



National Labor Relations Board

29 CFR Part 102

RIN 3142-AA18

Representation-Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Direct final rule.

SUMMARY: The National Labor Relations Board has decided to issue this final rule for the purpose of carrying out the National Labor Relations Act, which protects the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. While retaining the essentials of existing representation case procedures, this rule substantially rescinds the amendments made by a rule the Board promulgated in 2019 (which has been the subject of ongoing litigation) and thereby substantially returns representation case procedures to those that existed following the Board's promulgation of a rule concerning representation case procedures in 2014 (which was uniformly upheld by the federal courts). By doing so, this rule effectuates what the Board deems to be appropriate policy choices that enhance the fair, efficient, and expeditious resolution of representation cases.

DATES: This rule is effective December 26, 2023.

FOR FURTHER INFORMATION CONTACT: Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, (202) 273-2917 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background on the Rulemaking

The National Labor Relations Board (the Board) administers the National Labor Relations Act (the Act) which, among other things, governs the formation of collective-

bargaining relationships between employers and groups of employees in the private sector. Section 7 of the Act, 29 U.S.C. 157, gives employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity.

When employees and employers are unable to agree whether employees should be represented for purposes of collective bargaining, Section 9 of the Act, 29 U.S.C. 159, gives the Board the authority to resolve the question of representation. The Supreme Court has recognized that “Congress has entrusted the Board with 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 (1946). “The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.” *NLRB v. Waterman Steamship Corp.*, 309 U.S. 206, 226 (1940); see *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 37 (1942).

Representation case procedures are set forth in the Act, Board regulations, and Board case law.¹ The Board’s General Counsel has also prepared a non-binding Casehandling Manual describing representation case procedures in detail.²

Section 9 of the Act, 29 U.S.C. 159, itself sets forth the basic steps for resolving a question of representation. They are as follows. First, a petition is filed by an employee, a labor organization, or an employer. Second, the Board investigates the petition and, if there is reasonable cause, an appropriate hearing is held to determine whether a question of representation exists, unless the parties agree that an election should be conducted and agree concerning election details. Hearing officers are authorized to conduct pre-election hearings but may not make recommendations as to the result. Third, if there is a question of representation,

¹ The Board’s binding rules of procedure are found primarily in 29 CFR part 102, subpart D. Additional rules created by adjudication are found throughout the corpus of Board decisional law.

² NLRB Casehandling Manual (Part Two) Representation Proceedings (Sept. 2020).

an election by secret ballot is conducted in an appropriate unit. Fourth, the results of the election are certified.

The Act also permits the Board to delegate its authority to the regional directors who lead the Board's regional offices across the country and provides that, upon request, the Board may review any action of a regional director but that such requests do not stay regional proceedings unless specifically ordered by the Board. 29 U.S.C. 153(b).

Underlying these basic provisions is the essential animating principle that representation cases should be resolved quickly and fairly. As the Supreme Court has recognized, the Act secures a "democratic framework" in which "the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." *A.J. Tower Co.*, 329 U.S. at 331. Thus, the Board, the regional directors, and the General Counsel³ have sought to achieve timely, efficient, fair, accurate, uniform, and transparent resolution of representation cases.

To further these goals, in 2014 the Board issued a final rule that, while retaining the essentials of then-existing representation case procedures, implemented amendments that removed unnecessary barriers to the fair and expeditious resolution of representation cases.⁴ The 2014 rule codified best practices, simplified representation case procedures, made those procedures more transparent and uniform across regions, and modernized those procedures in view of changing technology.⁵

In short, the 2014 rule was intended, in significant part, to help the Board better achieve its statutory duty to accurately, efficiently, and speedily resolve questions of representation.⁶ The evidence is that the 2014 rule achieved its goals. The 2014 rule reduced the median time from petition to election by more than three weeks in cases involving a pre-election hearing and

³ The General Counsel administratively oversees the regional directors. 29 U.S.C. 153(d).

⁴ See *Representation—Case Procedures*, 79 FR 74308 (Dec. 15, 2014).

⁵ *Id.* at 74308, 74315.

⁶ *Id.* at 74316-74318.

by two weeks in cases involving an election agreement.⁷ The Board also achieved an improvement in the percentages of representation cases that it closed within 100 days of a petition's filing.⁸ Those improvements in processing representation cases were obtained at the same time that: parties were permitted to electronically file and serve petitions and other documents, thereby saving time and money, and affording non-filing parties the earliest possible notice; Board procedures were made more transparent and more meaningful information was guaranteed to be disseminated at earlier stages of proceedings; employees' Section 7 rights were afforded more equal treatment through the establishment of uniform time frames across regional offices, hearing dates became more predictable, and litigation was made more uniform; parties and the Board were more often spared the expense and inefficiency of litigating and deciding issues that are unnecessary to determine whether a question of representation exists and which may be mooted by election results; nonemployer parties were able to communicate about election issues with voters using modern means of communication such as email, texts, and cell phones, and were less likely to challenge voters out of ignorance; notices of election were made more informative and more often electronically disseminated; and employees voting subject to

⁷ Information produced from searches in the Board's NxGen case processing software shows that in fiscal years 2012, 2013, and 2014—the last three years before the 2014 rule was in effect—the median number of days between the petition and the election in contested cases was 66, 59, and 59, respectively, whereas in fiscal years 2016, 2017, and 2018—the first three years after the 2014 rule was in effect—the median number of days between the petition and the election in contested cases was 35, 36, and 41, respectively. In fiscal years 2012, 2013, and 2014—the last three years before the 2014 rule was in effect—the median number of days between the petition and the election in cases with an election agreement was 37, 37, and 37, respectively, whereas in fiscal years 2016, 2017, and 2018—the first three years after the 2014 rule was in effect—the median number of days between the petition and the election in cases with an election agreement was 23, 22, and 23, respectively.

⁸ In the four full fiscal years that the 2014 rule was fully in effect, the percentage of representation cases fully resolved within 100 days of a petition's filing was 87.6%, 89.9%, 88.8%, and 90.7%. In the four full fiscal years that preceded the 2014 rule taking effect, the percentage of representation cases fully resolved within 100 days of a petition's filing was 88.1%, 87.4%, 84.5%, and 84.7%. See NLRB Performance and Accountability Reports, FYs 2013-2014, 2016-2019, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>.

challenge were more easily identified, and the chances were lessened of their ballots being commingled.

The 2014 rule thus did a successful job of furthering the Board’s statutory mandate. And it resulted from a careful and comprehensive notice and comment process. Specifically, the Board, over the course of three-and-a-half years, considered tens of thousands of public comments generated over two separate comment periods totaling 141 days, including four days of hearings with live questioning by Board Members.⁹ By means of that canvassing and consideration of the views and perspectives of all stakeholders, the Board was able to make important improvements to its representation case procedures.

The 2014 rule was also subjected to legal challenges, which included arguments that it went beyond the Board’s statutory authority and was inconsistent with the Act, the Constitution, and/or the Administrative Procedure Act (APA). The courts uniformly rejected these claims and upheld the 2014 rule. See *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 218 (5th Cir. 2016) (The “rule, on its face, does not violate the National Labor Relations Act or the Administrative Procedure Act[.]”); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171, 220 (D.D.C. 2015) (rejecting claims that the 2014 rule contravenes either the Act or the Constitution or is arbitrary and capricious or an abuse of the Board’s discretion); see also *RadNet Mgmt. v. NLRB*, 992 F.3d 1114, 1121-1123 (D.C. Cir. 2021) (rejecting a challenge to various 2014 rule provisions implicating, among other things, the scope of the pre-election hearing, the alleged restriction of opportunities for employer and employee pre-election speech, and the alleged arbitrary and capricious consideration of irrelevant factors—including speed—by the Board in implementing the 2014 rule); *UPS Ground Freight v. NLRB*, 921 F.3d 251, 255-257 (D.C. Cir. 2019) (rejecting a challenge to the application of various 2014 rule provisions including scheduling of the pre-election hearing, the timing of the employer’s statement of position, and the pre-election deferral of the voting eligibility of two

⁹ See 79 FR at 74311.

employees in disputed classifications). In sum, the 2014 rule furthered the Board’s statutory mission and withstood legal challenge.

In 2017, about two-and-a-half years after the effective date of the 2014 rule, a newly composed Board majority issued a Request for Information (RFI) to evaluate whether the 2014 rule should be retained, retained with modifications, or rescinded.¹⁰ In issuing the RFI, the new Board majority noted only that the 2014 rule had “been in effect for more than 2 years,” that the Board’s composition had changed, and that various applications of the rule had been litigated in Board cases.¹¹ The new Board majority did not refer to any facts, data, expertise, or experience suggesting a problem with the 2014 rule’s implementation or functioning.

In 2019, the Board issued a final rule that substantially frustrated the 2014 rule’s amendments that were responsible for the improvements in the Board’s ability to fairly and expeditiously resolve questions of representation.¹² It did so without relying on any information received from the public in response to the 2017 RFI; indeed, the 2019 Board expressly disclaimed reliance on any of those responses.¹³ It also did so without notice and comment. In that 2019 rule, the Board consciously chose to add additional time to the representation case process.¹⁴ The 2019 rule imposed delay between the filing of the petition and the pre-election hearing, between the opening of the pre-election hearing and issuance of a decision and direction of election, between the issuance of the decision and direction of election and the election, and

¹⁰ *Representation-Case Procedures*, 82 FR 58783, 58784 (Dec. 14, 2017).

¹¹ *Id.*

¹² See generally *Representation-Case Procedures*, 84 FR 69524 (Dec. 18, 2019).

¹³ *Id.* at 69528 fn.12 (“None of the procedural changes ... are premised on the responses to the Request for Information; indeed, we would make each of these changes irrespective of the existence of the Request for Information.”).

¹⁴ The Board at the time acknowledged as much. See, e.g., *id.* at 69528 (“For contested cases, several provisions of the final rule will, both individually and taken together, result in a lengthening of the median time from the filing of a petition to the conduct of an election.”). Moreover, when the United States Court of Appeals for the District of Columbia Circuit reviewed the 2019 rule, see *infra* fns.23-26 and corresponding text, that court recognized the same conscious decision to add delay that we have recognized: “In the extensive preamble to the 2019 Rule ... the Board repeatedly acknowledges that its changes will result in longer waits before elections relative to the 2014 Rule.” *AFL-CIO v. NLRB*, 57 F.4th 1023, 1047 (D.C. Cir. 2023).

between the election and certification of the results.¹⁵ Those choices were made despite the Supreme Court’s observation that the Board is required to adopt and enforce rules to process representation cases “efficiently and speedily.” *A.J. Tower Co.*, 329 U.S. at 331. Although the 2019 Board repeatedly stated that the 2019 rule would promote fairness, accuracy, transparency, uniformity, certainty, and finality,¹⁶ the 2019 Board did not cite data or any other tangible evidence demonstrating that the 2014 rule impaired those interests or that the 2019 rule would promote them. The 2019 rule was, in short, premised on a series of abstract policy justifications.

After a notable decline in representation case processing times that followed the enactment of the 2014 rule, there has been an increase in case processing times following the enactment of the 2019 rule. In fiscal years 2018 and 2019—the last full two years that the 2014 rule was in effect—88.8% and 90.7%, respectively, of representation cases were resolved within 100 days.¹⁷ In fiscal years 2021 and 2022—the first full two years that the 2019 rule was in effect—82.3% and 85.4%, respectively, of representation cases were resolved within 100 days.¹⁸ Some of that recent delay is likely attributable to the effects of the COVID-19 pandemic, which, for instance, necessitated increased reliance on mail ballot, as opposed to in-person, voting. Even so, given the 2019 Board’s admission that its rule would lengthen the representation case process, we are confident that any pandemic-related delay in the processing of representation

¹⁵ As noted below, some of the 2019 amendments imposing delay were enjoined in subsequent litigation.

¹⁶ See, e.g., 84 FR at 69530 (“In sum, the final rules will likely result in some lengthening of the pre-election period, but the sacrifice of some speed will advance fairness, accuracy, transparency, uniformity, efficiency, and finality. This is, in our considered judgment, a more than worthwhile tradeoff.”).

¹⁷ NLRB Performance and Accountability Report, FY 2018, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>; NLRB Performance and Accountability Report, FY 2019, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>.

¹⁸ NLRB Performance and Accountability Report, FY 2021, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>. Information produced from searches in the Board’s NxGen case processing software shows 85.4% of representation cases were resolved within 100 days in fiscal year 2022.

cases has been compounded by the effects of the 2019 rule. Moreover, the delay would have been even greater had certain of its provisions not been enjoined.

The 2019 rule was challenged in court. The district court vacated five of its provisions before they could take effect. Those provisions had (1) extended the time for an employer to furnish the voter list following issuance of a decision and direction of an election or the approval of an election agreement;¹⁹ (2) expanded the scope of the pre-election hearing and provided that disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit normally will be litigated at the pre-election hearing and resolved by the Regional Director before the election; (3) delayed certification of election results until any request for review has been decided by the Board or until the deadline for filing such a request has passed; (4) imposed restrictions regarding whom parties can choose as their election observers; and (5) imposed a mandatory delay of at least 20 business days between the issuance of a direction of election and the election itself. The district court found that promulgation of those specific provisions violated the APA because the Board issued them without notice and comment.²⁰ The district court rejected the challenger's claim that the 2019 rule was arbitrary and capricious when considered as a whole.²¹ The district court also rejected the challenger's claims that a provision of the 2019 rule that imposed an automatic impoundment of ballots under certain circumstances

¹⁹ Following issuance of a decision and direction of election or approval of an election agreement, the employer is required to furnish the regional director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters, and, in separate sections of that list, the same information for those individuals who will be permitted to vote subject to challenge. The 2014 rule granted the employer 2 business days to file and serve the list; the 2019 rule extended the period to 5 business days. Compare 29 CFR 102.62(d), 102.67(l) (Dec. 15, 2014), with 29 CFR 102.62(d), 102.67(l) (Dec. 18, 2019).

²⁰ *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68, 87-100 (D.D.C. June 7, 2020) (severing, deeming invalid, and vacating the five provisions); see *AFL-CIO v. NLRB*, 471 F. Supp. 3d 228, 237-246 (D.D.C. July 1, 2020) (rejecting additional challenges to the 2019 rule).

²¹ 471 F. Supp. 3d at 240-242.

when a request for review is pending with the Board was arbitrary and capricious and contrary to law.²²

The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's ruling in part and reversed it in part. Specifically, it affirmed the district court's vacatur of the provisions regarding the extended time for furnishing the voter list, the delayed certification of election results, and the restrictions on choice of election observers.²³ It also affirmed the district court's conclusion that the 2019 rule was not arbitrary and capricious when considered as a whole.²⁴ But it reversed the district court's invalidation of the provisions regarding the expansion of pre-election litigation and the imposition of a mandatory delay between the direction of election and the election itself.²⁵ In addition, it reversed the district court and vacated the impoundment provision on the ground that automatic impoundment is contrary to Section 3(b) of the Act.²⁶

In a final rule issued on March 10, 2023, the Board, in compliance with the D.C. Circuit's decision, rescinded the four provisions of the 2019 rule that the court had vacated.²⁷ In another final rule issued on March 10, 2023, the Board extended to September 10, 2023 the effective date for the two provisions as to which the D.C. Circuit reversed the district court's vacatur.²⁸ The Board did so in view of the D.C. Circuit's remand of certain remaining challenges to those provisions to the district court and also to facilitate its reconsideration of those provisions.²⁹

Having now carefully reconsidered the two provisions yet to take effect as well as the other provisions in effect from the 2019 rule, the Board has decided to substantially rescind those provisions in order to return the Board's representation case procedures substantially to those in

²² Id. at 242-245.

²³ *AFL-CIO*, 57 F.4th at 1027, 1035-1043.

²⁴ Id. at 1046-1048.

²⁵ Id. at 1035, 1043-1046.

²⁶ Id. at 1048-1050.

²⁷ *Representation Case Procedures*, 88 FR 14908, 14908-14909 (Mar. 10, 2023).

²⁸ *Representation Case Procedures*, 88 FR 14913, 14913-14914 (Mar. 10, 2023).

²⁹ Id. at 14914.

effect following the implementation of the 2014 rule.³⁰ The Board has determined that it can do so by direct final rule because the provisions that we address concern agency procedure and therefore are exempt from notice and comment.³¹ Moreover, although notice and comment is often preferable to direct rulemaking even when it is not strictly required, in this instance we are merely rescinding provisions from one direct rulemaking (the 2019 rule) to return to provisions that resulted from notice and comment (the 2014 rule). Further, this rule, unlike the 2019 rule, is grounded in analysis of the Board's own data concerning representation case procedures.³² This rule, by substantially returning the Board's representation case procedures to those resulting

³⁰ To avoid the possible waste of administrative resources and public uncertainty if the two provisions that have yet to take effect were to go into effect for only a short period of time before their repeal, in a separate final rule issued in this issue of the Federal Register, the Board has stayed the effective date of those two provisions from September 10, 2023 to December 26, 2023, the date on which the instant rule is effective.

³¹ See 5 U.S.C. 553(b)(A).

³² Much of the statistical analysis is based on data produced from searches in the Board's NxGen case processing database. For provisions of the 2019 rule that took effect, the analysis often involves a comparison of the last two full fiscal years of data before the 2019 rule's implementation with the first two fiscal years of data after the 2019 rule's implementation (i.e., a comparison of data from fiscal years 2018 and 2019 with data from fiscal years 2021 and 2022). This is so because the 2019 rule was implemented in the middle of fiscal year 2020, making it difficult to untangle pre-2019 rule data from post-2019 rule data for that year and so we have opted not to assess data from that year. Additionally, because there are only two full fiscal years of data following implementation of the 2019 rule, we deemed it most rational to compare the data from those two years to the data from the two fiscal years immediately preceding implementation of the 2019 rule.

For provisions of the 2019 rule that have not yet taken effect because of the district court's order and the Board's subsequent decision to extend the effective date, there is obviously no relevant data following implementation of the 2019 rule. Accordingly, to assess the likely impact that letting those provisions take effect would have, the most relevant data for the analysis is that from the period preceding implementation of the 2014 rule as compared to the data from the period following implementation of the 2014 rule. That is because allowing those provisions from the 2019 to take effect would return the Board's procedures essentially to the pre-2014 status quo. And because the Board's NxGen case processing database does not include full fiscal year data for years more distant than 2013, the pre-2014 rule data is mostly limited to fiscal years 2013 and 2014. As there is only complete data for those two years prior to the implementation of the 2014 rule, we deemed it most rational to compare the data from those two years to the data from the two fiscal years (2016 and 2017) immediately following implementation of the 2014 rule. Also, because the 2014 rule was implemented in the middle of fiscal year 2015, making it difficult to untangle pre-2014 rule data from post-2014 rule data for that year, we have not included data from that year in the analysis.

from the 2014 rule, will enable the Board to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation.

