFL-CIO MSJ Memo, pp. 40-41]. The Board, however, recognized that this result could occur in isolated cases and reasonably determined that the benefits of deciding potentially moot cases outweighed the costs under the current procedures. [Board MSJ Memo, pp. 31-34]. The benefits of finality and certainty that flow from ensuring that issues affecting the election results are resolved *before* the ballots are revealed are substantial, as the Board explained. Impoundment allows all ballots to be comingled and counted at one time, once the remaining issues have been resolved. 84 Fed. Reg. at 69,548

(Amended 29 C.F.R. § 102.67(c)). It largely obviates situations in which election results are announced to the parties but are later rescinded— thereby "reduc[ing] the possibility of confusion." 84 Fed. Reg. at 69,548. The impoundment provision also preserves the important interest of ballot secrecy, both as to challenged ballots of individual voters and as to the sentiments of the entire proposed bargaining unit. *Id.* Finally, impoundment promotes efficiency, as it prevents the possibility of re-run elections in situations where ballots have been improperly comingled. *Id.* These are all important interests, and plainly demonstrate that the Board's impoundment provision is far from irrational.

Moreover, in its 2019 Amendment, the Board developed procedures to avoid deciding mooted cases. The Board "strictly limited" the impoundment rule to requests for review filed within ten business days of the DDE—thereby requiring the parties to decide whether to exercise this right well before the election and limiting the circumstances in which impoundment of all ballots occurs to request. 84 Fed. Reg. at 69,547. The Board also retained the 2014 Board's innovation of allowing parties to file requests for review *after* an election—thereby lessening the likelihood of having to decide mooted cases. *Id.* (noting "significant inducement" for parties to wait until after election to file requests for review).[7] Contrary to AFL-CIO's assertion, the Board recognized the potential mootness issue created by the impoundment procedure. The Board balanced the costs to "promptness and efficiency" caused by deciding potentially mooted issues with the benefits gained in "finality and certainty" through impoundment. *Id.* at 69,548. Its judgment is reasonable, particularly in light of the conflicting objectives that the Board must serve in determining how best to run elections. *SoundExchange Inc. v. Librarian of Congress,*

[7] Significantly, under any version of election rules the Board has applied, impoundment is a necessary procedure. For example, even under the 2014 Rule, Regional Directors impound ballots where challenged voters are determinative as to the outcome of the election. 84 Fed. Reg. at 69,547; 29 C.F.R. § 102.69(a) (2019).

571 F.3d 1220, 1225 (D.C. Cir. 2009) (finding that agency is "owe[d] substantial deference" where "objectives it must pursue point in different directions").

IV. The 2019 Amendment Is Consistent with Section 3(b) of the Act

17. There is also no merit to AFL-CIO's argument that three provisions of the 2019 Amendment (the impoundment provision, the provision prohibiting certifications while a request for review is pending, and the twenty-day period between the DDE and election)[8] violate the NLRA by requiring "a stay of representation case proceedings based on a party's filing – or potential filing – of a request for review." [AFL-CIO MSJ Memo, p. 41].

AFL-CIO argues that these three challenged provisions are inconsistent with the purpose of Section 3(b), which the Supreme Court explained was "designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination . . . . This authority to delegate to the regional directors is designed . . . to speed the work of the Board." *Magnesium Casting Co. v. NLRB,* 401 U.S. 137, 141 (1971). [AFL-CIO MSJ Memo, pp. 4, 41-42]. But *Magnesium Casting* also explains that the limits of this delegation, or even the choice whether to make such a delegation at all, remain firmly within the Board's discretion: "by § 3(b) Congress did *allow* the Board to make a delegation of its authority over determination of the appropriate bargaining unit to the regional director." *Id.* at 142 (emphasis added); *see also Chamber of Commerce of U.S. v. NLRB,* 118 F. Supp. 3d 171, 218 n.31 (D.D.C. 2015) (in *Magnesium Casting*, "the Supreme Court has already recognized the Board's authority to prescribe discretionary [post-election] review").

