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NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

RIN: 3142-AA09

Procedural Rules and Regulations; Corrections.

AGENCY: National Labor Relations Board.

ACTION: Final rule; correcting amendments.

SUMMARY: On March 6, 2017, the National Labor Relations Board revised its rules and regulations. Those revisions inadvertently failed to include certain language, which provided further clarification with respect to the prohibition on producing files and documents, and the prohibition on testifying. This document corrects that Section, as well as additional inadvertent errors that appear throughout the revised rules and regulations.

DATES: The correcting amendments are effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], but are applicable beginning March 6, 2017.

FOR FURTHER INFORMATION CONTACT: Gary Shinnars, Executive Secretary, National Labor Relations Board, 1015 Half Street, SE, Washington, DC 20570, (202) 273-3737 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: On March 6, 2017, the National Labor Relations Board revised its rules and regulations and inadvertently failed to include language in § 102.118. This is the first set of corrections to the NLRB revisions that were published in the Federal Register on February 24, 2017 (82 FR 11748).

List of Subjects in 29 CFR Part 102

Administrative practice and procedure, Labor management relations.

Accordingly, 29 CFR part 102 is corrected by making the following correcting amendments:

PART 102-RULES AND REGULATIONS, SERIES 8

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

Authority: Sections 1, 6, National Labor Relations Act (29 U.S.C. 151, 156).

Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 (5 U.S.C. 552a(j) and (k)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

2. Amend §102.21 by revising the second sentence to read as follows:

§ 102.21 Where to file; service upon the parties; form.

*** Immediately upon the filing of the answer, Respondent shall serve a copy thereof on the other parties. ***

3. Amend §102.30 by revising the first sentence of paragraph (c) to read as follows:

§ 102.30 Depositions, examination of witnesses.

(c) At the time and place specified in the order, the officer designated to take the deposition will permit the witness to be examined and cross-examined under oath by all the parties appearing, and the witness's testimony will be reduced to type-writing by the officer or under his/her direction. ***

4. Amend §102.65 by revising the second and eighth sentences of paragraph (a) to read as follows:

§ 102.65 Motions; intervention; appeals of Hearing Officer's rulings.

(a) ***The Motion shall immediately be served on the other parties to the proceeding.*** The Regional Director may rule upon all motions filed with him/her, causing a copy of the ruling to be served on the parties, or may refer the motion to the Hearing Officer, except that if the Regional Director prior to the close of the hearing grants a motion to dismiss the petition, the petitioner may obtain a review of such ruling in the manner prescribed in §102.71.***

5. Amend §102.66 by revising paragraph (f) to read as follows:

§ 102.66 Introduction of evidence: rights of parties at hearing; preclusion; subpoenas; oral argument and briefs.

(f) Subpoenas. The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of

witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. The Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Any party may file applications for subpoenas in writing with the Regional Director if made prior to hearing, or with the Hearing Officer if made at the hearing. Applications for subpoenas may be made ex parte. The Regional Director or the Hearing Officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. Such petition shall be filed with the Regional Director who may either rule upon it or refer it for ruling to the Hearing Officer except that if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the Hearing Officer. Notice of the filing of petitions to revoke shall be promptly given by the Regional Director or Hearing Officer, as the case may be, to the party at whose request the subpoena was issued. The Regional Director or the Hearing Officer, as the case may be, shall revoke the subpoena if, in his/her opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Regional Director or the Hearing Officer, as the case may be, shall make a simple statement of procedural or other grounds for his/her ruling. The petition to revoke, any answer filed thereto,

and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

6. Amend §102.67 by revising the first sentence of paragraph (c) and the first sentence of paragraph (i)(1) to read as follows:

§ 102.67 Proceedings before the regional director; further hearing; action by the regional director; appeals from actions of the regional director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list.

(c) Upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a Regional Director delegated to him/her under Section 3(b) of the Act except as the Board's Rules provide otherwise, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action by the Regional Director. ***

(i)(1) *** All documents filed with the Board under the provisions of this Section shall be double spaced, on 8 1/2- by 11-inch paper, and shall be printed or otherwise legibly duplicated. ***

7. Amend § 102.69 by revising paragraphs (a) and (d)(1)(ii) to read as follows:

§ 102.69 Election procedure; tally of ballots; objections; certification by the regional director; hearings; hearing officer reports on objections and challenges; exceptions to hearing officer reports; regional director decisions on objections and challenges.

- (a) Election procedure; tally; objections. Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the Regional Director, whose decision shall be final, have its name removed from the ballot, except that in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the Regional Director, disclaiming any representation interest among the employees in the unit. A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit. When the election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the Regional Director may prescribe. Any party and Board agents

may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the Regional Director objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor and a written offer of proof in the form described in §102.66(c) insofar as applicable, except that the Regional Director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause. Such filing(s) must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. The party filing the objections shall serve a copy of the objections, including the short statement of reasons therefor, but not the written offer of proof, on each of the other parties to the case, and include a certificate of such service with the objections. A person filing objections by facsimile pursuant to §102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile or electronically pursuant to §102.114(f) or (i). The Regional Director will transmit a copy of the objections to be served on each of the other parties to the proceeding, but shall not transmit the offer of proof.