II. List of Amendments

This list provides a concise statement of the ways in which this final rule changes or codifies current practice and the general reasoning in support of those steps. It is not “an elaborate analysis of [the] rules or of the detailed considerations upon which they are based”; rather, it “is designed to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules.”³³ As this list shows, the amendments provide targeted solutions to discrete problems. All of the matters addressed by each of the amendments listed are discussed in greater detail below. Moreover, in accordance with the discrete character of these matters, the Board hereby concludes that it would adopt each of these amendments individually, or in any combination, regardless of whether any of the other amendments were made. For this reason, the amendments are severable.

1. The pre-election hearing will generally be scheduled to open 8 calendar days from service of the Notice of Hearing. Under the 2019 rule, the pre-election hearing would generally be scheduled to open 14 business days from service of the Notice of Hearing. Restoring the 8 calendar days timeline established by the 2014 rule (which represented an effort to codify and make uniform preexisting best practices) will help the Board to more expeditiously resolve questions of representation while still allowing adequate time for a nonpetitioning party to prepare a Statement of Position and otherwise prepare and make arrangements before the pre-election hearing.

2. Regional directors have discretion to postpone a pre-election hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. Under the 2019 rule, regional

³³ ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79TH CONGRESS, 1944-46, SEN. DOC. No. 248, S. Rep. No. 752, at 225 (1945).

directors could postpone a pre-election hearing for an unlimited amount of time upon request of a party showing good cause. Restoring the extension provisions established by the 2014 rule ensures that the pre-election hearing will not be unnecessarily delayed.

3. A nonpetitioning party's Statement of Position responding to the petition generally will be due to be filed by noon the business day before the opening of the pre-election hearing. Because the pre-election hearing will normally open 8 calendar days after service of the Notice of Hearing, the Statement of Position is normally due 7 calendar days after service of the Notice of Hearing. Under the 2019 rule, a nonpetitioning party's Statement of Position was due to be filed 8 business days (or 10 calendar days) after service of the Notice of Hearing. Restoring the timeline for production of the Statement of Position to the timeline established by the 2014 rule is consistent with the restored shorter timeline between service of the Notice of Hearing and opening of the pre-election hearing, and preserves adequate time for a nonpetitioning party to prepare a Statement of Position.

4. Regional directors have discretion to postpone the due date for the filing of a Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. Under the 2019 rule, regional directors could postpone the due date for an unlimited amount of time upon request of a party showing good cause. Restoring the extension provisions established by the 2014 rule ensures that the Statement of Position (and the pre-election hearing) will not be unnecessarily delayed.

5. A petitioner shall respond orally to the nonpetitioning party's Statement of Position at the start of the pre-election hearing. Under the 2019 rule, a petitioner was required to file and serve a responsive written Statement of Position 3 business days prior to the pre-election hearing. Restoring the 2014 rule's requirement that the petitioner respond orally at the hearing—rather than in writing 3 business days in advance of the hearing—to the nonpetitioning party's Statement of Position eliminates an unnecessary barrier to the fair and expeditious resolution of

representation cases and preserves for the petitioner an adequate opportunity to respond to the nonpetitioning party's Statement of Position, thus continuing to facilitate orderly litigation.

6. An employer has 2 business days after service of the Notice of Hearing to post the Notice of Petition for Election in conspicuous places in the workplace and to electronically distribute it to employees if the employer customarily communicates with its employees electronically.

Under the 2019 rule, an employer had 5 business days for the requisite posting and electronic distribution. The restored shorter time frame ensures that the important information contained in the notice will be disseminated earlier to employees and employers alike, while preserving adequate time for employers to achieve posting and distribution.

7. The purpose of the pre-election hearing is to determine whether a question of representation exists. Accordingly, disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily do not need to be litigated or resolved prior to an election, and regional directors have authority to exclude evidence that is not relevant to determining whether there is a question of representation and thereby avoid unnecessary litigation on collateral issues that can result in substantial waste of resources. Under the 2019 rule, individual eligibility and inclusion issues were "normally" to be litigated at the pre-election hearing and resolved by the regional director prior to the election. Restoring the 2014 rule language more efficiently avoids litigating and resolving issues that are often mooted by the election results or amicably resolved following an election and permits fairer and more expeditious resolution of representation cases.

8. Parties may file post-hearing briefs with the regional director only with the regional director's special permission (following *pre*-election hearings) or hearing officer only with the officer's special permission (following *post*-election hearings) and within the time and addressing only the subjects permitted by the regional director or hearing officer, respectively. Under the 2019 rule, parties were entitled to file briefs up to 5 business days following the close of a pre- or post-election hearing, with an extension of an additional 10 business days available

upon a showing of good cause. Restoring only permissive post-hearing briefing permits regional directors and hearing officers adequate flexibility to request briefing in the rare complex case and eliminates redundant and repetitive briefing, and consequent delay, in the more commonplace straightforward cases.

9. Regional directors ordinarily should specify the election details—the type, date(s), time(s), and location(s) of the election and the eligibility period—in the decision and direction of election and should ordinarily simultaneously transmit the Notice of Election with the decision and direction of election. The parties will have already taken positions with respect to the election details in writing prior to the hearing and on the record at the hearing. Under the 2019 rule, regional directors were allowed to convey election details in the decision and direction of election (and to simultaneously transmit the Notice of Election with the decision and direction of election), but emphasis was placed on their discretion to convey them in a later-issued Notice of Election. By leaving no doubt that the ordinary course is to convey election details in the decision and direction of election and to simultaneously transmit the Notice of Election, the restored standard eliminates redundant and wasteful post-decision consultation regarding election details and, in turn, furthers the expeditious resolution of representation cases, while leaving regional directors free to engage in additional consultation where necessary.

10. Regional directors shall schedule elections for “the earliest date practicable” after issuance of a decision and direction of election. While the 2019 rule contained the same language, it also imposed a 20-business day waiting period between the decision and direction of election and the election that the 2014 rule had eliminated. The elimination of the mandatory waiting period language will reduce delay and eliminate an unnecessary barrier to the fair and expeditious resolution of questions of representation.

III. General Matters

Before explaining the specific provisions of the final rule, we address the general issues of the Board’s rulemaking authority; the shortcomings of the 2019 rule; and the desirability of this final rule to substantially rescind the 2019 rule and reinstitute the 2014 rule.

A. The Board’s Authority to Promulgate Representation Case Procedures

Congress delegated both general and specific rulemaking authority to the Board. Generally, Section 6 of the Act, 29 U.S.C. 156, provides that the Board “shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act . . . such rules and regulations as may be necessary to carry out the provisions of this Act.” Specifically, Section 9(c), 29 U.S.C. 159(c)(1), contemplates rules concerning representation case procedures, stating that elections will be held “in accordance with such regulations as may be prescribed by the Board.”

The Supreme Court unanimously held in *American Hospital Association v. NLRB*, 499 U.S. 606, 609-610 (1991), that the Act authorizes the Board to adopt rules governing representation case proceedings. The Board’s rules are entitled to judicial deference. *A.J. Tower*, 329 U.S. at 330. Representation case procedures are uniquely within the Board’s expertise and discretion, and Congress has made clear that the Board’s control of those procedures is exclusive and complete. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290 fn.21 (1974); *AFL v. NLRB*, 308 U.S. 401, 409 (1940). “The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.” *Waterman Steamship Corp.*, 309 U.S. at 226; see also *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971).

In *A.J. Tower*, 329 U.S. at 330, the Supreme Court recognized that “Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” The Act enshrines a democratic framework for employee choice and, within that framework, charges

the Board to “promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *Id.* at 331. As the Eleventh Circuit stated:

We draw two lessons from *A.J. Tower*: (1) The Board, as an administrative agency, has general administrative concerns that transcend those of the litigants in a specific proceeding; and, (2) the Board can, indeed must, weigh these other interests in formulating its election standards designed to effectuate majority rule. In *A.J. Tower*, the Court recognized ballot secrecy, certainty and finality of election results, and minimizing dilatory claims as three such competing interests.

Certainfeed Corp. v. NLRB, 714 F.2d 1042, 1053 (11th Cir. 1983). As explained above and below, the final rule is based upon just such concerns. The Act delegated to the Board the authority to craft its procedures in a manner that, in the Board’s expert judgment, will best serve the purposes of the Act. Here, the Board is acting pursuant to its clear regulatory authority to change its own representation case procedures in a manner that will better serve the purposes of the Act.

B. The 2019 Rule and the Desirability of this Final Rule

The 2019 rule was promulgated without notice and comment, in contrast to the 2014 rule. We believe that the process that culminated in the 2014 rule was superior, even if, aside from the provisions vacated by the D.C. Circuit, notice and comment was not legally required. In any case, in our policy judgment, the 2014 rule was superior to the 2019 rule. The shortcomings that mark the 2019 rule and the improvements made by reverting to the 2014 rule are largely addressed in the provision-specific discussion below but are previewed here.

1. The 2019 Board’s Process

As explained, the Board’s 2014 rule, to which we return in this rulemaking, was the product of extensive notice and comment. The 2019 rule, which significantly altered the 2014 rule, was not. Even if notice and comment was not required by the APA for most provisions addressed in the 2014 and 2019 rules, it provided useful guidance in crafting of the 2014 rule. In our view, because the 2019 Board was contemplating substantially altering important representation case procedures that were the product of notice and comment, it may have been

preferable if the Board had sought and relied on the input of relevant stakeholders, including workers, unions, employers, and legal practitioners, as the Board did in 2014.

The 2019 Board seemed to recognize the value of gathering the perspectives of stakeholders in at least some instances. Indeed, the same majority invited notice and comment in four other rulemaking proceedings.³⁴ And with respect to the 2014 rule specifically, in 2017—immediately after the Board’s composition had changed—the Board issued its RFI seeking public input as to whether it should retain, rescind, or change the 2014 rule. In issuing the RFI, the Board seemingly recognized the merit of inviting public input from the stakeholders whose perspectives were considered in the process that yielded the 2014 rule.³⁵ But when the responses to the RFI did not provide data, reliable evidence, or sound policy rationales to justify departure from the 2014 rule, the 2019 Board decided to expressly disclaim reliance on the responses to the RFI and proceed with implementing its own rule “without notice and comment.”³⁶

The 2019 Board also did not assess empirical data that the agency maintains. The 2019 Board conducted no analysis of more than four years of available agency data and records that provide insight into the impact of the 2014 rule, and it did not invoke its own experience administering the 2014 rule. Instead, the 2019 Board simply asserted that it was making changes to promote “fairness, accuracy, transparency, uniformity, efficiency, certainty, and finality” even though there was no data—empirical, anecdotal, experiential, or otherwise—substantiating its conclusion that the 2014 rule impaired those interests or that its rule would promote them.

2. The 2019 Rule’s Impact and the Desirability of this Final Rule

³⁴ See *Representation-Case Procedures: Voter List Contact Information; Absentee Ballots for Employees on Military Leave*, 85 FR 45553 (July 29, 2020); *Students Working in Connection With Their Studies*, 84 FR 49691 (Nov. 22, 2019); *Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, 84 FR 39930 (Oct. 11, 2019); *The Standard for Determining Joint-Employer Status*, 83 FR 46681 (Sept. 14, 2018).

³⁵ However, the RFI was not the equivalent of notice and comment rulemaking.

³⁶ 84 FR at 69528 (caps removed); see also 84 FR at 69528 fn.12 (“[W]e are not treating the responses to the 2017 Request For Information as notice-and-comment rulemaking.”).

Section 9 of the Act is animated by the principle that representation cases should be resolved quickly and fairly. As the Supreme Court has recognized, the Board “must” adopt policies and promulgate rules and regulations in order that “employees’ votes may be recorded accurately, efficiently and speedily.”³⁷ The Supreme Court noted, in discussing Section 9(d), that the policy in favor of speedy representation procedures “was reaffirmed in 1947, at the time that the Taft-Hartley amendments were under consideration,” and that Senator Taft stated that the Act should not “permit dilatory tactics in representation proceedings.”³⁸ In addition, the purpose of Congress in 1959 in permitting delegation of representation case proceedings to regional directors under Section 3(b) was to “speed the work of the Board.”³⁹

There is no precedent for the deliberate decision of the 2019 Board to lengthen, rather than shorten, the representation case process. Even with certain of the 2019 rule’s delay-causing provisions enjoined by court order, the data tends to show that it still has caused substantial delay. For instance, in the last two full years that the 2014 rule was fully in effect, 88.8% and 90.7% of representation cases were resolved within 100 days,⁴⁰ whereas in the first two full years that the 2019 rule was in effect, only 82.3% and 85.4% of representation cases were resolved within 100 days.⁴¹ Similarly, information produced from searches in the Board’s NxGen case processing software show that in each of the last two full years that the 2014 rule was fully in effect there was a median of 23 days from the filing of the petition to the holding of the election;

³⁷ *A.J. Tower*, 329 U.S. at 331.

³⁸ *Boire v. Greyhound Corp.*, 376 U.S. 473, 479 (1964). Because of the “exceptional need for expedition,” Congress exempted representation cases from the requirements of the APA. See Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945); see also 5 U.S.C. 554(a)(6).

³⁹ *Magnesium Casting Co.*, 401 U.S. at 141-142 (quoting legislative history).

⁴⁰ NLRB Performance and Accountability Report, FY 2018, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>; NLRB Performance and Accountability Report, FY 2019, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>.

⁴¹ NLRB Performance and Accountability Report, FY 2021, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>. Information produced from searches in the Board’s NxGen case processing software shows 85.4% of representation cases were resolved within 100 days in fiscal year 2022.

whereas in the first two full years that the 2019 rule was in effect, there was a median of 34 and 37 days from the filing of the petition to the holding of the election. Even if some increased delay was caused by the COVID-19 pandemic, we are confident that the 2019 rule’s delay-causing provisions—which the 2019 Board acknowledged would cause delay—contributed to the increased delay.

The 2019 Board was willing to accept the delay that it knew its amendments would cause because it said those amendments would “advance fairness, accuracy, transparency, uniformity, efficiency, and finality,” which it characterized as a “worthwhile tradeoff.”⁴² But, as explained, the Board did not cite any evidence for its claims; instead, it just speculated that its amendments would advance those interests. Nor does there seem to be evidence that increased delay apparently attributable to the 2019 rule has been offset by meaningful improvements in furthering the interests cited by the Board. Rather, the evidence would seem to be to the contrary. For instance, if the representation case process were meaningfully more certain, final, fair, accurate, transparent, and uniform, then arguably a substantially smaller portion of representation cases should involve Board reversals of regional director decisions, post-election objections and challenges, and rerun elections. But that is not what has happened since the 2019 rule took effect. The portion of representation cases involving Board reversals of regional directors’ decisions and directions of elections,⁴³ post-election objections and determinative

⁴² 84 FR at 69530.

⁴³ Information produced from searches in the Board’s NxGen case processing software shows that in fiscal years 2018 and 2019, which are the last two full years the 2014 rule was in effect, there were 2 reversals of regional directors’ decisions and directions of elections as compared to 2,574 total elections, amounting to a reversal in 0.07% of all elections. In fiscal years 2021 and 2022, which are the first two full years the 2019 rule was in effect, there were 5 reversals of regional directors’ decisions and directions of election as compared to 2,838 total elections, amounting to a reversal in 0.18% of all elections. Accordingly, under both the 2014 rule and the 2019 rule, a regional director’s decision and direction of election was reversed in about 0.1% to 0.2% of cases that have an election.

challenges,⁴⁴ and rerun elections⁴⁵ has remained largely stable. Those outcomes would seem to support the conclusion that representation cases are, at best, no more fair, accurate, transparent, uniform, certain, and final than they were under the 2014 rule.

The 2019 rule, by design, contemplated a slower representation case process, notwithstanding the Board's statutory mission to speedily and efficiently process representation cases. In the absence of any evidence that the 2019 rule has had, or might reasonably be expected to have, countervailing policy benefits that outweighed the clear potential for increased delay, and based on our determination that the policies of the Act are better served by the 2014 rule, the Board has decided to promulgate the instant rule that substantially rescinds the 2019 rule and reinstates the 2014 rule. Doing so will enhance the speed and efficiency with which the Board processes representation cases with, as noted in the previous paragraph, no discernible diminishment of fairness, accuracy, transparency, uniformity, and finality. The Board makes this change, "conscious" of its "change of course," because "there are good reasons" for returning to the 2014 rule, and based on those reasons, we believe that that rule does a better job of advancing the purposes of the Act than the 2019 rule. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁴⁴ Information produced from searches in the Board's NxGen case processing software shows that in fiscal years 2018 and 2019, which are the last two full years the 2014 rule was in effect, there were 172 cases involving election objections or determinative challenges as compared to 2,574 total elections, amounting to election objections or determinative challenges in 6.68% of all elections. In fiscal years 2021 and 2022, which are the first two full years the 2019 rule was in effect, there were 177 cases involving election objections or determinative challenges as compared to 2,838 total elections, amounting to election objections or determinative challenges in 6.24% of all elections. Accordingly, under both the 2014 rule and the 2019 rule, objections or determinative challenges were filed in about 6.5% of cases that have an election.

⁴⁵ Information produced from searches in the Board's NxGen case processing software shows that in fiscal years 2018 and 2019, which are the last two full years the 2014 rule was in effect, there were 59 cases with a rerun election, as compared to 2,574 total elections, amounting to rerun elections in 2.29% of all elections. In fiscal years 2021 and 2022, which are the first two full years the 2019 rule was in effect, there were 49 cases with a rerun election as compared to 2,838 total elections, amounting to rerun elections in 1.73% of all elections. Accordingly, under both the 2014 rule and the 2019 rule, there was a rerun election in about 2% of cases that have an election.

The provisions of the Board’s representation case procedures that we address in this rule are all procedural as defined in 5 U.S.C. 553(b)(A) and so this rule is exempt from notice and comment.⁴⁶ Moreover, the benefit of notice and comment is reduced under these circumstances because the Board is returning its representation case procedures essentially to those that applied immediately prior to the 2019 rule, and those pre-2019 final rule procedures were themselves the product of notice and comment rulemaking. The substantial delay, cost, and inefficiency that would result from another round of notice and comment is not sensible given that this rulemaking is grounded in the same fundamental perspectives and viewpoints gathered and considered in formulation of the 2014 rule to which the Board now substantially returns. Moreover, this rule, unlike the 2019 rule, is further grounded in analysis of the Board’s own representation case processing data and experience that support a return in substantial part to the 2014 rule.⁴⁷ We see no compelling reason to take the 2019 rule—issued without notice and comment—as the starting point for a new notice and comment process instead of proceeding as we do here: returning to the 2014 rule.

IV. Explanation of Changes to Particular Sections

Part 102, Subpart D—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

102.63 Investigation of Petition by Regional Director; Notice of Hearing; Service of Notice; Notice of Petition for Election; Statement of Position; Withdrawal of Notice of Hearing.