[8] These provisions are Amended Section 102.67(c), Amended Section 102.69(b), (c)(1), (c)(2)), and Amended Section 102.67(b), respectively.

Thus, Section 3(b) (29 U.S.C. § 153(b)) does not mandate that the Board delegate *all*, or even any, of its Section 9 powers to Regional Directors. Here, the Board has made the measured choice to continue to permit Regional Directors to make many decisions in the course of representation cases, but to no longer allow Regional Directors to issue a certification while a request for review is pending or could be filed.[9] As the Board explained, allowing Regional Directors to issue certifications in the face of a potential or actual request for review, as the 2014 Rule permitted, has not provided a final disposition by the Agency because such a certification is subject to reversal by the Board. Accordingly, the Board eliminated this provision to increase transparency and decrease the possibility of confusion when a Regional Director's previously-released decision is reversed on review. *See* 84 Fed. Reg. at 69,529 n.19 (discussing, among other cases, *The Boeing Co.*, 368 NLRB No. 67 (2019), in which an election was held on May 31, 2018, and the results certified in favor of the union, but the Board ultimately granted review, reversed the Regional Director's finding that the petitioned for unit was appropriate, and dismissed the petition on September 9, 2019).

Although these changes may delay the final disposition of some cases, the Board found that revising Regional Directors' authority will promote other important interests, as described. Thus, the Board tailored the 2019 Amendment to balance speed against the interests of reducing confusion, increasing efficiency, and producing greater finality upon the issuance of a certification. 84 Fed. Reg. at 69,525-26; 69,554; *see A.J. Tower Co.*, 329 U.S. at 331. Accordingly, the 2019 Rule is consistent with the purpose of Section 3(b).

[9] Under the 2019 Amendment, Regional Directors can also issue certifications where the parties reach stipulated election agreements and there are no post-election issues. 29 C.F.R. § 102.62(b) (2019). Another circumstance in which a Regional Director can issue a certification is after a consent election. Such an election occurs when the parties agree to proceed to an election, allow the Regional Director to issue a final and binding decision on all disputed issues after the election, and thereafter issue a certification of representative in the event the union prevails. In a consent election agreement, the parties explicitly waive their right to Board review of the Regional Director's decision and certification. 29 C.F.R. § 102.62(a) (2019). (These provisions are unchanged by the 2019 Amendment.)

18. AFL-CIO additionally relies on definitions from current editions of BLACK'S LAW DICTIONARY (11th ed. 2019) and WEBSTER'S II NEW COLLEGE DICTIONARY (2001), to support its interpretation of "stay," in an effort to show that these provisions create the "stay" prohibited by Section 3(b). [AFL-CIO MSJ Memo, pp. 44–45]. In so doing, AFL-CIO extracts the term from its proper historical context to favor its reading of Section 3(b) by imbuing it with statutory meaning not intended by Congress. The term "stay" in Section 3(b) should not be read in isolation to cover all types of stays, as AFL-CIO asserts. Rather, the plain text of Section 3(b) refers to a "stay *of any action taken by the regional director*." (Emphasis added.)

Each of the current definitions of "stay" cited by AFL-CIO offers multiple meanings of the term, including, as a noun, an order to suspend *either* "a judicial proceeding *or* a judgment" (BLACK'S LAW DICTIONARY (11th ed. 2019)), and as a verb, to "delay" an order *or* to "stop the effect of" an order (WEBSTER'S II NEW COLLEGE DICTIONARY (2001)). However, dictionaries in use at the time of the 1959 Congress that enacted Section 3(b), more clearly explained that the context of "stay" mattered, and that the kind of stay should be differentiated between staying an order (akin to the text of 3(b)), and staying a proceeding. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (to interpret meaning of statutory text "we look to the ordinary meaning of the term . . . at the time Congress enacted the statute").

