



BILLING CODE 7545-01

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

Procedural Rules and Regulations

RIN: 3142-AA10

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board amends its procedural rules and regulations to include testimony transmitted by videoconference, and amicus brief filings.

DATES: This rule is effective on [INSERT DATE 10 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Gary Shinnors, 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:

Background on the Rulemaking

The changes are summarized below:

I. Video Conferencing Testimony

The Board added language covering procedures applicable to deposition testimony contemporaneously transmitted by videoconference. The procedures cover the filing of applications to take depositions by videoconference, the safeguards required for the

taking of videoconference testimony, the timing, method, and bases for filing objections to the admissibility of videoconference testimony, transcription of videoconference testimony, and the payment of witness and court reporter fees associated with the taking of videoconference testimony.

II. Amicus Curiae Brief Filings

The Board added language setting forth the procedures covering procedures applicable to amicus curiae briefs. The procedures cover the circumstances when motions for permission to file an amicus brief may be filed, the contents of such motions, replies to motions, page length of amicus briefs, parties' answering briefs to amicus briefs, and the solicitation of amicus briefs by the Board.

Regulatory Flexibility Act Certification

Pursuant to Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Agency has determined that these rule amendments will not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

These rule amendments will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. These amendments will not

result in an annual effect on the economy of \$100,000,000 or more or a major increase in costs or prices, nor will these amendments have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction

The amended regulations contain no additional information-collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

Public Participation

This rule is published as a final rule. The National Labor Relations Board considers this rule to be a procedural rule which is exempt from notice and public comment, pursuant to 5 U.S.C. 553(b)(3)(A), as a rule of “agency organization, procedure, or practice.” If you wish to contact the Agency, please do so at the above listed address. However, before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 29 CFR Part 102

Administrative practice and procedure, Labor management relations.

Gary Shinnars

Executive Secretary

For the reasons stated in the preamble, the National Labor Relations Board amends 29 CFR part 102 as follows:

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 §102.30 by revising paragraphs (a) and (c) through (e) and adding paragraph (g) to read as follows:

§ 102.30 Depositions, examination of witnesses.

(a) Applications to take depositions, including deposition testimony contemporaneously transmitted by videoconference, must be in writing and set forth the reasons why the depositions may be taken, the name, mailing address and email address (if available) of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for taking the deposition, together with the name and mailing and email addresses of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the

“officer”). Such application must be made to the Regional Director prior to the hearing, and to the Administrative Law Judge during and subsequent to the hearing but before transfer of the case to the Board pursuant to §102.45 or §102.50. Such application must be served on the Regional Director or the Administrative Law Judge, as the case may be, and on all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The Regional Director or the Administrative Law Judge, as the case may be, will upon receipt of the application, if in the Regional Director’s or Administrative Law Judge’s discretion, good cause has been shown, make and serve on the parties an order specifying the name of the witness whose deposition is to be taken and the time, place, and designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order will be served on all the other parties by the Regional Director or on all parties by the Administrative Law Judge.

(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 in person or by contemporaneous transmission through videoconference, and testimony shall be transcribed by the officer or under the officer’s direction. All objections to questions or evidence will be deemed waived unless made at the examination. The officer will not have power to rule upon any objections but the objections will be noted in the deposition. The testimony must be subscribed by the witness to the satisfaction of the officer who will attach a certificate stating that the

witness was duly sworn by the officer, that the deposition is a true record of the testimony and exhibits given by the witness, and that the officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the witness because the witness is ill, dead, cannot be found, or refuses to sign it, such fact will be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer will immediately deliver the transcript, together with the certificate, in person, by registered or certified mail, or by E-File to the Regional Director or Division of Judges' office handling the matter.

(d) The Administrative Law Judge will rule upon the admissibility of the deposition or any part of the deposition. A party may object to the admissibility of deposition testimony by videoconference on grounds that the taking of the deposition did not comply with appropriate safeguards as set forth in §102.35(c), provided that the party opposing the admission of the deposition raised deficiencies in safeguards at the time of the deposition when corrections might have been made.