A. Scheduling of Pre-Election Hearing

⁴⁶ See also *AFL-CIO*, 57 F.4th at 1034-1046.

⁴⁷ This rule does not rescind a small number of technical amendments made by the 2019 rule that are not inconsistent with the policy objectives of this rule. Those amendments included standardized formatting requirements for requests for review; explicit authorization for oppositions in response to requests for review; explicit authorization for replies in support of requests for review only upon special leave of the Board; prohibition of piecemeal requests for review; clarification of final disposition for the purposes of filing a request for review; incidental changes in terminology; and updates to internal cross-references in the Board’s regulations. Those amendments also included conversion of all time periods in subpart D to business days; this rule largely retains that conversion, with the exception of the 8 calendar day timeline from the filing of the petition to the pre-election hearing discussed immediately below.

Unless the parties enter into an election agreement, the Board may not conduct an election without first holding a pre-election hearing to determine whether a question of representation exists. See 29 U.S.C. 159(c)(1), (4). Thus, the timing of the pre-election hearing affects the timing of the election. The longer it takes to open the pre-election hearing, the longer it takes to determine whether a question of representation exists, and, ultimately, the longer it takes to conduct the election.

The 2014 rule provided that a pre-election hearing would commence 8 calendar days from the date of the service of the Notice of Hearing, except in cases presenting unusually complex issues.⁴⁸ That timeline was consistent with *Croft Metals, Inc.*, 337 NLRB 688 (2002), where the Board had concluded that 5 business days' notice of pre-election hearings was sufficient.⁴⁹ It also codified best practices in some regions, where hearings were routinely scheduled to open in 7 days to 10 days.⁵⁰ The 2014 rule's hearing timeline helped to expeditiously resolve questions of representation, while allowing adequate time for a nonpetitioning party to prepare for the hearing and to file a Statement of Position.⁵¹

⁴⁸ 29 CFR 102.63(a)(1) (Dec. 15, 2014). Prior to the 2014 rule, the Board's regulations did not specify when pre-election hearings would open. Instead, the regulations merely indicated that hearings would open at a time and place designated by the regional director. See 29 CFR 102.63(a) (2011).

⁴⁹ 79 FR at 74309, 74370-74379, 74424 (explaining why hearing time frame provides due notice). Although our dissenting colleague casts aspersions on *Croft Metals* as persuasive precedent, he ultimately relies on it himself—as he must in the absence of a subsequent decision overruling it—in concluding that “the 2019 Rule is consistent with *Croft Metals*.” We agree. But so is this rule in returning to the default 8-day timeline for noticing pre-election hearings.

⁵⁰ Our dissenting colleague takes issue with our reference to “best practices.” His criticisms are misguided. As explained in the 2014 rule, a “1997 Report of the Best Practices Committee provided that hearings should open between 10 to 14 days of the petition's filing.” 79 FR at 74373. If, in 1997, it took several days for the Notice of Hearing to be served after the petition's filing, then scheduling a pre-election hearing for 8 calendar days after the service of the Notice of Hearing would render the contemporary timing roughly equivalent to the timing described by the Best Practices Committee's 1997 Report. Moreover, a “model opening letter in 1999”—and a *model* letter is an attempt to convey best practices—“indicated that the hearing should open no later than 7 days after service of the notice.” *Id.*

⁵¹ 79 FR at 74309, 74370-74376, 74424. Reviewing courts rejected every challenge to the hearing scheduling provisions contained in the 2014 rule. See *UPS*, 921 F.3d at 256 (“[A]n eight-day notice accords with both the Due Process Clause and [the employer's] statutory right to an ‘appropriate’ hearing[.]”); *ABC of Texas*, 826 F.3d at 220, 222-223 (“[T]he rule changes to

The 2019 rule, however, more than doubled the applicable time frame, delaying the opening of the pre-election hearing from 8 calendar days to 14 business days from service of the Notice of Hearing.⁵² In our considered judgment, the reasons offered by the 2019 Board do not justify delaying the opening of the pre-election hearing, which necessarily delays resolution of the question of representation.

The 2019 Board provided no empirical basis for concluding that the 2014 rule time frame for the opening of the pre-election hearing needed changing. Rather, the 2019 Board principally asserted that revision of the timeline was “essentially dictated” by the other changes that the 2019 Board had voluntarily decided to make to the Statement of Position provisions of the 2014 rule.⁵³ But because those changes to the Statement of Position provisions are rescinded for the reasons explained in detail elsewhere,⁵⁴ the principal rationale for the extended hearing timeline no longer exists. Accordingly, this final rule reverts to the 8-calendar day time frame for the opening of the pre-election hearing to further expedite the resolution of questions concerning representation.⁵⁵

The 2019 Board’s secondary rationales for extending the timeline are not compelling.

The assertion that a longer timeline would allow parties to better deal with “preliminary

the pre-election hearing did not exceed the bounds of the Board’s statutory authority[.]”); *Chamber*, 118 F. Supp. 3d at 177, 205-206 (rejecting due process challenge to hearing scheduling provision).

⁵² 29 CFR 102.63(a)(1) (Dec. 18, 2019).

⁵³ 84 FR at 69533; see also *id.* at 69534 (acknowledging that “modifications” to the Statement of Position requirements “account for the 14-business-day timeline between the notice of hearing and the start of the pre-election hearing”).

⁵⁴ See *infra* *C. Due Date for Nonpetitioning Party’s Statement of Position*; *E. Responsive Statement of Position*.

⁵⁵ Our dissenting colleague admits that it is “obvious” that reverting to the 8-calendar day time frame would expedite the representation case process, but he then says that relying on that factor instead of “weighing carefully the other important interests at stake[]is hardly a reasoned basis” for the reversion. That contention ignores the relative importance of the statutory interest in the quick resolution of representation cases. See *A.J. Tower Co.*, 329 U.S. at 331 (“[T]he Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.”). It further ignores the balance of our discussion, which carefully considers and discounts the various other non-statutory interests identified by the 2019 Board in setting a lengthier time period for opening the pre-election hearing.

arrangements,” like retaining counsel, identifying and preparing witnesses, gathering information, and arranging any travel, and other “procedural obligations,”⁵⁶ was not grounded in evidence that parties were having trouble addressing these issues within 8 calendar days’ notice of the opening of the pre-election hearing. Part of the reason the 2019 Board could not point to evidence of an actual problem is likely because employers have the necessary information to prepare for pre-election hearings before notices of hearings ever issue⁵⁷ and are regularly aware of union organizing campaigns even before the filing of petitions.⁵⁸ So the 8-calendar day timeline is adequate for parties to retain counsel and make arrangements and prepare for hearings. Even assuming the 8-calendar day time frame causes some inconvenience, we believe that the statutory interest in expeditiously resolving questions of representation outweighs the non-statutory interest in facilitating parties’ hearing preparation.⁵⁹

The 2019 Board also speculated that additional time would give parties “better opportunity to reach election agreements.”⁶⁰ The Board cited no evidence for this view, and since the 2019 rule took effect there is no evidence that parties are more frequently reaching election agreements than under the 2014 rule. Prior to 2014, when hearings were scheduled to open in more than 8 calendar days in some regions, parties consistently entered into election agreements in about 90% of representation cases. When the 2014 rule’s 8-calendar day timeline was in effect, parties still consistently entered into election agreements in about 90% of representation cases. In the two full fiscal years since the 2019 rule’s 14-business day timeline

⁵⁶ 84 FR at 69533.

⁵⁷ See 79 FR at 74372, 74378-74379.

⁵⁸ See *id.* at 74320-74321, 74372, 74378-74379.

⁵⁹ Further, the timeline enables the regional director to grant postponements in appropriate cases. See *id.* at 74371, 74424; 29 CFR 102.63(a)(1) (Dec. 15, 2014).

We reject our dissenting colleague’s contention that our assessment of policy priorities in setting the time frame for opening of the pre-election hearing amounts to a denial of due process. He quotes one generalized statement of due process requirements but then does not explain why the time frame we set does not satisfy those requirements. He also fails to meaningfully engage with the relevant legal discussion on this issue in the 2014 rule. See 79 FR at 74371-74373. Moreover, as noted in fn.51, the courts have uniformly rejected due process challenges to the 2014 hearing scheduling provisions.

⁶⁰ 84 FR at 69533.

has taken effect, however, parties entered into election agreements in only 80.7% and 83.7% of representation cases.⁶¹ It may be that the current downward trend is partly attributable to issues arising from the COVID-19 pandemic; if so, the increased timeline that purported to give parties a “better opportunity to reach election agreements” clearly has not functioned as intended in that context and we accordingly cannot be confident that the extended timeline does, in fact, better encourage election agreements. Regardless, the available data show a decline, rather than an increase, in the rate at which parties reach election agreements since the 2019 rule took effect.

The 2019 Board also asserted that a 14-business day timeline “may” ease “logistical burdens” on the agency’s regional personnel.⁶² Though we are sensitive to the demands on regional personnel, we make the policy judgment that the regions are better served shifting their resources to accomplish the statutory goal of more expeditiously resolving questions of representation. In any event, the significant drop in election agreement rates following the implementation of the 2019 rule—regardless of the specific reason for the drop—itself represents a significant drain on regional resources by adding many more representation cases to the regions’ hearing dockets. If a return to the 2014 rule allows election agreement rates to rebound, this should more effectively ease the logistical burdens on regional personnel from processing representation cases.

The 2019 Board’s final justification—that a 14-business day timeline brings the pre-election hearing schedule “into closer alignment” with the post-election hearing schedule⁶³—is also not compelling. We do not discern a good reason to make the pre-election hearing timeline correspond to the post-election hearing timeline just to achieve symmetry. Instead, making pre-

⁶¹ Information reported in the Agency’s NxGen case processing software shows: election agreement rates of 91.1% in each of fiscal years 2013 and 2014, the full fiscal years immediately preceding the implementation of the 2014 rule; election agreement rates of 91.7%, 91.7%, 90.6%, and 91.3% in fiscal years 2016, 2017, 2018, and 2019, the full fiscal years immediately following the implementation of the 2014 rule; and election agreement rates of 80.7% and 83.7% in fiscal years 2021 and 2022, the full fiscal years immediately following the implementation of the 2019 rule.

⁶² 84 FR at 69533.

⁶³ Id. at 69533 & fn.45.

election hearing scheduling more uniform with post-election hearing scheduling simply imposes unnecessary delay in conducting pre-election hearings.

B. Postponement of Pre-Election Hearing

To further expedite the resolution of representation cases and promote uniformity and transparency, this final rule also reinstates the 2014 rule's standard for postponement of a pre-election hearing. Accordingly, a regional director can postpone a pre-election hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances.⁶⁴ Reimposing a higher standard of postponement than the comparatively unbounded good cause standard that the 2019 rule imposed makes clear to the parties that the statutory mission of the expeditious processing of representation cases will not give way unless the parties have truly special or extraordinary circumstances that make postponement appropriate.⁶⁵ The 2019 Board justified its imposition of a more permissive good cause standard by referring to regional director discretion.⁶⁶ But the regional directors—the career officials who do an admirable job administering representation cases—already had adequate discretion in this regard. Specifically, the 8-calendar day time frame is inapplicable when, in the regional director's discretion, the case presents unusually complex issues because in those cases, the regional director may set the hearing to open in a longer time frame.⁶⁷ Thus, requests to extend the opening of pre-election hearings beyond 8 days are unnecessary in cases presenting sufficient complexity and, in all other cases, delay is reasonably only warranted when a party has a truly special or extraordinary circumstance. Moreover, by concretely defining the standard postponement as up to 2 business days where the “special circumstances” criterion is satisfied, the representation case process in this respect becomes more transparent, as the parties are aware ahead of time what sort of

⁶⁴ 79 FR at 74371; 29 CFR 102.63(a)(1) (Dec. 15, 2014).

⁶⁵ 29 CFR 102.63(a)(1) (Dec. 18, 2019).

⁶⁶ 84 FR at 69534.

⁶⁷ 79 FR at 74371.

postponement they might encounter. The process also becomes more uniform, as similarly situated parties in diverse regions of the country will likely have postponements of similar length.

C. Due Date for Nonpetitioning Party's Statement of Position

The final rule also reinstates the 2014 rule's requirement that the nonpetitioning party's Statement of Position is due to be filed by noon the business day before the opening of the pre-election hearing.⁶⁸ Thus, because the pre-election hearing will normally open 8 calendar days after service of the Notice of Hearing, the Statement of Position will be due about 7 calendar days after service of the Notice of Hearing.

This 7-day time frame is sufficient for completion of the Statement of Position.⁶⁹ The 2019 Board labeled the Statement of Position "complicated," but it is not. It requires the nonpetitioning party to briefly specify its positions on the appropriateness of the petitioned-for unit, jurisdiction, the existence of any bar to an election, and the type, dates, times, and locations of the election.⁷⁰ Specifically, an employer simply needs to disclose little more than: whether an election involving its own employees has been held in the preceding 12 months, and whether the petitioned-for employees are covered by a contract (election bar issues); whether the employer is engaged in interstate commerce (jurisdiction); and whether employees in the petitioned-for unit share similar working conditions (unit appropriateness). This is the sort of information that a typical employer knows before a petition is ever filed,⁷¹ and, even if it did not, it is the sort of information an employer would usually determine when it becomes aware of a union organizing drive, which is typically before the filing of a petition.⁷² Giving the nonpetitioning party 7 additional days to compile the information after service of the Notice of Hearing is enough. To the extent that a small minority of employers may feel rushed when compiling the relevant

⁶⁸ 29 CFR 102.63(b) (Dec. 15, 2014).

⁶⁹ 79 FR at 74371-74379.

⁷⁰ 29 CFR 102.63(b)(1)(i)(A).

⁷¹ See *supra* fn.57.

⁷² See *supra* fn.58.

information, that tradeoff is again consistent with our mission: the statutory interest in expeditiously resolving questions of representation outweighs the non-statutory interest in maximizing employer convenience.⁷³

The 2019 Board did not rely on empirical evidence or other data to extend the due date for the nonpetitioning party's Statement of Position to 8 business days after service of the Notice of Hearing. The 2019 Board speculated that giving parties more time may help the parties "better balance" their other pre-hearing tasks, "including retaining counsel, researching the facts and relevant law, identifying and preparing potential witnesses, making travel arrangements, coordinating with regional personnel, and exploring the possibility of an election agreement."⁷⁴ Even assuming that the 2019 Board had cited data suggesting that these tasks are particularly time-consuming in the context of a pre-election hearing (which it did not), they are tasks that are in synergy with the requirement of the Statement of Position. Specifically, researching the facts and relevant law, identifying and preparing potential witnesses, and exploring the possibility of an election agreement are all tasks that will reveal the information that is required to be compiled and disclosed in the Statement of Position. In other words, gathering the information required by the Statement of Position is not an additional task that will add time to a nonpetitioning party's pre-hearing work; instead, it is a task that a nonpetitioning party will already be performing. Acknowledging this reality undercuts another of the 2019 Board's assertions—that giving more

⁷³ Moreover, the rule provides for extensions where appropriate. 29 CFR 102.63(b) (Dec. 15, 2014). We further note that the courts rejected every challenge to the 2014 rule's 7-day time frame for completion of the statement of position. See *Chamber*, 118 F. Supp. 3d at 205 & fn.24 (rejecting plaintiff's argument that "the burdensome requirement of the Statement of Position violates [its] due process rights by not providing it sufficient time to respond"); *UPS*, 921 F.3d at 255-257 (rejecting a challenge to the application of various 2014 rule provisions including the timing of the employer's Statement of Position).

Our dissenting colleague is no more persuasive in contending that "due process demands" more than 7 calendar days for a nonpetitioning party to prepare a Statement of Position. He fails to engage with due process case law or to explain how the 3-day difference between our 7-day provision of preparation time and his preferred 10-day standard crosses over to a standard that falls short of constitutional guarantees.

⁷⁴ 84 FR at 69535.

time for preparation of the Statement of Position would promote more election agreements.⁷⁵ It is the compiling of the relevant information—again, something that an employer will already be doing in the run up to a pre-election hearing—that facilitates entry into election agreements, and the instant rule, by preserving approximately one business day after the filing and service of the Statement of Position before the hearing opens, just as readily facilitates agreements. Indeed, since the 2019 rule’s 8-business day time frame has taken effect, there has been no increase in election agreements.⁷⁶ Even assuming the 7-calendar day time frame for completion of the Statement of Position causes some inconvenience, we believe that the statutory interest in expeditiously resolving questions of representation outweighs the non-statutory interest in maximizing the convenience of the nonpetitioning parties. Accordingly, to further expedite the resolution of representation cases, the nonpetitioning party’s Statement of Position ordinarily will now be due 7 calendar days after service of the Notice of Hearing, just as it was under the 2014 rule.

D. Postponement of the Statement of Position

To further expedite the resolution of representation cases and promote uniformity and transparency, this rule also reinstates the 2014 rule’s standard for an extension of time for the filing of a Statement of Position. Accordingly, a regional director may postpone the due date for the filing of a Statement of Position up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances.⁷⁷ This amendment is justified for substantially the same reasons as the amendment to the standard for postponement of the opening of the pre-election hearing—namely, this standard makes clear to the parties that the statutory mission of the expeditious processing of representation cases will not give way unless the parties have truly special or

⁷⁵ *Id.*

⁷⁶ See *supra* fn.61.

⁷⁷ 79 FR at 74371, 74374; 29 CFR 102.63(b) (Dec. 15, 2014).

extraordinary circumstances justifying the delay and provides a more concrete guidepost in the interests of uniformity and transparency.⁷⁸

E. Responsive Statement of Position

This rule also rescinds the 2019 rule's requirement that a petitioner file a written responsive Statement of Position by noon 3 business days after the nonpetitioning party's filing of its Statement of Position and 3 business days before the opening of the pre-election hearing.⁷⁹ In its place, this rule reinstates the 2014 rule's requirement that, if the parties are unable to enter into an election agreement, the petitioner shall respond orally on the record at the pre-election hearing to the issues raised in the nonpetitioning party's Statement of Position.⁸⁰ Like many of the other amendments made by this rule, this particular amendment will further the agency's statutory mandate to more expeditiously resolve questions of representation.

The gains in terms of expedition are substantial. By eliminating the 3 business days that a petitioning party has to formulate a written response to a nonpetitioning party's Statement of Position and further eliminating the additional 3 business days of mandated waiting that follows, the Board has eliminated 6 business days from the representation case process. This delay—and the responsive Statement of Position that the 2019 Board used to justify it—was unnecessary.