Thus, the editions of BLACK'S LAW DICTIONARY (4th ed. 1951) and RADIN LAW DICTIONARY (1st ed. 1955) available to Congress in 1959, firmly distinguish between a "stay of execution" and a "stay of proceedings," by providing separate entries for each type of stay.[10] (Attached as Appendices A and B, respectively.) In BLACK's LAW DICTIONARY (4th ed. 1951), a

[10] Among contemporaneous-usage dictionaries, *Black's* and *Radin* are considered to be among "the most useful and authoritative for the English language generally and for law." Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 GREEN BAG 2D 419, 423, 428 (2013).

stay of execution is "[t]he stopping or arresting of execution on a judgment . . . for a limited period," but a stay of proceedings is "[t]he temporary suspension of the regular order of proceedings." Similarly, in RADIN LAW DICTIONARY 329 (1st ed. 1955), a stay of execution is "the requirement that execution of a judgment or sentence shall not be carried out for a definite time," but a stay of proceedings is separately defined as "the suspension by court order of all proceedings in an action at law." Thus, it is clear that although "stay" can be used to mean either suspending a proceeding or stopping the effect of an order already issued, the subject of the stay must be identified to give it meaning, as the 1959 Congress can be presumed to have understood. Here, the text of Section 3(b) removes any potential ambiguities in the word "stay" by plainly identifying the subject of the stay as "any action taken by the regional director." 29 U.S.C. § 153(b).[11]

Moreover, the Board's interpretation of Section 3(b) reads "stay" in its statutory context, thereby giving effect to Congress's unambiguously expressed intent and more clearly ascertaining the intrinsic meaning of the statutory provision at issue. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 861 (1984). Thus, the Court should reject AFL-CIO's attempt to take the term "stay" out of context, and selectively ignore the very provisions in Section 3(b) that resolve any potential ambiguities.[12]

[11] Had Congress meant to include the multiple definitions of "stay," it could have instead worded 3(b) to state "any [*proceeding or*] action taken," and not used language that clearly limits the meaning of "stay" to actions a Regional Director has already taken. *See Hawaii v. Trump*, 878 F.3d 662, 696–97 (9th Cir. 2017) ("We presume that Congress's inclusion of specified items and exclusion of others is intentional."), *rev'd on other grounds & remanded*, 138 S. Ct. 2392 (2018); 2A SUTHERLAND, STATUTORY CONSTRUCTION §§ 45:14, 47.23 (7th ed. 2019) ("*expressio* (or *inclusio*) *unius exclusio alterius est*; which means that the expression or inclusion of one thing implies the exclusion of others").

[12] Should this Court find that it cannot resolve the Section 3(b) issue based upon the text's plain language, the fact that the Board is entitled to substantial deference in promulgating its representation rules should be determinative. *See above* at pp. 4-5, discussing *A.J. Tower*, *Inland Empire*, and *Waterman S.S.*; *see also United Food & Commercial Workers Int'l Union v. NLRB*, 880 F.2d 1422, 1428 (D.C. Cir. 1989) ("The Board has primary responsibility for applying the general provisions of the [National Labor Relations Act], and where its interpretation

V. The Challenged Provisions of the 2019 Amendment Are Severable

19. Invalidation of any (or all) of the challenged provisions of the 2019 Amendment would not require the Court to invalidate any other portion of the 2019 Amendment, as those individual provisions are each entirely severable from the Amendment as a whole. To find the challenged provisions severable, this Court must find: first, that "the agency would have adopted the same disposition regarding the unchallenged portion of the regulation if the challenged portion were subtracted," and second, that the remaining parts of the regulation are able to "function sensibly without the stricken provision." *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 351 (D.C. Cir. 2019)*; see also MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001).