(e) All errors or irregularities in compliance with the provisions of this section will be deemed waived unless a motion to suppress the deposition in whole or part is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(g) The official record of the deposition testimony will be the official transcript prepared by the officer designated to transcribe the deposition testimony.

3. Revise §102.32 to read as follows:

§ 102.32 Payment of witness fees and mileage; fees of officer who transcribes deposition or video testimony.

Witnesses summoned before the Administrative Law Judge must be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken or who testify by videoconference and the officer who transcribes the testimony shall severally be entitled to the same fees as are paid for like services in the courts of the United States, and those fees shall be paid by the party at whose instance the deposition is taken.

4. Amend §102.35 by adding paragraph (c) to read as follows:

§ 102.35 Duties and powers of Administrative Law Judges; stipulations of cases to Administrative Law Judges or to the Board; assignment and powers of settlement judges; video testimony.

(c) Upon a showing of good cause based on compelling circumstances, and under appropriate safeguards, the taking of video testimony by contemporaneous transmission from a different location may be permitted.

(1) Applications to obtain testimony by videoconference must be presented to the Administrative Law Judge in writing, and the requesting party must simultaneously serve notice of the application upon all parties to the hearing. The application must set forth the compelling circumstances for such testimony, the witness's name and address, the location where the video testimony will be held, the matter concerning which the witness is expected to testify, the conditions in place to protect the integrity of the testimony, the transmission safeguards, and the electronic address from which the video testimony will be transmitted. Such application and any opposition must be made promptly and within such time as not to delay the proceeding.

(2) Appropriate safeguards must ensure that the Administrative Law Judge has the ability to assess the witness's credibility and that the parties have a meaningful opportunity to examine and cross-examine the witness, and must include at a minimum measures that ensure that representatives of the parties have the opportunity to be present at the remote location, the judge, participants, and the reporter are able to hear the testimony and observe the witness, the camera view is adjustable to provide a close-up view of counsel and the witness and a panoramic view of the room, exhibits used in the witness's examination are exchanged in advance of the examination, and video technology assistance is available to assist with technical difficulties that arise during the examination. The Administrative Law Judge may also impose additional safeguards.

(3) The official record of the videoconference testimony will be the official transcript prepared by the officer designated to transcribe the testimony.

5. Amend §102.46 by revising the section heading and adding paragraph (i) to read as follows:

§ 102.46 Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements; amicus curiae briefs.

(i) Amicus curiae briefs. Amicus curiae briefs will be accepted only by permission of the Board. Motions for permission to file an amicus brief must state the bases of the movant's interest in the case and why the brief will be of benefit to the Board in deciding the matters at issue. Unless the Board directs otherwise, the following procedures will apply.

(1) The Board will consider motions to file an amicus brief only when: (a) a party files exceptions to an Administrative Law Judge's decision; or (b) a case is remanded by the court of appeals and the Board requests briefing from the parties.

(2) In circumstances where a party files exceptions to an Administrative Law Judge's decision, the motion must be filed with the Office of the Executive Secretary of

the Board no later than 42 days after the filing of exceptions, or in the event cross-exceptions are filed, no later than 42 days after the filing of cross-exceptions. Where a case has been remanded by the court of appeals, the motion must be filed no later than 21 days after the parties file statements of position on remand. A motion filed outside these time periods must be supported by a showing of good cause. The motion will not operate to stay the issuance of a Board decision upon completion of the briefing schedule for the parties.

(3) The motion must be accompanied by the proposed amicus brief and must comply with the service and form prescribed by §102.5. The brief may be no more than 25 pages in length.

(4) A party may file a reply to the motion within 7 days of service of the motion. A party may file an answering brief to the amicus brief within 14 days of issuance of the Board's order granting permission to file the amicus brief. Replies to an answering brief will not be permitted.

(5) The Board may direct the Executive Secretary to solicit amicus briefs. In such cases, the Executive Secretary will specify in the invitation the due date and page length for solicited amicus briefs, and the deadline for the parties to file answering briefs. Absent compelling reasons, no extensions of time will be granted for filing solicited amicus briefs or answering briefs.

[FR Doc. 2017-19783 Filed: 9/18/2017 8:45 am; Publication Date: 9/19/2017]