As the 2019 Board itself admitted, the petitioner already takes a written position on certain key issues to be resolved at the pre-election hearing in its petition.⁸¹ Requiring a responsive Statement of Position is largely redundant and does not “serve the purpose of uniformity” by ensuring that each side makes a written filing prior to the pre-election hearing,⁸² as each side already puts its positions in writing. As to the other issues that the nonpetitioning party's Statement of Position addresses for the first time—like jurisdiction (which turns on the

⁷⁸ See *supra* B. *Postponement of Pre-Election Hearing*. Of course, any extension of time granted for the filing of the Statement of Position will typically result in a corresponding delay in the hearing date and the petitioner's oral response to the Statement of Position.

⁷⁹ 84 FR at 69536; 29 CFR 102.63(b)(1)(ii) (Dec 18, 2019).

⁸⁰ 79 FR at 74309, 74393; 29 CFR 102.66(b) (Dec. 15, 2014).

⁸¹ 84 FR at 69536.

⁸² *Id.*

employer's dealings in interstate commerce) and the names and job titles of the employer's own employees—that depends on information that is usually under the exclusive control of the nonpetitioning employer and, if necessary, can be responded to by the petitioner orally at the hearing without a written response. The 2019 Board was of the view that a responsive Statement of Position would help “clarify” positions and provide “notice” of the issues that remain in dispute to be worked out at the hearing.⁸³ But the 2019 Board pointed to no evidence that a petitioner's oral statement on the record at the opening of the pre-election hearing did not already provide the needed clarification and notice that would guide the resolution of outstanding issues throughout the remainder of the hearing.

The 2019 Board also asserted that the “[m]ost important[.]” feature of requiring a written responsive Statement of Position was “greater efficiency.”⁸⁴ But requiring the petitioning party to prepare and file a statement that is largely redundant to its already-filed written petition and that deals with a few additional issues that can be readily addressed orally at the pre-election hearing adds inefficiency to the representation case process. And by giving the petitioning party 3 business days to prepare its responsive Statement of Position and then adding 3 additional business days after its filing before the pre-election hearing can open, the 2019 rule's requirement further guaranteed that 6 additional business days are added to every representation case that goes to a pre-election hearing. Requiring an additional and unnecessary written filing and then stopping the representation case process for 6 days is inefficient. The 2019 Board also said that the additional written filing and mandated delay might “facilitate better preparation for the hearing” by the parties and agency personnel⁸⁵ and “additional opportunity and incentive for parties to reach election agreements.”⁸⁶ As to the former rationale, there is no evidence that the conduct of hearings has demonstrably improved as a result of this device (or that the 2014 rule's

⁸³ Id.

⁸⁴ Id. at 69537.

⁸⁵ Id.

⁸⁶ Id.

requirement had impaired hearing efficiency). As to the 2019 Board’s latter rationale of promoting election agreements, there is no indication that the speculation has come to pass. The evidence is that stipulation rates have not improved since the 2019 rule took effect, but have in fact decreased.⁸⁷

In sum, the 2019 rule’s requirement of a written responsive Statement of Position plus delay of 6 additional business days has hindered the expeditious resolution of representation cases. Accordingly, this rule—to further the agency’s statutory mission of expeditious and efficient resolution of representation cases—eliminates the responsive Statement of Position requirement and its attendant 6-business day delay.

F. Posting and Distribution of Notice of Petition for Election

The posting and electronic distribution of the Notice of Petition for Election serves the important purpose of quickly and clearly communicating to employees and employers alike important information about the representation case process. This effective mechanism for accurate information sharing—which the 2019 Board admitted serves a “laudatory purpose”⁸⁸—is essential to strengthening workplace democracy. The Notice specifies that a petition has been filed, the type of petition, the proposed unit, the name of the petitioner, briefly describes the procedures that will follow, lists employee rights and sets forth in understandable terms the central rules governing organizational campaign conduct, and provides the Board’s website address, where more information about the representation case process is available.⁸⁹

Given the straightforward but essentially important information conveyed by this Notice of Petition for Election, the 2014 rule provided for the employer to post it within 2 business days after service of the Notice of Hearing in conspicuous places in the workplace and to electronically distribute it to employees if the employer customarily communicates with its

⁸⁷ See *supra* fn.61.

⁸⁸ 84 FR at 69538.

⁸⁹ 79 FR at 74309, 74379.

employees electronically. That timeline is warranted.⁹⁰ An employer is provided with the Notice of Petition for Election by the regional director at the same time it receives the Notice of Hearing; it is not a document for which the employer needs to compile any information or draft itself.⁹¹ The employer's task involves no more than printing copies of the Notice it is provided, affixing them to the wall of the workplace, and sending digital copies of the document to employees in an email or some similar electronic service. Given that an employer can promptly complete this task, the provision of 2 business days to complete it is sufficient, particularly when weighed against the vital information that the Notice disseminates.

Accordingly, this rule rescinds and replaces the 5-business day time frame that the 2019 rule gave employers to post the Notice of Petition for Election after service of the Notice of Hearing.⁹² Instead, we replace it with the 2-business day timeline set forth in the 2014 rule, because in our view the 2019 Board provided no good reason for providing the additional time. The 2019 Board speculated that employers, particularly "large multi-location employers," "may" face "logistical difficulties" in complying with the 2-business day timeline.⁹³ However, the 2019 Board cited no evidence for this rationale. That is because large multi-location employers, with large centralized human resource departments and sophisticated electronic infrastructure, are particularly able to execute this task quickly. Smaller employers can also complete this task within 2 business days given the simplicity of the posting requirement and the relatively smaller audience to whom a small employer must distribute the Notice.⁹⁴

The 2019 Board's other rationale for a 5-business day time frame was that quick dissemination of the Notice was "less urgent" because of the delay its rule had imposed in the

⁹⁰ 79 FR at 74379-74380; 29 CFR 102.63(a)(2) (Dec 15, 2014).

⁹¹ The employer is also provided with instructions on how to post and distribute it. See 79 FR 74463; 29 CFR 102.63(a)(1), (2) (Dec. 15, 2014).

⁹² 84 FR at 69538; 29 CFR 102.63(a)(2) (Dec. 18, 2019).

⁹³ 84 FR at 69538.

⁹⁴ Our dissenting colleague does little more than repeat the 2019 speculation that both large and small employers will have difficulty complying with notice-posting within 2 business days. Yet, he cites no evidence that any such issues proved problematic in the five years that the 2014 rule's standard was in effect.

opening of the pre-election hearing.⁹⁵ That rationale shows the 2019 Board’s misunderstanding of key aspects of the representation case process and the reality of organizational campaigns. The purpose of the Notice is not to inform employees of the pre-election hearing; rather, as noted, it serves the important purpose of informing employees and the employer alike about the filing of the petition, the process that will follow, employee rights, and the rules governing campaign conduct. Accordingly, by requiring posting within 2 business days, we promote greater transparency concerning the representation case process. Additionally, because, for the reasons explained elsewhere, we have reinstated the 2014 rule’s 8-calendar day timeline for the opening of the pre-election hearing, even if it made sense to link the posting of the Notice and the opening of that hearing, shortening the time frame for posting of the Notice from 5 to 2 business days approximates the equivalent reduction in the time it will take for the pre-election hearing to open.

102.64 Conduct of hearing.

Section 9(c)(1) of the Act establishes the purpose of a pre-election hearing: to determine whether a question of representation exists.⁹⁶ Even so, prior to the 2014 rule, the Board’s rules and regulations entitled parties to litigate, at the pre-election hearing, issues like individual eligibility to vote or inclusion in an appropriate unit (including supervisory status questions) that were not necessary to determine whether a question of representation exists. The 2014 rule expressly stated the purpose of the pre-election hearing—to determine whether a question of representation exists—and established that individual eligibility and inclusion issues “ordinarily need not be litigated or resolved before an election is conducted” and ensured that regional directors could limit the evidence offered at the pre-election hearing to that which is necessary

⁹⁵ 84 FR at 69538.

⁹⁶ Section 9(c)(1) of the Act provides, in relevant part: “Whenever a petition shall have been filed ... the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.”

for a determination of whether a question of representation exists. The 2019 rule provided that individual eligibility and inclusion issues should “normally” be resolved at the pre-election hearing. This rule reinstates the 2014 amendments and rescinds the 2019 amendments.⁹⁷

It is inefficient to encourage parties to litigate individual eligibility and inclusion issues at the pre-election hearing. By not addressing these individual eligibility and inclusion issues in the ordinary course at the pre-election hearing, unnecessary litigation is eliminated. Specifically, if a majority of employees votes against representation in the election, even assuming all the disputed votes were cast in favor of representation, then the disputed eligibility and inclusion questions become moot and therefore never have to be litigated or decided. If, on the other hand, a majority of employees chooses to be represented, even assuming all the disputed votes were cast against representation, then the Board’s experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining once they are free of the tactical considerations that exist pre-election.⁹⁸ Thus, here too the disputed eligibility or inclusion issues never need to be litigated or decided by the Board. Even if the parties cannot work out the remaining individual issues in bargaining, there is no need for another election to resolve the matter; rather, the unit placement of a small number of employees can be resolved through a unit clarification procedure.⁹⁹

The gains in efficiency and expedition are not just accrued in the minority of representation cases that require a pre-election hearing. Bargaining between the parties always takes place in the shadow of the law—that is, against the backdrop of what *would* happen if the

⁹⁷ 79 FR at 74380-74393. These 2014 rule provisions were uniformly upheld by the courts. Indeed, every court to have considered the matter has rejected the claim that the statute entitles parties to litigate at the pre-election hearing (and requires the regional director or the Board to decide prior to the election) all individual eligibility or unit inclusion issues. See *RadNet*, 992 F.3d at 1122; *UPS*, 921 F.3d at 257; *ABC of Texas*, 826 F.3d at 222-223; *Chamber*, 118 F. Supp. 3d at 195-203.

⁹⁸ 79 FR at 74391; see *New York Law Publishing Co.*, 336 NLRB No. 93, slip op. at 1 (2001) (“The parties may agree through the course of collective bargaining on whether the classification should be included or excluded.”).

⁹⁹ 79 FR at 74391.

parties failed to enter into an election agreement and proceeded to a pre-election hearing. Accordingly, if there is leeway to regularly litigate individual eligibility or inclusion issues at the pre-election hearing, then, even if there are no disputes as to facts relevant to the existence of a question of representation, parties may have an incentive to insist on raising individual issues and proposing to present evidence related to those issues to trigger the threat of the delay occasioned by the hearing process and the time it will take the regional director to review the transcript and write a decision in order to extract concessions from the opposing side.¹⁰⁰

The 2019 rule's directive that individual eligibility and inclusion issues ordinarily should be litigated at the pre-election hearing and decided prior to the election has never taken effect because of the district court's order enjoining it,¹⁰¹ and, following the D.C. Circuit's reversal of the district court's ruling in that regard,¹⁰² the Board's order extending its effective date.¹⁰³ The relevant evidence since enactment of the 2014 amendments show the gains in efficiency referenced above. After the 2014 rule took effect, with the pre-election hearing focused on the existence of a question of representation rather than on extraneous issues that can be resolved, if necessary, later in the representation case process, there was a significant reduction in the time it took regional directors to issue their decisions and directions of elections.¹⁰⁴

Further, the 2019 Board ignored the 2014 Board's explanation of why permitting regional directors to deny litigating a small number of individual eligibility or inclusion issues was unlikely to increase the number of determinative challenge cases requiring post-election litigation of those issues.¹⁰⁵ As the Fifth Circuit explained in upholding the provision, "[t]he

¹⁰⁰ *Id.* at 74386-74387.

¹⁰¹ *AFL-CIO*, 466 F. Supp. 3d at 100.

¹⁰² *AFL-CIO*, 57 F.4th at 1043-1045.

¹⁰³ 88 FR at 14913, 14914.

¹⁰⁴ E.g., February 15, 2018 Letter from NLRB Chairman Kaplan and General Counsel Robb to Senator Murray and Representatives Scott, Sablan, and Norcross (Summary Table) (reporting a 24-day median for regional directors to issue a decision and direction of election following the close of the pre-election hearing in the year immediately preceding the 2014 rule's effective date as compared to a 12-day median in the year immediately following the 2014 rule's effective date).

¹⁰⁵ See 79 FR at 74387-74388.

Board considered evidence that more than 70% of elections in 2013 were decided by a margin greater than 20% of all unit employees, ‘suggesting that deferral of up to 20% of potential voters ... would not have compromised the Board’s ability to immediately determine election results in the vast majority of cases.’” *ABC of Texas*, 826 F.3d at 228.¹⁰⁶

Significantly, the Board’s experience since the 2014 rule provisions went into effect confirms the validity of the 2014 Board’s judgment in this regard and undermines the 2019 Board’s conclusion that the 2014 rule’s benefits of avoiding unnecessary litigation that also delays elections comes at the expense of certainty, finality, and efficiency. After the 2014 rule went into effect, the number of elections resulting in determinative challenges remained stable, despite a significant increase in regional directors approving election agreements in which certain individuals vote subject to challenge.¹⁰⁷ That fact supports the conclusion that when regional directors deny pre-election litigation of a small number of individual eligibility and

¹⁰⁶ While the 2014 Board set forth its view that “regional directors’ discretion would be exercised wisely if regional directors typically chose not to expend resources on pre-election [litigation and resolution of] eligibility and inclusion issues amounting to less than 20 percent of the proposed unit,” and if regional directors typically chose to approve parties’ stipulated election agreements in which up to 20% of the unit is to be voted under challenge, 79 FR at 74388 fn.373, the 2014 Board also stated, as the Fifth Circuit noted, that it “‘expect[ed] regional directors to permit litigation of, and to resolve, such [individual eligibility or inclusion] questions when they might significantly change the size or character of the unit.’” See *ABC of Texas*, 826 F.3d at 222; 79 FR at 74390.

¹⁰⁷ For the 2-year period immediately following the implementation of the 2014 rule there were 191 election agreements that permitted individuals to vote subject to challenge. See February 15, 2018 Letter from NLRB Chairman Kaplan and General Counsel Robb to Senator Murray and Representatives Scott, Sablan, and Norcross at p.5. For the 2-year period prior to the implementation of the 2014 rule there were only 47 election agreements that permitted individuals to vote subject to challenge. See February 15, 2018 Letter from NLRB Chairman Kaplan and General Counsel Robb to Senator Murray and Representatives Scott, Sablan, and Norcross at p.5. Accordingly, the 2014 rule caused an uptick in agreements to defer litigation. Nevertheless, information produced from searches in the Board’s NxGen case processing software shows that in fiscal years 2016 and 2017, the first two full fiscal years after implementation of the 2014 rule, there were only 56 cases requiring a post-election regional director decision on determinative challenges across 3,203 cases with an election (1.75% of cases with an election), and in fiscal years 2013 and 2014, the last two full fiscal years before implementation of the 2014 rule, there were 53 such cases across 3,240 cases with an election (1.64% of cases with an election). Accordingly, even with the uptick in the proportion of cases involving agreements to defer, the proportion of cases requiring a post-election decision to resolve those challenges remained stable at about 1.7%.

inclusion issues, they avoid unnecessary litigation that is often ultimately mooted by the results of the election. The statistics also show that there was stability in the number of unit clarification petitions,¹⁰⁸ demonstrating that the increased pre-election deferral of individual eligibility decisions did not cause a spike in parties coming back before the Board to resolve individuals' placement inside or outside the relevant bargaining units. In short, the 2014 amendments that we reinstate have not shifted litigation from before the election to after the election. Rather, the amendments have eliminated pre-election litigation that was unnecessary, as proven by the absence of a corresponding increase in post-election litigation. Thus, by continuing to encourage the deferral of individual eligibility decisions, the rule we adopt demonstrates a substantial gain in agency efficiency.

The 2019 Board provided several justifications for its expansion of litigation at the pre-election hearing but none of them is compelling. Its justification articulated in terms of enhanced finality and certainty¹⁰⁹ is not supported by the data, cited above, showing the stabilizing effect of the 2014 rule on both post-election litigation concerning determinative challenges and the need for unit clarification petitions. Elections thus remain just as final and certain under the 2014 amendments as they were under the pre-2014 status quo to which the 2019 rule would largely return.

The 2019 Board's concern that individual questions of supervisory status, if not decided pre-election, would prevent employers from knowing who they can use to campaign against a union in the pre-election campaign and would increase the possibility of post-election objections

¹⁰⁸ Comparing information reported on the agency's website concerning total representation elections won by unions with information reported in the NLRB Performance and Accountability Reports concerning total unit clarification petitions filed in the following fiscal year (to take into account time for bargaining to resolve any deferred unit placement issues) shows that in fiscal years 2016 and 2017, which again were the first two full fiscal years after the implementation of the 2014 rule, unit clarification petitions constituted 8.2% and 7.2% of all representation elections won by unions in the previous fiscal year, and in fiscal years 2013 and 2014, which again were the last two full fiscal years prior to the implementation of the 2014 rule, the corresponding figures were 7.3% and 8.7%.

¹⁰⁹ 84 FR at 69539-69540.

based on conduct attributable to an individual whose eligibility and/or supervisory status was not resolved prior to an election is similarly unpersuasive.¹¹⁰ Supervisory status issues exist only at the margin because in most cases where there is uncertainty concerning the supervisory status of one or more individuals, the employer nevertheless has in its employ managers and supervisors whose status is not in dispute.¹¹¹ The importance of expedition in the election process simply outweighs employers' interest in certainty that a particular individual or individuals may or may not be utilized in a pre-election campaign against a union. The employer is not hindered in its efforts to mount its pre-election campaign if it chooses to avoid utilizing individuals on its behalf whose statutory supervisory status is uncertain, a determination that employers are best situated to determine.¹¹² On the other hand, the 2019 rule's requirement that the marginal supervisor's

¹¹⁰ Contrary to the unfounded speculation of the 2019 Board majority, see 84 FR at 69525, 69529, 69530, 69540, as well as the predictions of the 2014 dissenting Board Members, see 79 FR at 74438 fn.581, 74445, the relevant data indicate no increase in post-election objections litigation arising after the deferral of supervisory status questions under the 2014 rule. Comparing the periods before and after implementation of the 2014 rule (which approximates the change that would result from the 2019 rule's litigation changes going into effect), there was stability in the number of cases necessitating post-election decisions on objections by regional personnel and in the number of rerun elections ordered by regional directors.

Information produced from searches in the Board's NxGen case processing software shows that in fiscal years 2016 and 2017, which were the first two full fiscal years after the implementation of the 2014 rule, there were 114 cases requiring a regional decision on objections following an election and 61 cases in which regional directors directed rerun elections, as compared to 3,203 total elections, amounting to objections in 3.56% of all elections and reruns in 1.9% of all elections. For fiscal years 2013 and 2014, which were the last two full fiscal years prior to the implementation of the 2014 rule, there were 118 objections cases and 59 reruns as compared to 3,240 total elections, amounting to objections in 3.64% of all elections and reruns in 1.82% of all elections. Thus, the implementation of the 2014 rule did not cause a spike in either post-election objections or in elections needing to be rerun.