20. Here, the Board clearly meets both prongs of the severability analysis. With respect to the first—the agency's intent—as noted above, the Board expressly stated its intention that the vast majority of the provisions of the 2019 Amendment are severable. 84 Fed. Reg. at 69,525 n.5. This intention is further demonstrated by the Board's specifically excepting provisions that it considers non-severable. 84 Fed. Reg. at 69,533 n.40 (time for scheduling pre-election hearing, and submitting initial and responsive Statements of Position are not severable; the Board also would not extend the timeline for employers to post a Notice of Petition without the extended timeline for the pre-election hearing and the submission of Statements of Position).[13]

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of what the Act requires is reasonable, in light of the purposes of the Act and the controlling precedent of the Supreme Court, courts should respect its policy choices.").Thus, under either step of *Chevron*, the Board's interpretation should be upheld. [*See also* NLRB MSJ Memo pp. 41-44].

[13] None of these provisions are properly challenged by AFL-CIO. It only briefly references the extension of these time frames in a footnote. [AFL-CIO MSJ Memo, p. 32 n.24]. *See Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (a court "need not consider cursory arguments made only in a footnote").

21. With respect to the second prong, if this Court were to strike any or all of the challenged provisions, the remaining portions of the Amendment could still function sensibly.

- **Scope of Pre-Election Hearing (Amended Section 102.64(a)):** If the Court strikes Amended Section 102.64(a), concerning resolution of unit scope and voter eligibility issues prior to the election, the residual amendments would remain workable. [Board MSJ Memo, p. 44]. Although there may be fewer matters to litigate before the election if these issues were deferred, parties will still use the time provided by Amended Section 102.63(a)(1) before the pre-election hearing to prepare, file, and serve the statement of position and newly-required responsive statement of position, as well as to prepare to litigate the remaining issues to be addressed at the hearing. Amended Section 102.63(b).[14] Thus, contrary to AFL-CIO's assertions [AFL-CIO MSJ Memo, p. 28], the benefits of allowing the parties more time to reach agreement and prepare for the pre-election hearing will remain even if status and eligibility issues are not litigable at the pre-election hearing.
- **Minimum of Twenty Business Days Between DDE and Election (Amended Section 102.67(b)):** If the Court strikes Amended Section 102.67(b), setting at least twenty business days between the DDE and the election, then the Board's 2014 provision setting elections at the "earliest date practicable" provision is compatible with the rest of the 2019 Amendment. The "earliest date practicable" can certainly be set consistent with other provisions in the rule. For example, in setting the "earliest practicable date," employers would still

[14] If there are fewer matters to litigate before the election, there will be fewer issues to include in a post-hearing brief [AFL-CIO MSJ Memo, p. 29], which surely does not make that provision unworkable.

have five days to file and serve the voter list, under Amended Section 102.67(l), as opposed to two days under the 2014 Rule. This affects *when* the "earliest practicable date" occurs but does not otherwise make the Amendment non-functional.

- **Five-Day Deadline to Provide Voter List (Amended Section 102.62(d)):** If the Court strikes Amended Section 102.62(d), which gives employers five business days to provide the voter list, the previous rule giving employers two days to provide that list would remain intact. This does not interfere with any other provision in the 2019 Amendment, as no other portion of the 2019 Amendment concerns the voter list timeframe.
- **Election Observer Limitations (Amended Section 102.69(a)(5)):** If the Court strikes Amended Section 102.69(a)(5) concerning observers, then 29 C.F.R. Section 102.69(a) (2019) as currently written, would continue in effect, and would not implicate any other provision in either the 2014 Rule or the 2019 Amendment. Parties would remain free to select election observers under existing Board precedent.
- **Certifications and Requests for Review (Amended Section 102.69(b)):** If the Court strikes Amended Section 102.69(b), which addresses certifications, then under the 2014 Rule, if ballots are counted, the election results are certified by the Regional Director after resolving challenged ballots and objections, but prior to the Board's resolution of a pending request for review. This reversion to the 2014 Rule would not impact the functional workings of the remainder of the 2019 Amendment. (Of course, ballots in cases that are

subject to impoundment (Amended Section 102.67(c)) could not be certified by Regional Directors for the obvious reason that, absent a count of the ballots, there would be nothing to certify.) Striking Amended Section 102.69(b) thus would neither leave Amended Section 102.67(c) inoperable nor undercut the Board's justifications for promulgating that section.