(d)(1)(i) Record in case with hearing. In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the Notice of Hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, offers of proof made at the post-election hearing, any briefs or other legal memoranda submitted by the parties, any report on such objections and/or on challenged ballots, exceptions, the decision of the Regional Director, any requests for review, and the record previously made as defined in §102.68. Materials other than those set out above shall not be a part of the record.

8. Amend §102.71 by revising the second sentence of paragraph (c) to read as follows:

§ 102.71 Dismissal of petitions; refusal to proceed with petition; requests for review by the Board of action of the regional director.

(c) *** The request shall contain a complete statement setting forth facts and reasons upon which the request is based.***

9. Amend §102.72 by revising the section heading and paragraphs (a) introductory text, (a)(1), and (c) to read as follows:

§ 102.72 Filing petition with general counsel : investigation upon motion of general counsel; transfer of petition and proceeding from region to general counsel or to another region; consolidation of proceedings in same region; severance; procedure before general counsel in cases over which the general counsel has assumed jurisdiction.

- (a) Whenever it appears necessary in order to effectuate the purposes of the Act, or to avoid unnecessary costs or delay, the General Counsel may permit a petition to be filed with him/her in Washington, DC, or may, at any time after a petition has been filed with a Regional Director pursuant to §102.60, order that such petition and any proceeding that may have been instituted with respect thereto:

- (1) Be transferred to and continued before him/her, for the purpose of investigation or consolidation with any other proceeding which may have been instituted in a Regional Office or with him/her; or

(c) The Regional Director may exercise the powers in paragraphs (a)(2) and (4) of this section with respect to proceedings pending in his/her Region.

10. Amend §102.80 by revising paragraph (b) to read as follows:

§ 102.80 Dismissal of petition; refusal to process petition under expedited procedure.

(b) If it shall appear to the regional director that an expedited election is not warranted but that proceedings under subpart C of this part are warranted, he/she shall so notify the parties in writing with a simple statement of the grounds for his/her decision.

11. Amend §102.81 by revising the first sentence of paragraph (a) and the first sentence of paragraph (c) to read as follows:

§ 102.81 Review by the general counsel of refusal to proceed on charge; resumption of proceedings upon charge held during pendency of petition; review by general counsel of refusal to proceed on related charge.

- (a) Where an election has been directed by the Regional Director or the Board in accordance with the provisions of §§102.77 and 102.78, the Regional Director shall decline to issue a complaint on the charge, and he/she shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his/her action.***

- (c) If in connection with an 8(b)(7) proceeding, unfair labor practice charges under other sections of the Act have been filed and the Regional Director upon investigation has declined to issue a complaint upon such charges, he/she shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his/her action.***

12. Amend §102.83 by revising the second sentence to read as follows:

§ 102.83 Petition for referendum under Section 9(e)(1) of the Act; who may file; where to file; withdrawal.

*** The petition shall be in writing and signed, and either must be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or must contain a declaration by the

person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his/her knowledge and belief.***

13. Amend § 102.118 by revising paragraphs (a) and (b) to read as follows:

§ 102.118 Present and former Board employees prohibited from producing documents and testifying; production of witnesses' statements after direct testimony.

(a) Prohibition on producing files and documents. Except as provided in §102.117 respecting requests cognizable under the Freedom of Information Act, no present or former employee or specially designated agent of the Agency will produce or present any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent of the Board or the Chairman of the Board if the document is in Washington, DC, and in control of the Board; or of the General Counsel if the document is in a Regional Office of the Board or is in Washington, DC, and in the control of the General Counsel. A request that such consent be granted must be in writing and must identify the documents to be produced, the nature of the pending proceeding, and the purpose to be served by the production of the documents.

(b) Prohibition on testifying. No present or former employee or specially designated agent of the Agency will testify on behalf of any party to any cause

pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia, or any subdivisions thereof, with respect to any information, facts, or other matter coming to that person's knowledge in that person's official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in answer to a subpoena or otherwise, without the written consent of the Board or the Chairman of the Board if the person is in Washington, DC, and subject to the supervision or control of the Board or was subject to such supervision or control when formerly employed at the Agency; or of the General Counsel if the person is in a Regional Office of the Agency or is in Washington, DC, and subject to the supervision or control of the General Counsel or was subject to such supervision or control when formerly employed at the Agency. A request that such consent be granted must be in writing and must identify the person whose testimony is desired, the nature of the pending proceeding, and the purpose to be served by the testimony of the official.

National Labor Relations Board

Gary Shinnars,
Executive Secretary

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