¹¹¹ 79 FR at 74389.

¹¹² Our dissenting colleague contends that "this issue is not simply about an employer disseminating its message to employees, it is about 'post-election complications where the putative supervisors engage in conduct during the critical period that is objectionable when engaged in by a supervisor, but is unobjectionable when engaged in by nonparty employees.'" But, as noted in fn.110, supra, the relevant data show no overall increase in election objections that would have resulted from more objectionable conduct by individuals later determined to be supervisors following implementation of the 2014 rule. And our dissenting colleague makes no attempt to support his abstract prediction with cases or data showing otherwise. This is especially notable since the 2014 rule to which we return and which made it so that individual eligibility and inclusion issues were ordinarily not litigated at the pre-election hearing was in effect for *five years*, surely sufficient time for "complications" to have arisen, if in fact they were real.

status be resolved before the election creates the possibility, if not the probability, of extensive and detail-oriented litigation of the supervisory status of one or more individuals, which would, in turn, inevitably slow down the election process. In other words, it creates incentives that are the exact opposite of the goals of a speedy and efficient election process. Moreover, even if supervisory status issues had to be litigated and resolved pre-election, the issues would still remain unresolved between the time the petition was filed and the holding of a hearing and the subsequent rendering of the regional director's decision. Thus, there would always inevitably be a period of time during a campaign when supervisory status issues, to the extent they exist, are unresolved.¹¹³ Then, even if the regional director resolved the issues before an election, that resolution would still remain subject to review by the Board, and any Board decision, in turn, would potentially be subject to review in a court of appeals. Moreover, because we separately rescind the 2019 rule's mandatory 20-business day waiting period before an election can be held following issuance of a decision and direction of election,¹¹⁴ there is a shorter window between any decision and direction of election and the election itself. That, in turn, reduces any benefit of having a regional director decide, for the employer's campaign purposes, who the supervisors are in the decision and direction of election. Thus the 2019 Board's approach sacrificed efficiency and expeditiousness with a negligible countervailing benefit in terms of finality and certainty.

The 2019 Board's justification grounded in fair and accurate voting and transparency—namely, that resolving individual eligibility or inclusion issues before the election would permit employees to know the “precise contours” of the unit in which they are voting¹¹⁵—also is unconvincing. As noted above, even if individual eligibility and inclusion issues were decided before an election, there is always some uncertainty such that the “precise contours” of the unit are rarely defined prior to an election. For another, as the D.C. Circuit has explained, permitting

¹¹³ This would also include a substantial part of the “critical period” between the filing of the petition and the election. 79 FR at 74389.

¹¹⁴ See *infra B. Elimination of the 20-Business Day Waiting Period Between Issuance of the Decision and Direction of Election and the Election.*

¹¹⁵ 84 FR at 69540-69541.

employees “to vote under challenge” does not “imperil the bargaining unit’s right to make an informed choice, so long as the notice of election ... alert[s] employees to the possibility of change to the definition of the bargaining unit,”¹¹⁶ as occurs under the rules. The 2019 Board’s view that this notice would confuse employees and so “runs the risk of being a disincentive for some employees to vote”¹¹⁷ was based on no evidence of reduced voter turnout.¹¹⁸

In sum, by rescinding the 2019 amendments and restoring the 2014 rule language, we reduce unnecessary litigation and eliminate an unnecessary barrier to the fair and expeditious resolution of questions concerning representation.¹¹⁹

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

A. Introduction of Evidence; Offers of Proof

¹¹⁶ *UPS*, 921 F.3d at 257 (internal quotation marks omitted).

¹¹⁷ 84 FR at 69541.

¹¹⁸ As the 2014 rule noted, there was no evidence that voter turnout was depressed prior to the 2014 rule, when employees were likewise permitted to vote subject to challenge. 79 FR at 74390.

¹¹⁹ In arguing that the Board should maintain the 2019 rule’s directive that individual eligibility and inclusion issues should ordinarily be resolved prior to the election, our dissenting colleague attempts to rely on the Supreme Court’s decision in *A.J. Tower*. He misconstrues that case. In *A.J. Tower*, the Supreme Court, in addition to directing that “the Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily,” 329 U.S. at 331, upheld the Board’s decision in that case to prohibit the employer’s post-election challenge to the eligibility of one of the voters in the election, *id.* at 332-333. The employer had attempted to challenge the eligibility of one of the voters 4 days after the election took place. *Id.* at 327-328. In upholding the Board’s decision not to consider that untimely challenge, the Court agreed that “challenges to the eligibility of voters” must “be made prior to the actual casting of ballots, so that all uncontested votes are given absolute finality.” *Id.* at 331. The case thus stands for the proposition that challenges to voters’ eligibility in union elections must be *made* prior to the election—not that all such challenges need to be *resolved* prior to the election. Indeed, post-election *resolution* of challenged ballots has been a feature of the Board’s election procedures since the earliest days of the Act (and has continued under both the 2014 and 2019 rules). See, e.g., 79 FR at 74386 and fn.364, 74391 (citing *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994) (“The NLRB’s practice of deferring the eligibility decision saves agency resources for those cases in which eligibility actually becomes an issue.”)); 84 FR at 69540 fn.66, 69541 (“[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. Section 102.64(a) as modified by the final rule states only that disputes concerning unit scope, voter eligibility, and supervisor status will ‘normally’ be litigated and resolved by the regional director.”).

Consistent with the modifications to Section 102.64 explained immediately above and for the reasons discussed there, this reinstated rule reverts Section 102.66(a) to the version that resulted from the 2014 rule to clarify that the evidence admissible at a pre-election hearing is normally limited to the existence of a question of representation and is not admissible as to other issues. Further consistent with that and for the same reasons, this rule modifies Section 102.66(c) to eliminate the introduction of evidence that is not consistent with the offer of proof procedure for the receipt of evidence concerning the existence of a question of representation.

B. Briefing Following Pre-Election Hearing

Generally, in formal agency adjudication, parties are entitled to briefing.¹²⁰ But Congress expressly excluded adjudications involving “the certification of worker representatives” from that requirement.¹²¹ It did so because “these determinations rest so largely upon an election or the availability of an election”¹²² and “because of the simplicity of the issues, the great number of cases, and the exceptional need for expedition.”¹²³ The 2019 Board acknowledged this.¹²⁴ Even so, the 2019 Board decided to grant parties an absolute right to file briefs up to 5 business days following the close of the pre-election hearing, with an extension of an additional 10 business days available upon a showing of good cause. This rule rescinds that decision and reverts to the 2014 rule’s standard that parties are entitled to present oral argument at the close of the pre-election hearing, but they may file post-hearing briefs only upon special permission of the regional director and within the time and addressing only the subjects permitted by the regional director.¹²⁵

¹²⁰ 5 U.S.C. 557(c).

¹²¹ 5 U.S.C. 554(a)(6); see also 79 FR at 74402.

¹²² S. Rep. No. 752, at 202 (1945); see also 79 FR at 74402.

¹²³ Senate Committee on the Judiciary Comparative Print on Revision of S. 7, 79th Cong., 1st Sess. 7 (1945); see also 79 FR at 74402.

¹²⁴ See 84 FR at 69542 (“[W]e do not take issue with the proposition that the Board is not required to permit post-hearing briefs after pre-election hearings[.]”).

¹²⁵ 79 FR at 74401-74403, 74426-74427; 29 CFR 102.66(h) (Dec. 15, 2014). We agree with the 2014 Board’s conclusion that given the often recurring and uncomplicated legal and factual issues arising in pre-election hearings, briefs are not necessary in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and accurate decisions.

Rescission of the blanket entitlement to post-hearing briefing is warranted given the recurring and uncomplicated legal and factual issues arising in pre-election hearings. There is a relatively contained body of law applicable in the repeated factual contexts that present issues at pre-election hearings, and, accordingly, in the vast majority of cases, regional directors can properly resolve the issues without briefing.¹²⁶ Moreover, regional directors retain the discretion to order briefing when they are confronted with the rare case that poses a truly complex issue.¹²⁷

The Board thus has no reason to believe that the quality of regional director decisions will decline. Regional directors infrequently make incorrect decisions in the pre-election context. Since the 2019 rule took effect, there has been no decline in the proportion of cases in which the Board grants review or reverses regional director pre-election decisions, which tends to show that the default entitlement to post-hearing briefing has not helped regional directors reach the right results or avoid prejudicial errors to an even greater degree.¹²⁸ Eliminating the

¹²⁶ *Id.*

¹²⁷ Our dissenting colleague points to cases involving independent contractor status as exemplars of situations in which briefing would assist regional directors with the application of multi-factor legal tests. However, under the 2014 rule, regional directors exercised their discretion to permit briefing in many independent contractor cases. See 84 FR at 69578 fn.230 (then-Member McFerran, dissenting) (listing independent contractor cases in which regional directors allowed briefing under the 2014 rule). We also find it significant that in some independent contractor cases, parties waived filing briefs in lieu of presenting oral argument, thereby evidencing that parties themselves recognize that post-hearing briefing to regional directors is not necessary in all cases involving independent contractors. *Id.*

We also note that, just as was the case under the 2014 rule, parties remain entitled to file a brief with the Board in support of any request for review of the regional director's decision and direction of election. 79 FR at 74402.

¹²⁸ Information produced from searches in the Board's NxGen case processing software shows that in fiscal years 2018 and 2019—the last two full years the 2014 rule was in effect—the Board granted review in 9 of the 82 cases in which a party filed a request for review and reversed the regional director's decision in 2 of those cases. Accordingly, across those years, a request for review was granted in 10.98% of cases with an election in which a request for review was filed, and a request for review caused a reversal in 2.44% of cases with an election in which a request for review was filed. In fiscal years 2021 and 2022—the first two full years the 2019 rule was in effect—the Board granted review in 19 of the 119 cases in which a party filed a request for review and reversed the regional director's decision in 5 of those cases. Accordingly, across those years, a request for review was granted in 15.97% of cases with an election in which a request for review was filed, and a request for review caused a reversal in 4.2% of cases with an election in which a request for review was filed. Accordingly, the data do not tend to show that regional director decision making has improved with the benefit of default briefing under the

default entitlement to post-hearing briefing thus comes with no clearly discernible cost, and the primary benefit is enhancing the Board's ability to expeditiously process representation cases.¹²⁹ By eliminating a mandated 5-business day briefing period (with the possibility of 10 additional business days upon an extension), the issuance of a decision and direction of election and any subsequent election can occur sooner. Moreover, giving no entitlement to post-hearing briefing following a pre-election hearing and permitting it only if deemed helpful by the decisionmaker is a uniform and transparent standard and, by eliminating a redundant round of briefing, the rule promotes finality.

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.

A. Specification of Election Details in Decision and Direction of Election; Notice of Election

An election cannot be conducted until the details of the election are set and the Notice of Election advises the employees of when, where, and how they may vote. Prior to the 2014 rule, these details were resolved after the decision and direction of election issued in sometimes lengthy telephone consultations and negotiations with the various parties.¹³⁰ To eliminate one of the “choke points” in getting to the election, the 2014 rule required that the parties state their preferences on the election details in their petitions and Statement of Position, and further provided that the hearing officer would solicit the parties' positions on the election details again, prior to the close of the hearing.¹³¹ Because the parties will already have twice stated their positions on the election details, this rule directs that election directions will ordinarily specify

2019 rule. This is consistent with prior data showing that regional director decision making did not suffer following the implementation of the 2014 rule. See 84 FR at 69578 fn.231 (then-Member McFerran, dissenting).

¹²⁹ Our dissenting colleague contends that permitting briefing in all cases would “promot[e] more *efficient* case processing without unduly delaying resolution of the case.” (Emphasis in original.) We have provided reasons and analyzed data to show why briefing as a matter of right is, among other things, *inefficient*.

¹³⁰ 79 FR at 74404.

¹³¹ *Id.*; see also 29 CFR §§ 102.61(a)(12), (b)(9), (c)(11); 102.63(b)(1)(i), (2)(i), (iii), (3)(i); 102.66(g) (Dec. 15, 2014).

the type, date(s), time(s), and location(s) of the election and the eligibility period and that the regional director will ordinarily transmit the Notice of Election simultaneously with the direction of election. By consolidating the decision and direction of election with the specification of the election details in the ordinary course, the Board eliminates the need for wasteful post-decision consultation and, in turn, can more expeditiously resolve questions of representation.

Additionally, providing this information with the direction of election promotes greater transparency and certainty than if dissemination of this important information is delayed. If necessary, regional directors remain free to consult with the parties again about election details after directing an election.

This amendment thus reverts to the standard of the 2014 rule¹³² and rescinds the 2019 rule's amendment that merely provided that the regional director "may" specify the election details in the decision and direction of election and effected a "shift in emphasis" by providing that the regional director "retains discretion to continue investigating these details after directing an election and to specify them in a subsequently-issued Notice of Election."¹³³ The Board does not doubt the discretion of the regional director to work out election details, if necessary, after directing an election, but there is no compelling reason to "shift" the ordinary course from how the 2014 rule established it. The 2019 Board admitted that "the regional director should ordinarily be able to provide election details in the direction of election."¹³⁴ Determining election details as an entirely separate process after directing the election is, ordinarily, a step that adds unnecessary delay and inefficiency to the representation case process. Accordingly, like other aspects of this rule, this is another instance where we amend the rule to make it responsive to the ordinary course scenario, with a safety valve responsive to the exception. Doing so causes no discernible detriment and furthers the goals of expeditiously and efficiently processing representation cases and promoting transparency and certainty.

¹³² 79 FR at 74404-74405.

¹³³ 84 FR at 69544; 29 CFR 102.67(b) (Dec. 18, 2019).

¹³⁴ 84 FR at 69544.

B. Elimination of the 20-Business Day Waiting Period Between Issuance of the Decision and Direction of Election and the Election

Both the 2014 rule and the 2019 rule provided that regional directors shall schedule elections for the earliest date practicable.¹³⁵ However, the 2019 rule imposed a 20-business day (or 28-calendar day) waiting period before an election can be held following issuance of a decision and direction of election to permit the Board to rule on any request for review that may be filed.¹³⁶ The instant rule rescinds this amendment that, by definition, substantially delays the election that is designed to answer the question of representation.

The scheduling of an election for the earliest date practicable furthers the Board's statutory mission to expeditiously process representation cases. A mandated waiting period—which effectively stays the election in every contested case for a set period of time—is, as a threshold statutory matter, in tension with Congress's instruction in Section 3(b) of the Act that the grant of review of a regional director's action “shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.”¹³⁷ Moreover, as a policy matter, a waiting period necessarily delays the election, which is designed to answer the question of representation. Thus, by eliminating it, the Board eliminates an unnecessary barrier to the fair and expeditious resolution of questions concerning representation and thereby furthers a statutory goal. And because, as the Board has noted elsewhere, bargaining takes place in the shadow of the law such that some parties use the threat of a pre-election hearing and the result of a waiting period to extract concessions concerning election details, the impact of the earliest date practicable standard is also felt in the more common context of a stipulated election.

Rescinding the mandatory waiting period—which, on its terms, exists solely to permit the Board to rule on any request for review that may be filed within 10 business days of a direction of election¹³⁸—is also responsive to the fact that requests for review of a decision and direction of

¹³⁵ See 29 CFR 102.67(b) (Dec. 15, 2014); 29 CFR 102.67(b) (Dec. 18, 2019).

¹³⁶ 84 FR at 69544-69547; 29 CFR 102.67(b) (Dec. 18, 2019).

¹³⁷ 29 U.S.C. 153(b).

¹³⁸ 84 FR at 69544-69547.

election are filed in only a small percentage of cases, are granted in only a small percentage of the cases in which they are filed, and result in orders staying elections in hardly any cases at all.¹³⁹ And, as a result of another amendment from the 2014 rule that the 2019 rule did not change, parties are free to file requests for review even after completion of an election.

Accordingly, even if a waiting period could, in some instances, enable the Board to resolve requests for review prior to elections taking place, there is no meaningful benefit to doing so and certainly no benefit large enough to outweigh the cost of added delay in every other case. And a standard that directs a regional director to schedule an election on the earliest date practicable gives sufficient flexibility to allow for an extended delay between the direction and conduct of election in the rare case when such delay is necessary.

The 2019 Board admitted that its mandated waiting period would run counter to the statutory goal of expeditious resolution of representation cases.¹⁴⁰ Yet it imposed the change anyway, again speculating that imposing this substantial delay would promote other interests. There is no evidence that it would have done so, and even if such evidence existed, we make a different judgment of policy priorities. After enactment of the 2014 rule, which eliminated a similar 25-calendar day waiting period that had been mandated previously,¹⁴¹ the data show that elections have been no less final, certain, fair, accurate, transparent, or uniform.¹⁴² The 2014

¹³⁹ For instance, information produced from searches in the Board's NxGen case processing software shows that in fiscal year 2019—the last full year that all provisions of the 2014 rule were in effect—there were 1,179 total elections and 128 cases with a decision and direction of election but only 47 with a request for review. So a request for review was filed in only 36.72% of cases with a directed election and in only 3.99% of cases with an election. Among those 47 cases with a request for review, only 2 requests for review were granted and neither resulted in an order staying an election, so a request for review was granted in only 0.17% of cases with an election and in only 1.56% of directed election cases. Neither of the cases granting the request for review resulted in an order staying an election, so there was a stay of the election in 0% of elections (directed or otherwise).

¹⁴⁰ 84 FR at 69546 (“We acknowledge here that the 20-business-day period will detract from how promptly elections were—or at least could be—conducted under the 2014 amendments.”).

¹⁴¹ 79 FR at 74410.

¹⁴² See 84 FR at 69582 & fns.244-247 (then-Member McFerran, dissenting) (citing data showing stability in relevant indicia of finality, certainty, fairness, accuracy, transparency, and uniformity).

rule's elimination of the waiting period between issuance of the direction of the election and the election was upheld by the courts¹⁴³ and enabled the Board to hold elections more quickly after the decision and direction of election issued than it was prior to the 2014 rule.¹⁴⁴ Thus, eliminating the mandated waiting period expedites the processing of representation cases with no meaningful drawback in any other important policy interest.

We further note that the 2019 Board conceded that “[i]n many respects,” its waiting period amendment “goes hand-in-hand with [its] amendment permitting litigation of eligibility and inclusion issues at the pre-election hearing and serves the same policy interests.”¹⁴⁵ Thus, the 2019 Board argued that “providing a period before the election during which parties can file and the Board can rule on requests for review permits [those eligibility and inclusion] issues to be definitively resolved prior to the election (or at least prior to the counting of the votes), thereby promoting finality and certainty.”¹⁴⁶ But this rule rescinds the 2019 amendment that provided that individual eligibility or inclusion issues normally will be litigated at the pre-election hearing and resolved by the regional director prior to the election, making the corresponding waiting period superfluous.