- **Impoundment of Ballots in Certain Circumstances Where Request for Review Is Filed (Amended Section 102.67(c)):** Finally, if the Court strikes the provision requiring ballot impoundment if a request for review is filed within ten business days of the DDE, the remainder of the Amendment would still function sensibly. The parties will simply have more knowledge of the results of the election than if the ballots had been impounded. Put simply, if the provision for automatic impoundment is removed, then requests for review filed within ten business days of the DDE are treated the same as all other requests for review.

22. Indeed, while some of the 2019 Amendment's provisions are related in the sense that they serve the same policy goals and are part of the same set of election procedure rules, it does *not* follow that individual provisions cannot function independently. 84 Fed. Reg. at 69,545. For example, Amended Section 102.67(b), the provision requiring at least twenty days between the DDE and the election, was described by the Board as an amendment that "goes hand-in-hand" with Amended Section 102.64(a), regarding the scope of pre-election hearings because they "serve[] the same policy interests." 84 Fed. Reg. at 69,545. That these provisions are related does *not* mean that they are interdependent. *See id.* at 69,545 n.92 ("These amendments are, however, severable, and we would adopt each of them independently of the

other.").

Finally, AFL-CIO mischaracterizes the Board's position when it asserts that "[t]he majority acknowledges the 'intertwined character of the [rule's] component parts,'" [AFL-CIO MSJ Memo, p. 28 (quoting *Tel. and Data Sys., Inc. v. FCC*, 19 F.3d 42, 50 (D.C. Cir. 1994))]. AFL-CIO relies on the Board's explanation that the 2019 provision reinstating parties' right to file post-hearing briefs (an issue that AFL-CIO is not challenging) is supported by the amended provision requiring more pre-election issues to be decided--issues that may be fact intensive. *Id*. (citing 84 Fed. Reg. at 69,542). The Board's acknowledgment that one provision may have some bearing on the other is not an acknowledgment that the provisions are so intertwined that they cannot function independently.[15] Thus, AFL-CIO has demonstrated neither that the Board intended the entire Amendment to be non-severable, *see MD/DC/DE Broadcasters Ass'n,* 236 F.3d at 22, nor that the Amendment cannot "function sensibly without the stricken provision," *see Carlson*, 938 F.3d at 351, much less both. Thus, if necessary, this Court should find the individually challenged provisions of the Amendment severable.

VI. Conclusion

As has been amply demonstrated, the Board analyzed the 2014 Rule's operation and concluded that it wished to make certain procedural amendments, in order to promote legitimate policy considerations, consistent with the objectives of the Act. Accordingly, for the reasons set forth by the Board in its Motion for Summary Judgment, and in the instant Opposition to AFL-

[15] AFL-CIO's citation to *New York v. U.S. Dep't of Health and Human Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019) [AFL-CIO MSJ Memo, p. 27], is unavailing. The court there based its finding of severability on the totality of the case, where, among other flaws, the agency lacked substantive rulemaking authority as to three of the challenged five provisions, and its stated justification for the rulemaking was factually untrue. *Id.* at 577. The court concluded that "the rulemaking exercise here was sufficiently shot through with glaring legal defects as to not justify a search for survivors. And leaving stray non-substantive provisions intact would not serve a useful purpose." *Id.* Simply stated, the rule in *New York* was so legally and factually flawed *ab initio* that the court found any sort of severability pointless–a situation quite different from here, where the Board's rulemaking authority is undoubtedly intact and it has not been accused of misstating its reasons for the Amendment.

CIO's Motion for Summary Judgment, this Court should deny AFL-CIO's Motion and grant the Board's Motion in its entirety.

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Dated this 6th day of May
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Minneapolis, Minnesota