The 2019 Board's speculations that a mandated month-long waiting period would promote finality, certainty, uniformity, transparency, and fairness and accuracy are unavailing for additional reasons. First, in the vast majority of representation cases, the parties are able to reach an election agreement that necessarily precludes the possibility of a pre-election request for review. In the majority of the comparatively small percentage of contested cases, parties choose

¹⁴³ See, e.g., *ABC of Texas*, 826 F.3d at 226-227 (noting that the Act does not mandate a specified waiting period prior to the election).

¹⁴⁴ Information produced from searches in the Board's NxGen case processing software shows post-2014 rule medians of 11 to 12 calendar days from issuance of a decision and direction of election to the election itself in FYs 2016-2017. This shows that elimination of the waiting period enabled the Board to conduct elections more quickly because the waiting period would have prevented the Board from conducting elections so soon after issuance of the decision and direction of election.

¹⁴⁵ 84 FR at 69545.

¹⁴⁶ *Id.*

not to file a request for review.¹⁴⁷ In all those cases, the mandated month-long waiting period serves no purpose other than to add needless delay to the process.¹⁴⁸ And even in the minority of cases where a party files a request for review prior to the election, there is no guarantee that the Board, given resource constraints and other responsibilities, will be able to rule on the request within the waiting period, which, again, means that a waiting period may cause needless delay. And then, even assuming the Board can resolve the pre-election request within the waiting period, historical practice shows that the Board rarely reverses a regional director's pre-election decisions,¹⁴⁹ and so, once again, the mandated delay will have served little beneficial purpose.

In sum, there is a very small number of cases where: (1) a party files a request for review before the election; (2) the Board rules on the request for review prior to the election; and (3) the Board's ruling reverses the regional director's decision. That means that the 2019 rule's waiting period would cause delay in every contested case (and every stipulated election case—comprising the vast majority of the Board's representation case docket—whose terms are impacted by parties' estimations of how much time would transpire before the election if the nonpetitioning party insisted on a pre-election hearing) in order to claim a nebulous and unproven enhancement of finality, certainty, uniformity, transparency, and fairness and accuracy in the tiny number of cases that meet these three uncommon conditions. We do not judge that tradeoff to be worthwhile. Delay for no benefit in the vast majority of cases would not be offset

¹⁴⁷ For instance, information produced from searches in the Board's NxGen case processing software shows that in fiscal year 2019—the last full year the 2014 rule was in effect—there were 1,179 total elections and 128 cases with a decision and direction of election but only 47 with a request for review. So a request for review was filed in only 36.72% of cases with a directed election and in only 3.99% of cases with an election.

¹⁴⁸ Moreover, as noted above, although the waiting period, on its terms, applies only to directed elections, the threat of a directed election and the attendant waiting period may also be used to extract concessions concerning election details in an election agreement.

¹⁴⁹ For instance, information produced from searches in the Board's NxGen case processing software shows that in fiscal year 2019—the last full year that all provisions of the 2014 rule were in effect—among the 47 cases with a request for review, only 2 requests for review were granted and neither resulted in a reversal, so a request for review was granted in only 1.56% of directed election cases and warranted reversal in 0% of directed election cases.

by improved finality, certainty, uniformity, transparency, and fairness and accuracy in a tiny number of cases.

Accordingly, to eliminate an unnecessary barrier to the fair and expeditious resolution of questions of representation, with the necessary flexibility for regional director adjustment to the circumstances of any particular case, this rule rescinds the month-long waiting period and directs regional directors to schedule an election for as soon as practicable after the direction of an election.¹⁵⁰

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. Briefing Following Post-Election Hearing

To further enhance the expeditious resolution of questions concerning representation without any countervailing decline in other policy interests, this rule also rescinds the 2019 rule's blanket entitlement for parties to file post-hearing briefs with the hearing officer in all cases.¹⁵¹ Accordingly, this rule reverts to what the 2019 Board conceded was the Board's "historical[]" practice of permitting briefing only at the discretion of the hearing officer.¹⁵²

Certification of the results of a Board-conducted election cannot issue until any determinative challenges or election objections are resolved. Thus, by giving parties an entitlement of 5 business days—and up to an additional 10 business days upon a showing of

¹⁵⁰ Rather than defend the 2019 Board's contemporaneous justifications for its waiting period provision, our dissenting colleague espouses a new rationale: that the 20-business day waiting period is "critical" to provide an adequate "period of time during which employees can become 'fully informed' voters." The 2019 Board did not offer this "fully informed voters" justification for imposing a 20-business day waiting period and instead explained that "this period is designed 'to permit the Board to rule on any request for review which may be filed[.]'" See 84 FR at 69545. In any event, the 2014 Board comprehensively explained why all of the changes made in that rule to which we return, including preventing the 20-business day waiting period from taking effect, do not prevent employees from becoming fully informed about their decision whether to unionize. See *infra* Part V (summarizing the 2014 rule's explanation, 79 FR at 74318-74326, 74423-74424, that the changes in the aggregate would continue to provide a meaningful opportunity for campaign speech before the election).

¹⁵¹ 29 CFR 102.69(c)(1)(iii) (Dec. 18, 2019).

¹⁵² 84 FR at 69556.

good cause—to file briefs following the close of the post-election hearing, the 2019 rule built in another layer of delay. Rescinding this blanket entitlement for briefing thus further reduces delay and thereby promotes finality and, by avoiding another round of briefing, saves the Board and the parties resources expended on repetitive argument. The parties will already have had a chance to present argument on the challenges and objections at the hearing itself. Many of these challenges and objections issues are straightforward and frequently reoccurring. Hearing officers thus gain expertise in resolving them and only rarely need to resort to briefing to do so. When such briefing would be helpful, they can allow it.¹⁵³ Additionally, under the 2014 rule provisions which we reinstate, parties still have a right to file briefs with the regional director when they file exceptions to the hearing officer’s recommended disposition of post-election objections and determinative challenges, and parties also have a right to file briefs with the Board in support of any request for review of the regional director decision on objections and determinative challenges. Accordingly, another round of briefing following the close of the post-election hearing is not necessary.

V. Response to the Dissent

Our dissenting colleague makes a number of provision-specific arguments that we have rebutted in the discussion above. Generally, these arguments assert that our reinstatement of some aspect of the 2014 rule will have various negative consequences. But those arguments suffer from the same defect as the rationale for the 2019 rule itself: They lack factual support, notwithstanding that the 2014 rule was in effect for five years. If there were negative consequences arising from it, our dissenting colleague should be able to demonstrate as much.

The balance of the dissent makes two broader arguments, each claiming that we have failed to engage in reasoned decision making. Thus, our colleague argues (1) that we have

¹⁵³ Our dissenting colleague contends that we “minimize the complexity of representation cases” by eliminating briefing as of right. He overlooks that in complex cases, in both the pre- and post-election hearing context, the regional director or hearing officer has discretion to allow briefing.

improperly prioritized expedition in the representation case process at the supposed expense of employees being fully informed and (2) that we have improperly considered representation case data that was likely impacted by the COVID-19 pandemic. As we explain below, each of these arguments misses the mark.

The Board has a statutory duty to ensure that representation cases are resolved expeditiously. As we have noted, Congress has described “the exceptional need for expedition” in representation cases,¹⁵⁴ and the Supreme Court has said that we “must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.”¹⁵⁵ By effectively returning the Board’s representation case procedures to those that were in effect for five years under the 2014 rule, we enhance the speed with which representation cases will be resolved and, in doing so, we act consistent with the policy of Congress, as recognized by the Supreme Court.

In fulfilling that statutory duty, we have not sacrificed employees’ ability to become fully informed voters. As extensively explained in the 2014 rule’s preamble, the changes to the Board’s election procedures will continue to provide a meaningful opportunity for campaign speech before the election, and thus a sufficient opportunity for employees to become fully informed voters.¹⁵⁶ Several factors mitigate any arguable problems introduced by a shortened campaign period flowing from the 2014 rule’s expedited case processing. First, union organizing campaigns typically start well before the representation case process is ever triggered by the filing of a petition with the Board, so employees typically start becoming informed about their decision whether to be represented by a union well before the representation case process is triggered. Moreover, as recognized by the Supreme Court, union organizing campaigns rarely catch employers by surprise and so employers too can begin informing employees about their

¹⁵⁴ Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945).

¹⁵⁵ *A.J. Tower*, 329 U.S. at 331.

¹⁵⁶ See 79 FR at 74318-74326, 74423-74424.

union views before a petition is filed.¹⁵⁷ “[E]ven in the absence of an active organizing campaign, employers in nonunionized workplaces may and often do communicate their general views about unionization to both new hires and existing employees” through materials like handbooks and orientation videos.¹⁵⁸ In addition, employers are able to rapidly disseminate their campaign message post-petition.¹⁵⁹ And, as recognized by reviewing courts turning back challenges to the 2014 rule, regional directors will take into account parties’ “opportunity for meaningful speech about the election” in setting an election date.¹⁶⁰ Our dissenting colleague disregards this because he has a different policy preference, which, as explained, we reject.¹⁶¹

The dissent’s other argument—questioning the data we have considered—is equally unfounded. Even putting aside the data which support our policy choice here, we would still choose to substantially rescind the 2019 rule and reinstate the 2014 rule. As we have explained above, the 2019 Board necessarily acknowledged it was adding time to the representation case process¹⁶² and justified this change with speculation that that cost of this added time would be offset by policy benefits like increased fairness, accuracy, transparency, uniformity, and finality. We make a different policy calculation, concluding that the cost of the added delay in the 2019 rule is not offset by benefits related to other values. There was no evidence, pre-COVID-19, supporting the claimed benefits of the 2019 rule, and that absence of evidence supports our decision to substantially rescind the 2019 rule and return to the 2014 rule. Our dissenting

¹⁵⁷ See *id.* at 74320 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969)).

¹⁵⁸ See *id.* at 74321-74322.

¹⁵⁹ See *id.* at 74322-74323.

¹⁶⁰ See *RadNet*, 992 F.3d at 1122 (quoting 79 FR at 74318); *ABC of Texas*, 826 F.3d at 227 (same).

¹⁶¹ Notably, our dissenting colleague fails to present any evidence of an election in which employees did not have adequate time to become informed about the decision they were making. Put simply, under the procedures to which we return, representation cases will clearly be resolved more expeditiously and there is no evidence that employees will be inadequately informed.

¹⁶² See, e.g., 84 FR at 69528 (“For contested cases, several provisions of the final rule will, both individually and taken together, result in a lengthening of the median time from the filing of a petition to the conduct of an election.”); *AFL-CIO*, 57 F.4th at 1047 (“In the extensive preamble to the 2019 Rule ... the Board repeatedly acknowledges that its changes will result in longer waits before elections relative to the 2014 Rule.”).

colleague's charge that the data from the period of the COVID-19 pandemic is tainted is entirely irrelevant to this aspect of our analysis.

Our dissenting colleague's argument also disregards the fact that, in addition to the more recent data we cite, our policy choice is supported by a substantial amount of data from both the period immediately prior to the effective date of the 2014 rule and the period when the 2014 rule was in effect.¹⁶³ None of this data was impacted by the effects of the pandemic, and it supports the view that the 2014 rule, to which we substantially return, allows for the expeditious processing of representation cases while ensuring fairness, accuracy, transparency, uniformity, and finality.

As for the more recent data from fiscal years during the COVID-19 pandemic, that data only provides further confirmatory support for our policy judgment. We have fully acknowledged that some of the recent delay in representation cases is likely attributable to the effects of the COVID-19 pandemic, but, as we have explained, we believe that some of the delay, as borne out in the data, is also due to the 2019 rule, given the 2019 Board's concession that its rule would lengthen the representation case process. Moreover, as we have demonstrated above, the recent data also provides confirmatory support for the conclusion that the 2019 rule has not demonstrably improved fairness, accuracy, transparency, uniformity, and finality. As we have explained, the 2019 Board never provided any evidence that there was a problem related to these policy values under the 2014 rule. Nor, examining pre-COVID-19 data, have we found

¹⁶³ See, e.g., supra fn.7, fn.8, fn.17, fn.43, fn.44, fn.45, fn.61, fn.104, fn.107, fn.108, fn.110, fn.128, fn.139, fn.144, fn.147, fn.149.

Indeed, we note that, because some of the 2019 rule provisions—regarding the scope of the pre-election hearing and the waiting period between issuance of the decision and direction of election and the election itself—did not go into effect and because the 2019 rule stated that those provisions largely restored the pre-2014 rule status quo (84 FR at 69525, 69539-69542, 69544-69545), the relevant comparison with respect to those provisions is not between the pre-2019 rule and the post-2019 rule COVID-19 periods, but between the periods before and after the implementation of the 2014 rule.

such evidence. That the recent data is consistent with those prior conclusions simply confirms that our policy judgment is more than amply supported.¹⁶⁴

VI. Dissenting View of Member Kaplan

Member Marvin E. Kaplan, dissenting.

A. Introduction

My colleagues reinstate the *Representation—Case Procedures* Rule that the Board promulgated in 2014¹⁶⁵ and revoke the remaining aspects of the Representation-Case Procedures Rule promulgated by the Board in 2019.¹⁶⁶ In doing so, my colleagues echo the rationale in the 2014 Rule with significant emphasis on an "observation" made by the Supreme Court in *NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946), that "the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently, and speedily." My colleagues' emphasis, however, is based on a fundamentally flawed premise – that speed is more important than any other consideration in determining whether the Board is fulfilling its duty to protect one of the fundamental rights protected by the Act: the right of employees to choose whether or not to be represented by a union. Further, nothing in the *A.J. Tower* decision suggests that the Court was urging the Board to place expediency over all other considerations in determining whether the Board's rules met the statutory goal of Section 9(b).

As just one example, the Board has expressly recognized that "ensuring that all employees are fully informed about the arguments concerning representation and can freely and

¹⁶⁴ Notably, the 2019 Board promulgated its rule without relying on *any* data at all. See 84 FR at 69557 (“[O]ur reasons for revising or rescinding some of the 2014 amendments are [] based on non-statistical policy choices.”). If those choices (endorsed by our dissenting colleague then and now) were not arbitrary and capricious, then our reasoned decision to give some weight to recent data cannot be infirm. See *AFL-CIO*, 57 F.4th at 1046-1048 (rejecting challenge that the 2019 rule was arbitrary and capricious as a whole due to the Board’s ignoring data and not even citing anecdotal evidence of problems with the 2014 rule).

¹⁶⁵ Hereinafter, the "2014 Rule."

¹⁶⁶ Hereinafter, the "2019 Rule." For ease of reference, I will refer to the revocation of the 2019 Rule, even though my colleagues are only revoking those provisions that remain in effect following the decision in *AFL-CIO v. NLRB*, 57 F.4th 1023 (D.C. Cir. 2023).

fully exercise their Section 7 rights" is an *important statutory right*. *Mod Interiors*, 324 NLRB 164, 164 (1997) (emphasis added); accord *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240 (1966) (finding that "an employee who has had an effective opportunity to hear the arguments concerning choice is in a better position to make a more fully informed and reasonable choice"). Yet, my colleagues' reinstatement of the 2014 Rule unquestionably values quick elections over fully informed voters. For example, by delaying the determination of questions of eligibility, supervisory status, and unit scope until after the election, the 2014 Rule deprives employees of the ability to understand which coworkers would be included in the unit they are voting on, and which would not.¹⁶⁷ Similarly, by revoking the 2019 Rule's *reinstatement* of the 20-business day waiting period between the issuance of the decision and direction of election and the election and replacing it with the mandate in the 2014 Rule that regional directors must schedule elections for "the earliest date practicable," the majority has drastically limited the period of time during which employees can become "fully informed" voters.¹⁶⁸ By placing an inordinate emphasis on speedy elections, my colleagues have failed to consider the extent to which these rules will have a negative effect on the very individuals the Act was meant to protect in representation elections—the voters. One is left to wonder how much the voters will actually benefit from the requirements that elections be held as quickly as possible when they find themselves exercising this right without fully understanding the arguments concerning representation and the ways in which their vote may affect them.

¹⁶⁷ As will be discussed *infra*, the Supreme Court has already recognized that pre-election determination of these issues *supports* the Act's interest in efficient and timely elections, in part because parties that are unhappy with the results of elections will not have the opportunity to delay the finalization of results by litigating these issues later.

¹⁶⁸ The majority characterizes the 2019 Rule as "impos[ing]" a 20-business day waiting period. If that is so, then the Board had been "imposing" a 20-business day waiting period on parties to elections for a long time prior to the 2014 Rule, which for the first time prohibited regional directors from establishing any waiting period whatsoever.

Further, my colleagues are revoking the 2019 Rule before there has been any opportunity to obtain relevant data pertaining to the effects of that rule. In *State Farm*¹⁶⁹ the Supreme Court held that, in order for a rulemaking to survive the "arbitrary and capricious" standard, an agency must "examine the *relevant* data and articulate a satisfactory explanation for its action" *Id.* at 43 (emphasis added). Given the extraordinary effects of the COVID-19 pandemic on the Board's election processes for the short period of time in which the 2019 Rule has been in effect, however, relevant data—i.e., data based on elections not conducted under extraordinary circumstances—is not available. Therefore, no one is in a position as of yet to make any data-driven conclusions regarding the efficacy of the Rule. Simply put, any attempt to challenge the 2019 Rule based on data is premature. Because my colleagues cannot identify any relevant data that would enable the effects of the 2019 to be compared with data from the years following the 2014 Rule, I do not believe that my colleagues' re-promulgation of the 2014 Rule can survive the "arbitrary and capricious" standard.¹⁷⁰

B. The Majority's Decision to Revoke the 2019 Rule and Repromulgate Corresponding Sections from the 2014 Rule Is Arbitrary and Capricious in Violation of the Administrative Procedure Act Because the Decision is Not Based on Representative Data

My colleagues repeatedly state that the Board's internal data regarding the processing of representation petitions after the implementation of the 2019 Rule demonstrate that the rule lengthened election times without any appreciable improvement in the other interests upon which the Board relied in promulgating that rule. In doing so, my colleagues chiefly rely on data taken from the first two years that the 2019 Rule was effective. However, the COVID-19 pandemic began shortly after the Board implemented the 2019 Rule. It cannot reasonably be disputed that

¹⁶⁹ *Motor Vehicles Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983).

¹⁷⁰ My colleagues contend that their "reasoned decision to give some weight to recent data cannot be infirm" because "the 2019 Board promulgated its rule without relying on *any* data at all." The 2019 Rule relied on a reasoned balancing of competing statutory and policy interests—interests not adequately considered by the 2014 Rule. To state the obvious, relying on flawed data as justification for overturning the 2019 Rule is not the same thing.

the pandemic caused the Board to conduct elections in a manner so different from the norm that any data derived therefrom, especially with regard to the time that it took to hold elections, is not representative data. Accordingly, because that data does not exist, my colleagues fail to establish that their decision to revoke the 2019 Rule is based on any relevant data, as required by the Supreme Court.

"Due to the extraordinary circumstances related to the pandemic," the Board was forced to temporarily suspend elections in March 2020 in order to "ensure the health and safety of Board employees as well as members of the public involved in the election process." *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 3 (2020) (internal quotations omitted). When elections resumed, the Board flipped existing election standards on their head. Longstanding Board law favors conducting manual Board elections, and that preference is reflected in the percentage of mail ballot elections conducted during the years immediately following the 2014 Rule.¹⁷¹ During those years, mail-ballot elections represented less than 13% of all elections. In the fiscal years following the 2019 Rule, however, mail-ballot elections represented an unprecedented percentage of Board elections: in fiscal year 2020, 45% of elections were held by mail ballot; in 2021, the percentage was a staggering 83.9%; and in 2022, 77.6% of elections were conducted by mail-ballot election. My colleagues attempt to downplay the dramatic effect that this had on the time frames within which elections took place under the 2019 Rule, but they are ignoring undisputed facts. Not only do mail-ballot elections take longer than manual elections as a general rule, but the regional offices also had to factor additional mailing time into the election deadlines due to the reliability issues plaguing the United States Postal Service.¹⁷²

¹⁷¹ In fiscal years 2015 through 2019, the percentage of mail-ballot elections ranged from 10.3% to 12.8%.

¹⁷² See, e.g., Quinn Klinefelter, *U.S. Postal Service Struggles To Deliver Mail After Holidays Amid Pandemic*, NPR (Jan. 22, 2021, 7:01 PM), <https://www.npr.org/2021/01/22/959273022/theres-no-end-in-sight-mail-delivery-delays-continue-across-the-country>.

Despite the truly unprecedented circumstances faced by the Board in conducting elections after the implementation of the 2019 Rule, my colleagues attempt to rely on data from that period, acknowledging only that the effects of the COVID-19 pandemic *may* have affected the results. For example, the majority notes that 88.8% and 90.7% of representation cases were resolved within 100 days during the last 2 full years, respectively, of the 2014 Rule while only 82.3% and 85.4% were resolved within that time period during the first 2 years of the 2019 Rule. Again, any increase in processing times is easily, and indeed logically, attributable to the effects of the pandemic on the Board's election processes.¹⁷³ They further observe, among other things, that the reversal of regional director decisions and directions of elections, the number of election objections and determinative challenges, and the number of rerun elections all remained relatively unchanged under the 2019 Rule. Even assuming that this data could be considered representative data, the fact that the effects of the 2019 Rule were consistent with the effects of the 2014 Rule does not establish a reasonable justification for revoking the 2019 Rule.

Because no representative data yet exists with regard to the effect on the 2019 Rule on election processes, there is no data to support my colleagues' conclusion that the 2019 Rule is a "failure." Nor is there evidence to suggest that the "increased delay apparently attributable to the 2019 [R]ule has [not] been offset by meaningful improvements in furthering the interests cited by the Board." Accordingly, my colleagues have failed to establish that data justifies their decision to revoke the 2019 Rule.

C. The Decision to Revoke the 2019 Rule and Repromulgate Corresponding Sections from the 2014 Rule Is Arbitrary and Capricious in Violation of the Administrative Procedure Act Because the Majority Fails to Provide a Reasoned Basis for its Amendments

¹⁷³ Remarkably, my colleagues assert that even though some delay is "likely attributable to the effects of the COVID-19," they "are confident that any pandemic-related delay in the processing of representation cases has been compounded by the effects of the 2019 Rule." They further assert that "the delay would have been even greater had certain of its provisions not been enjoined." With due respect to my colleagues, pure speculation of what the data might have been had the pandemic not drastically changed the landscape in which elections were held does not constitute a reasoned basis for revoking the 2019 Rule.

As a participant in the promulgation of the 2019 Rule, I have already explained, at length, why the revocation of the 2014 Rule was necessary and why the 2019 better effectuated the purposes of the Act. See 84 FR at 69526-69587. My additional comments in this dissent are not meant to replace those explanations but rather to supplement them.¹⁷⁴

1. Scheduling of Pre-Election Hearing

My colleagues reinstate the 2014 Rule's significant contraction of the time period between the filing of a petition to the pre-election hearing. Specifically, the pre-election hearing will now generally be scheduled to open eight calendar days—which, as my colleagues note, could result in a period of only five business days should a holiday fall within that period—from service of the notice of hearing compared to the fourteen business days¹⁷⁵ provided for in the 2019 Rule. I have already addressed the rationale for replacing the eight-calendar day period with the fourteen-day period in the 2019 Rule, so I will not repeat those reasons here. However, I note that my colleagues have utterly failed to establish a reasoned basis for revoking the 2019 Rule and reinstating the somewhat draconian time limitations put in place by the 2014 Rule.

Their explanation for reimposing such a strict limitation on the time available to parties to prepare for the hearing and file a statement of position¹⁷⁶ is limited to three rationales. First, they state that the eight-day period is necessary because a longer time period would result in elections taking longer. In addition to being obvious, relying on that factor alone—as opposed to weighing carefully the other important interests at stake—is hardly a reasoned basis for revoking the 2019 Rule. As mentioned above, conducting elections as soon as possible is neither mandated by the Act nor by the Supreme Court. Second, my colleagues cite *Croft Metals, Inc.*,

¹⁷⁴ Accordingly, my colleagues' assertion that I am not "defend[ing] the 2019 Board's contemporaneous justifications for its waiting period provision" is simply false. I am choosing not to repeat all the analytical justifications set forth in the 2019 Rule because, in my view, doing so here serves no purpose other than redundancy.

¹⁷⁵ The 2019 Rule used business days instead of calendar days to reduce confusion and promote uniformity and transparency.

¹⁷⁶ As discussed later, these time limitations could result in an employer being required to undertake all the work necessary to file a Statement of Position in three and a half business days.

337 NLRB 688 (2002) as a reasoned basis for reinstating the 2014 Rule. In that case, after finding that the three days of notice provided prior to the Employer was insufficient, the Board opined that "a minimum of five [business] days notice was sufficient." *Id.* at 688. What my colleagues fail to note, however, is that *Croft Metals*, a case that issued more than twenty years ago, has never been cited in another Board case. In my view, a single Board case hardly provides a reasoned basis for establishing five business days as the mandatory—not minimum—period of notice. For that matter, that case does not provide a reasoned basis for revoking the 2019 Rule because the 2019 Rule is consistent with *Croft Metals*. Finally, my colleagues adopt the rationale set forth in the 2014 Rule – that the eight-day period "codified *best practices* in some regions." (Emphasis added.) In addition to being misleading, this rationale does not provide sufficient justification for limiting the notice provided to parties before the hearing to eight days.

Throughout the 2014 Rule, the Board justifies its significant overhaul of the Board's representation rules by saying that the amendments reflect "best practices." In fact, the 2014 Rule uses this phrase at least ten times without providing any basis whatsoever for concluding that the amendments being proposed have been found to be "best practices" by anyone other than the Board in writing its rules. See, e.g., 79 FR at 74308, 74309, 74315, 74353, 72363, 74367. After all these mentions, the 2014 Rule finally introduces a source for determining "best practices" – a "1997 Report of Best Practices Committee."¹⁷⁷ *Id.* at 74373.

Thereafter, the 2014 Rule cites to that Report frequently as evidence that aspects of the rule are consistent with what was considered a "best practice." See *id.* at 74401 n.434; 74415 n.470; 74416; 74427 n.528. Unlike other aspects of the 2014 Rule, however, the Board did not adopt the "best practice" set forth in the Report in establishing the deadline for scheduling the pre-election hearing. The 1997 Report indicated that, as a best practice, hearings should open

¹⁷⁷ The 2014 Rule later refers to a "1997 Report of Best Practices Committee—Representation Cases." See, e.g., 79 FR at 74427 n.528. I am assuming that the references are to the same report.

between ten and fourteen days after the filing of the petitions.¹⁷⁸ 79 FR at 44373. The Board, however, arbitrarily came up with its own "best practice." Specifically, the Board stated

The pre-election hearing will generally be scheduled to open 8 days from notice of the hearing. This largely codifies *best practices* in some regions, where hearings were regularly scheduled to open in 7 days to 10 days. However, practice was not uniform among regions, with some scheduling hearings for 10 to 12 days, and actually opening hearings in 13 to 15 days, or even longer. The rule brings all regions in line with best practices.

79 FR at 74309 (emphasis added).¹⁷⁹ There are many problems with this reasoning, including the obvious question why the selection of "eight days" as a maximum, when the alleged "best practices" range was between seven and ten, was not arbitrary. But there is an even more fundamental problem. The 2014 Rule does not explain why it was a "best practice" to open hearings at eight days rather than seven days, ten days, twelve days, or "even longer." In justifying the eight-day period, my colleagues fare little better. In finding it a "best practice," they beg the question: they assume that shorter time periods between the filing of the petition and the opening of the hearing are "best practices" for no other reason than that they are shorter. Unfortunately, reasoned decision-making requires more analysis than "we think shorter is better," and justifying a specific outcome by declaring that examples consistent with that outcome were "best practices," while examples inconsistent with that outcome were not, does not come close to constituting reasoned analysis.

It is also worth noting that my colleagues fail to give significant weight to the negative effects that their rules will have on employers in general, and small businesses in particular. My colleagues attempt to minimize these effects, accusing the 2019 Rule of unnecessarily sacrificing

¹⁷⁸ In asserting that the 2014 Rule's failure to adopt the Report's "best practice" in this area was not arbitrary, my colleagues rely on post-hoc speculation. The 2014 Rule, however, did not rely upon my colleagues' explanation for its decision to depart from the "best practice" set forth in the Report. Accordingly, such post-hoc speculation hardly establishes that the 2014 Rule's selection of eight days from notice of the hearing—which was not the "best practice" cited in the Report—was not arbitrary.

¹⁷⁹ Quoting the 2014 Rule, my colleagues also observe that a "model opening letter in 1999"—and a model letter is an attempt to convey best practices—'indicated that the hearing should open no later than seven days after service of the notice.'" Again, this does not answer the question of why the 2014 Rule determined that eight days after the notice of the hearing was the proper limit.

“the statutory interest in expeditiously resolving questions of representation” to, among other things, the “non-statutory interest in maximizing employer convenience.” Among these “non-statutory interests” that the 2019 Rule sought to protect are the “convenience” of retaining legal counsel, the “convenience” of adequately gathering the facts, the “convenience” of fully researching the applicable law, the “convenience” of securing witnesses; the “convenience” of adequately coordinating with regional personnel; and the “convenience” of having sufficient time to secure an election agreement with the other parties. What my colleagues characterize as “conveniences,” I characterize as basic fairness and due process.¹⁸⁰ They guarantee that “parties [have] the opportunity to present evidence and advance arguments concerning” issues fundamental to resolving questions concerning representation. *Bennett Industries*, 313 NLRB 1363, 1363 (1994). Such protections are critical to ensuring that employees in the prospective unit have the opportunity to make a fully informed decision about their representational status in the absence of objectionable conduct.¹⁸¹

2. Conduct of Hearing

¹⁸⁰ Contrary to the majority's representation, only one court has considered the issue of whether the notice provided to employers before the pre-hearing election satisfied due process. *UPS Ground Freight v. NLRB*, 921 F.3d 251 (D.C. Cir. 2019) (finding that employer's due process rights were not violated by receiving 11 days notice before the pre-election hearing). The other two cases cited by the majority involved facial challenges to the 2014 Rule. In both of those cases, the courts found that they could not strike down the 2014 Rule on due process grounds because there was no showing "that an employer will necessarily be deprived of its due process rights in every set of circumstances." *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171, 206 (D.D.C. 2015); see also *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016). Finding that the 2014 Rule does not necessarily preclude due process in all instances is entirely different from finding that the 2014 Rule satisfies due process in all instances.

¹⁸¹ My colleagues contend that I “fail[] to meaningfully engage with the relevant legal discussion on [the due process] issue in the 2014 [R]ule.” Yet, the 2014 Rule’s analysis is little more than a recapitulation of its earlier findings. For instance, on one side of the due process scale, the 2014 Rule found that the shorter timeframes “pose little risk of error” because issues resolved in representation cases are “typically . . . not all that complex to litigate.” 79 FR at 74372. On the other, it found that the tighter timeframes “serve very important public interests” because “each delay in resolving the question concerning representation causes public harm.” *Id.* Based on this relative weighting, the 2014 Rule concluded that its many changes did not deprive parties of their due process rights. It was this flawed analysis that the Board thoroughly and appropriately rejected in the 2019 Rule, in which I participated. Once again, I do not believe it is necessary to redundantly explain the reasons for that rejection in this dissent.

As mentioned above, my colleagues place significant emphasis on an "observation" made by the Supreme Court in *NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946), that "the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently, and speedily." 329 U.S. at 331. And further, as discussed above, this statement by the Court did not require the Board to promulgate rules so that employees' votes would be recorded as speedily as possible. Rather, the Court indicated that any such rules must "insure the fair and free choice of bargaining representatives by employees." *Id.* at 330.

But more importantly, my colleagues completely disregard the actual holding in *A.J. Tower*. The issue before the Court was whether the Board had erred in denying the employer's *post-election* challenge to the eligibility of one of the voters. The employer asserted that, at the time of the election, it had not realized that the employee had abandoned her position prior to the election. The U.S. Court of Appeals for the Fifth Circuit had found that the Board erred by denying this challenge, reasoning that for jurisdictional reasons the Board could not certify a unit where less than a majority of *employees* who voted had voted for unionization. In overruling the Fifth Circuit's decision, the Court expressly disapproved of the employer's attempt to challenge the employee's eligibility post-election:

The principle of majority rule, however, does not foreclose practical adjustments designed to protect the election machinery from the ever-present dangers of abuse and fraud. Indeed, unless such adjustments are made, the democratic process may be perverted, and the election may fail to reflect the will of the majority of the electorate. *One of the commonest protective devices is to require that challenges to the eligibility of voters be made prior to the actual casting of ballots, so that all uncontested votes are given absolute finality.* In political elections, this device often involves registration lists which are closed some time prior to election day; all challenges as to registrants must be made during the intervening period or at the polls. Thereafter it is too late. The fact that cutting off the right to challenge conceivably may result in the counting of some ineligible votes is thought to be far outweighed by the dangers attendant upon the allowance of indiscriminate challenges after the election. *To permit such [post-election] challenges, . . . would invade the secrecy of the ballot, destroy the finality of the election result, invite unwarranted and dilatory claims by defeated candidates and "keep perpetually before the courts the same excitements, strifes, and animosities which characterize the hustings, and which ought, for the peace of the community, and*

the safety and stability of our institutions, to terminate with the close of the polls." Cooley, *Constitutional Limitations* (8th ed., 1927), p. 1416.

Long experience has demonstrated the fairness and efficaciousness of the general rule that once a ballot has been cast without challenge and its identity has been lost; its validity cannot later be challenged. This rule is universally recognized as consistent with the democratic process. And it is generally followed in corporate elections. *The Board's adoption of the rule in elections under the National Labor Relations Act is therefore in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives.*

Moreover, the rule in question is one that is peculiarly appropriate to the situations confronting the Board in these elections. In an atmosphere that may be charged with animosity, post-election challenges would tempt a losing union or an employer to make undue attacks on the eligibility of voters so as to delay the finality and statutory effect of the election results. Such challenges would also extend an opportunity for the inclusion of ineligible pro-union or anti-union men on the pay-roll list in the hope that they might escape challenge before voting, thereafter, giving rise to a charge that the election was void because of their ineligibility and the possibility that they had voted with the majority and were a decisive factor. The privacy of the voting process, which is of great importance in the industrial world, would frequently be destroyed by post-election challenges. And voters would often incur union or employer disfavor through their reaction to the inquiries.

Id. at 327-329 (emphasis added).

Accordingly, my colleagues ignore the inconvenient fact that the Supreme Court found—*in the very same case* where it observed the need to record employee votes accurately, efficiently, and speedily—that resolving issues of employee eligibility to vote before the election not only satisfies that goal but is "peculiarly appropriate" in Board elections and "is in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives." Accordingly, any assertion that the Court's decision in *A.J. Tower* supports a revocation of Section 102.64(a) of the 2019 Rule, which states that "[d]isputes concerning unit scope, voter eligibility and supervisory status will normally be litigated and resolved by the Regional Director before an election is directed," is without merit.¹⁸²

¹⁸² My colleagues argue that *A.J. Tower* "stands for the proposition that challenges to voters' eligibility in union elections must be made prior to the election—not that all such challenges

Finally, my colleagues argue that “[s]upervisory status issues exist only at the margin because in most cases where there is uncertainty concerning the supervisory status of one or more individuals, the employer nevertheless has in its employ managers and supervisors whose status is not in dispute [and who] may . . . be utilized in a pre-election campaign against a union.” As the 2019 Rule observed, however, this issue is not simply about an employer disseminating its message to employees, it is about “post-election complications where the putative supervisors engage in conduct during the critical period that is objectionable when engaged in by a supervisor, but is unobjectionable when engaged in by nonparty employees.” 84 FR at 69540.¹⁸³

3. Due Date for Non-petitioning Party's Statement of Position

As discussed above, my colleagues have failed to establish that the 2014 Rule met the requirement under the Administrative Procedures Act by providing a non-arbitrary, reasoned basis for requiring regional directors to schedule pre-election hearings no more than eight calendar days from the service of the Notice of Hearing.¹⁸⁴ The arbitrary nature of this

need to be resolved prior to the election.” However, the reasoning behind the Court’s decision is undeniable. The Court concluded that resolving questions of voter eligibility promotes the bedrock democratic ideal of the fully informed voter and the substantial interest in election finality. Certainly, the 2019 Rule’s preference for resolving such questions prior to the election better advances these interests than did the 2014 Rule to which my colleagues return.

Because my colleagues would limit the scope of the pre-election hearing consistent with the 2014 Rule, they would also rescind the 2019 Rule’s provisions pertaining to the parties’ right to introduce relevant facts into the record and call, examine, and cross-examine witnesses at the pre-election hearing. For the reasons summarized above and more fully stated in the 2019 Rule, I would retain these additional provisions as well. 84 FR at 69542.

¹⁸³ The majority contends that, if this were indeed a “real” problem, the relevant data should show an increase in election objections. Of course, that argument ignores the much more likely outcome of this ambiguity—that a putative supervisor will not voice any opinion about unionization because they do not want to risk engaging in objectionable conduct.

¹⁸⁴ My colleagues reinstate the same standards set forth in the 2014 Rule for postponement of the hearing: a party must establish either “special circumstances” or “extraordinary circumstances” to obtain a postponement of the hearing. (They also set these standards for obtaining an extension for the Statement of Position, but given that the Statement of Position is due the day before the hearing at noon, it is hard to imagine that a party would be able to obtain a meaningful extension unless the hearing is postponed.) For the reasons set forth in the 2019 Rule, I do not believe that there is a compelling reason for jettisoning the Board's standard "good cause" standard for providing postponements and extensions, which was reinstated by the 2019 Rule.

unreasonably short time frame results in an even more problematic result insofar as the 2014 Rule requires that the Statement of Position is due by noon the day before the opening of the pre-election hearing. Based on the scheduling of the pre-election hearing, this will normally be due about seven calendar days after service of the notice of hearing.

As explained in the 2019 Rule, I disagree with this provision of the 2014 Rule. See 84 FR at 69534-69538. The 2019 Board determined that the statement of position is an effective tool in narrowing the issues to be litigated and even in facilitating election agreements. However, the statement of position can only be effective if the parties have adequate time to prepare it. Parties must craft a statement of position while simultaneously retaining counsel, researching facts and law, identifying potential witness, and possibly negotiating election agreements. But even if my colleagues are, in effect, deciding that it is not important that parties have sufficient time to prepare statements of position, it is then arbitrary and capricious for them also to preclude parties from later raising an argument that did not appear in its statement of position. Either statements of position play an important role in representation case procedures or they do not. If the latter is true, then I'm not sure why my colleagues continue to require parties to file them at all. If the former is true, then due process demands that parties have an adequate time to consider all possible concerns that they might wish to raise with regard to the election, given that those concerns will be deemed waived if they are not set forth in the Statement of Position.¹⁸⁵

Most parties, as well as Regional Directors and courts, have no difficulty interpreting what is required to establish good cause. I do not believe that the same can be said for determining what is required to establish "special circumstances" or "extraordinary circumstances."

¹⁸⁵ In *UPS Ground Freight*, the D.C. Circuit concluded that the "Statement of Position is not binding" because, under the 2014 Rule, the regional director has the discretion to "permit the employer to amend its Statement of Position in a timely manner for good cause." 921 F.3d at 256. With due respect to the court, I am not sure how that follows. The Statement of Position *is* binding; the employer is limited to the issues raised in that document. The fact that the regional director *has the discretion* to amend the Statement of Position does not mean that the employer *has the right* to amend the Statement of Position. If the regional director opts not to permit an amendment, then the Statement of Position, which employers must file as little as three and a half days following service of the Notice of Hearing, *is* binding.

4. Responsive Statement of Position

My colleagues also rescind the 2019 Rule provision requiring the petitioner to file a written responsive statement of position, instead requiring the petitioner to respond orally at the pre-election hearing, as was done under the 2014 Rule. For the reasons stated in the 2019 Rule, retention of the right to file a written responsive statement of position better supports the interests of timeliness, efficiency, transparency, and uniformity in elections. 84 FR at 69536-69538

5. Notice of Petition for Election

My colleagues rescind the 2019 Rule's requirement that employers post and distribute the notice of petition for election within five business days after service of the notice of hearing and return to the 2014 Rule, which required the posting and distribution of the notice to be done within two business days. The majority argues that because the information contained in the notice is "straightforward," an employer should have no problem promptly completing this task.

Although the majority views the posting and distribution as a simple task, this ignores the realities of the modern workplace. As more fully explained in the 2019 Rule, employers can easily encounter logistical difficulties in posting and distributing the notice. 84 FR at 69538. Large employers, especially large multi-location employers, need time to determine all of the places where the notice will need to be posted and all of the employees to whom it must be electronically distributed. Such information cannot always be easily ascertained by a few keystrokes at some far-off centralized human resources department, as my colleagues so readily believe. Smaller employers, who may not be well versed in the intricacies of the Board's election rules, too will need time to consult with legal counsel to fully understand their obligations to post and distribute the notice in addition to securing the information necessary to satisfy that obligation. Getting these decisions right is critical because failure to properly post and distribute the notice of petition for election in a timely manner may result in setting aside the election. Moreover, with the expanded timeframe under the 2019 Rule, the notice will be posted

for longer than under the 2014 Rule, thereby better informing employees of their rights and the election procedures. As a result, the few extra days to comply with this important requirement better serves the purposes of the Act.

6. Elimination of the 20-day waiting period

Prior to the 2014 Rule, the Board's statements of procedure provided that the regional director would not normally schedule an election until a date between the 25th and 30th day after the date of the decision and direction of election, which allowed the Board time to act on any requests for review. The 2019 Rule slightly modified this traditional timeline, requiring regional directors to schedule elections no sooner than twenty business days after issuance of the decision and direction. As mentioned above, this period following the issuance of the decision and direction of election is critical to protect employees' rights under the Act to freely choose whether or not to be represented by a union. Again, the Board has expressly recognized that "ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights" is an *important statutory right*. *Mod Interiors*, 324 NLRB 164, 164 (1997) (emphasis added); accord *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240 (1966) (finding that "an employee who has had an effective opportunity to hear the arguments concerning choice is in a better position to make a more fully informed and reasonable choice"). Yet, it is not clear how the majority reconciles this critical statutory right with its revocation of the 2019 Rule's *reinstatement* of the 20-business day waiting period and its restoration of the 2014 Rule's mandate that regional directors must schedule elections for "the earliest date practicable." It is clear to me that this revision in the Board's rules drastically limits the period of time during which employees can become "fully informed" voters.¹⁸⁶

¹⁸⁶ The majority characterizes the 2019 Rule as "impos[ing]" a 20-business day waiting period. If that is so, then the Board had been "imposing" a 20-business day waiting period on parties to elections for a long time prior to the 2014 Rule, which for the first time prohibited regional directors from establishing any waiting period whatsoever.

Simply put, no one can say for certain how much time is sufficient time to allow an electorate to become fully informed voters. However, I think it is fair to say that it is difficult to imagine a rule that would more directly infringe on employees' rights in this regard than requiring that elections be scheduled "as soon as practicable." For the reasons set forth in the 2019 Rule, 84 FR at 69538-69542, 69544-69547, and summarized in my dissent to the final rule staying the implementation of these provisions, 88 FR at 14915, I believe that the majority has failed to adequately consider the important statutory interest in allowing employees to become "fully informed" voters in reinstating the unprecedented requirement that regional directors schedule elections as soon as possible.¹⁸⁷

7. Post-hearing Briefs

My colleagues also rescind provisions of the 2019 Rule that reinstated the parties' right to file briefs after close of the pre-election hearings and extended that right to post-election hearings.¹⁸⁸ They return to the 2014 Rule, under which parties were entitled to present oral argument at the close of the hearings and could only file briefs upon special permission of the regional director in the case of pre-election hearings or the hearing officer in the case of post-election hearings. In doing so, they minimize the complexity of representation cases, as did the

¹⁸⁷ I also note that my colleagues' complaint about the 2019 Rule's 20-day waiting period reflects some inconsistency in their position. When tasking the Board's Regions with quickly processing representation matters, my colleagues characterize these cases as mainly presenting "straightforward and frequently reoccurring" issues governed by a "contained body of law." However, when it comes to the Board's processing of the inevitable requests for review, my colleagues are quick to plead that "resource constraints and other responsibilities" prevent expedited action.

Because my colleagues would limit the scope of the pre-election hearing consistent with the 2014 Rule, they would also rescind the 2019 Rule's provisions pertaining to the parties' right to introduce relevant facts into the record and call, examine, and cross-examine witnesses at the pre-election hearing. For the reasons summarized above and more fully stated in the 2019 Rule, I would retain these additional provisions as well. 84 FR at 69542.

My colleagues simply echo the arguments advanced in the 2014 Rule to support their conclusion that employees will have the opportunity to become fully informed even under their shortened timeframe. However, the dissenters to the 2014 Rule ably discussed the flawed evidence and analysis on which the 2014 majority relied. 79 FR at 74439-74440.

¹⁸⁸ Under the 2019 Rule, parties were entitled to submit post-hearing briefs within 5 business days after the close of the hearing. For good cause, the hearing officer could grant an extension of time not to exceed an additional 10 business days.

2014 Rule. In 2019, the Board recognized that error of the 2014 Rule’s approach, observing that many of the issues that are litigated in hearings are anything but straightforward. 84 FR at 69542-69543, 69556. For instance, issues such as supervisory or independent contractor status frequently require detailed factual analyses in the context of multi-factor legal tests. Permitting parties a few days to file post-hearing briefs allows the parties time to review the transcript, to engage in legal research, and, thereby, to refine, moderate, or even abandon arguments on these difficult questions. Such efforts assist the Board and the parties in resolving matters in dispute, thereby promoting more *efficient* case processing without unduly delaying resolution of the case.¹⁸⁹

8. Notice of Election

Finally, my colleagues rescind the 2019 Rule provision that clarified the regional directors’ discretion to issue the direction of election separately from the notice of election by expressly stating that they “may” do so and return to the 2014 Rule, which stated that regional directors will “ordinarily” do so. As the 2019 Rule correctly observed, by clarifying the regional directors’ discretion to issue a direction of election and resolve election details later without having to justify a bifurcated action based on the existence of “unusual circumstances,” the 2019 Rule made the process more *transparent*. The 2019 Rule also made the process more *efficient* because it afforded regional directors greater leeway to engage the parties in post-hearing discussions about the conduct of the election and, thereby, created space with which to achieve agreement. 84 FR at 69544.

¹⁸⁹ Supervisory status and independent contractor status are just two issues that require a detailed factual analysis where briefing can be used to best make sense of fact intensive arguments. Indeed, some cases may raise many unique issues that together create a complex case in which the regional director or hearing officer would greatly benefit from briefing.

My colleagues attempt to downplay the significance of the elimination of parties’ opportunity to file post-hearing briefs by asserting that, the regional directors and hearing officers can grant “special permission” in the “rare complex case” in which they deem such briefing is needed. With due respect, it is cold comfort to parties to learn that their ability to advocate for their position in writing is only available should the regional director or hearing officer grant them permission to do so.

D. Conclusion

My colleagues' efforts are, at best, unnecessary and premature and, at worst, arbitrary and capricious. The Final Rule forces regional directors to run elections as quickly as possible, without providing adequate safeguards to preserve the rights of all parties involved. My colleagues have failed to provide a reasoned basis for concluding that speedy elections protect employees' right to fully exercise their statutory rights under the Act. Nor have my colleagues established any representative data to support their view that the 2019 Rule must be revoked. For the reasons discussed in this dissent, as well as the analyses set forth in the Board's 2019 Rule and the cited portions of the dissent to the 2014 Rule, I cannot join my colleagues in promulgating the amendments set forth in this Rule.

VII. Other Statutory Requirements

Regulatory Flexibility Act

The Board is not required to prepare a final regulatory flexibility analysis for this final rule under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601, et seq., because the Agency has not issued a Notice of Proposed Rulemaking prior to this action.

Paperwork Reduction Act

The amended regulations are exempt from the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq. See 44 U.S.C. 3518(c). Accordingly, the final rule does not contain information collection requirements necessitating the approval of the Office of Management and Budget under the Paperwork Reduction Act.

Final Rule

This rule is published as a final rule. As discussed above in the preamble, and consistent with the decision in *AFL-CIO v. NLRB*, 57 F.4th 1023 (D.C. Cir. Jan. 17, 2023), this rule has been deemed a procedural rule exempt from notice and comment, pursuant to 5 U.S.C. 553(b)(A), as a rule of “agency organization, procedure, or practice.”

List of Subjects in 29 CFR Part 102

Administrative practice and procedure, Labor management relations.

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: 29 U.S.C. 151, 156. Section 102.117 also issued under 5 U.S.C.

552(a)(4)(A), and Section 102.119 also issued under 5 U.S.C. 552a(j) and (k). Sections 102.143 through 102.155 also issued under 5 U.S.C. 504(c)(1).

Subpart D—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

2. Revise § 102.63 to read as follows:

§ 102.63 Investigation of petition by Regional Director; Notice of Hearing; service of notice; Notice of Petition for Election; Statement of Position; withdrawal of Notice of Hearing.

(a) *Investigation; Notice of Hearing; notice of petition for election.* (1) After a petition has been filed under § 102.61(a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the Regional Director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the Act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the Regional Director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a Notice of Hearing before a Hearing Officer at a time and place fixed therein. Except in cases presenting unusually complex issues, the Regional Director shall set the hearing for a date 8 days from the date of service of the notice excluding intervening Federal holidays, but if the 8th day is a weekend or Federal holiday, the Regional Director shall set the hearing for the following business day. The Regional Director may postpone the hearing

for up to 2 business days upon request of a party showing special circumstances. The Regional Director may postpone the opening of the hearing for more than 2 business days upon request of a party showing extraordinary circumstances. A copy of the petition, a description of procedures in representation cases, a Notice of Petition for Election, and a Statement of Position form as described in paragraphs (b)(1) through (3) of this section, shall be served with such Notice of Hearing. Any such Notice of Hearing may be amended or withdrawn before the close of the hearing by the Regional Director on the director's own motion.

(2) Within 2 business days after service of the Notice of Hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and shall also distribute it electronically to employees in the petitioned-for unit if the employer customarily communicates with its employees electronically. The Notice of Petition for Election shall indicate that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit and whether an election shall be conducted. The employer shall maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a)(8). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(b) *Statements of Position*—(1) *Statement of Position in RC cases.* If a petition has been filed under § 102.61(a) and the Regional Director has issued a Notice of Hearing, the employer shall file with the Regional Director and serve on the parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the

notice. The Regional Director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The Regional Director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The Regional Director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(i) *Employer's Statement of Position.* (A) The employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; state whether the employer agrees that the proposed unit is appropriate, and, if the employer does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; state the employer's position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing.

(B) The Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer.

(C) The Statement of Position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding

the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(2) *Statement of Position in RM cases.* If a petition has been filed under § 102.61(b) and the Regional Director has issued a Notice of Hearing, each individual or labor organization named in the petition shall file with the Regional Director and serve on the other parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The Regional Director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The Regional Director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The Regional Director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The Regional Director may permit each individual or labor organization named in the petition to amend its Statement of Position in a timely manner for good cause.

(i) *Individual or labor organization's Statement of Position.* Each individual or labor organization's Statement of Position shall state whether it agrees that the Board has jurisdiction over the employer; state whether it agrees that the proposed unit is appropriate, and, if it does not

so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the individual or labor organization intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state its position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues it intends to raise at the hearing.

(ii) *Identification of representative for service of papers.* Each individual or labor organization's Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as its representative and accept service of all papers for purposes of the representation proceeding and be signed by the individual or a representative of the individual or labor organization.

(iii) *Employer's Statement of Position.* Within the time permitted for filing the Statement of Position, the employer shall file with the Regional Director and serve on the parties named in the petition a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(3) *Statement of Position in RD cases—(i) Employer’s and Representative’s Statements of Position.* (A) If a petition has been filed under § 102.61(c) and the Regional Director has issued a Notice of Hearing, the employer and the certified or recognized representative of employees shall file with the Regional Director and serve on the parties named in the petition their respective Statements of Position such that they are received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The Regional Director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The Regional Director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The Regional Director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The Regional Director may permit the employer and the certified or recognized representative of employees to amend their respective Statements of Position in a timely manner for good cause.

(B) The Statements of Position of the employer and the certified or recognized representative shall state each party’s position concerning the Board’s jurisdiction over the employer; state whether each agrees that the proposed unit is appropriate, and, if not, state the basis for the contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote each party intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; and state each party’s respective positions concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues each party intends to raise at the hearing.

(C) The Statements of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer or the certified or recognized representative of the employees and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer or the certified or recognized representative, respectively.

(D) The employer's Statement of Position shall also include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also provide the requested information concerning the employer's relation to interstate commerce and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date.

(c) *UC or AC cases.* After a petition has been filed under § 102.61(d) or (e), the Regional Director shall conduct an investigation and, as appropriate, may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a Notice of Hearing before a Hearing Officer at a time and place fixed therein; or take other appropriate action. If a Notice of Hearing is served, it shall be accompanied by a copy of the petition. Any such Notice of Hearing may be amended or withdrawn before the close of the hearing by the Regional Director on the director's own motion.

All hearing and post-hearing procedure under this paragraph (c) shall be in conformance with §§ 102.64 through 102.69 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in § 102.62(a), the Regional Director's action shall be final, and the provisions for review of Regional Director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71. The Regional Director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67, except where an agreement under § 102.62(a) is involved.

3. Amend § 102.64 by revising paragraph (a) to read as follows:

§ 102.64 Conduct of hearing.

(a) The purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. If, upon the record of the hearing, the Regional Director finds that a question of representation exists, the director shall direct an election to resolve the question.

* * * * *

4. Amend § 102.66 by revising paragraphs (a), (c), and (h) to read as follows:

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

(a) *Rights of parties at hearing.* Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The Hearing Officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The

rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

* * * * *

(c) *Offers of proof.* The Regional Director shall direct the Hearing Officer concerning the issues to be litigated at the hearing. The Hearing Officer may solicit offers of proof from the parties or their counsel as to any or all such issues. Offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony. If the Regional Director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received.

* * * * *

(h) *Oral argument and briefs.* Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Post-hearing briefs shall be filed only upon special permission of the Regional Director and within the time and addressing the subjects permitted by the Regional Director. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the Regional Director together with the brief. No reply brief may be filed except upon special permission of the Regional Director.

* * * * *

5. Amend § 102.67 by revising paragraph (b) 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.

* * * * *

(b) *Directions of elections.* If the Regional Director directs an election, the direction ordinarily will specify the type, date(s), time(s), and location(s) of the election and the eligibility period. The Regional Director shall schedule the election for the earliest date practicable

consistent with these Rules. The Regional Director shall transmit the direction of election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The Regional Director shall also transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided), and it will ordinarily be transmitted simultaneously with the direction of election. If the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election shall so state, and shall advise employees that the individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as they have been permitted to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of the individuals will be resolved, if necessary, following the election.

* * * * *

6. Amend § 102.69 by revising paragraph (c)(1)(iii) 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.

* * * * *

(c) * * * (1) * * *

(iii) *Hearings; Hearing Officer reports; exceptions to Regional Director.* The hearing on objections and challenges shall continue from day to day until completed unless the Regional Director concludes that extraordinary circumstances warrant otherwise. Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable. Any party shall have the right to appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the objections and determinative challenges that are the subject of

the hearing. The Hearing Officer may rule on offers of proof. Post-hearing briefs shall be filed only upon special permission of the Hearing Officer and within the time and addressing the subjects permitted by the Hearing Officer. Upon the close of such hearing, the Hearing Officer shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. Any party may, within 10 business days from the date of issuance of such report, file with the Regional Director an original and one copy of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director. Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director. Extra copies of electronically-filed papers need not be filed. The Regional Director shall thereupon decide the matter upon the record or make other disposition of the case. If no exceptions are filed to such report, the Regional Director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

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Dated: August 18, 2023.

Roxanne L. Rothschild,

Executive Secretary

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