

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 87-47

23 July 1987

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Joseph E. DeSio, Associate General Counsel

SUBJECT: 3-Day Posting Rule for Notices of Election

The Board has adopted in final form its earlier proposed rule requiring that election notices be posted at least 3 days prior to an election. The rule was published in the Federal Register on 6 July 1987 and has an effective date of 5 August 1987. In adopting the rule, and in response to comments it received concerning the proposed rule, the Board has made certain modifications in order to clarify the rule. As described in the supplemental information accompanying the rule, it changed the reference to elections conducted under Section 9(c) to elections conducted under Section 9 to eliminate any inference that elections conducted under Section 9(e) (UD elections) were meant to be excluded from coverage under the new rule. The Board has also adopted the suggestion to modify the rule to affirmatively state that a failure to post the notice will be grounds for setting aside an election upon timely filing of an objection. Further, the Board has changed the proposed language to make it clear that the "3 full working days" excludes the day of election and begins at 12:01 a.m. on the first day of the 3 full working days prior to the election.

While the impact of the new rule on Regional Office operations should be minimal, certain modifications in Regional Office forms will be necessary. Specifically, to insure that employers are adequately apprised of their posting obligations, it is necessary to modify the cover letter which accompanies the petition to include the rule in its entirety. The easiest method of accomplishing this may simply be to include a copy of the rule as an attachment to which reference is made in the cover letter. The Election Order Sheet should also include a Board agent note

indicating that he or she has orally reminded the employer of its notice posting obligation, i.e., the following should be added to the form:

Employer orally informed of notice posting requirement.

(Initials of Board Agent)

(Date)

With respect to the nature of the oral reminder it will be sufficient for the Board agent to refer the employer to the notice it had earlier received with the petition. Also, the oral reminder should be made at the time the Board agent is working out the details of the election with the parties and filling out the election order sheet.

The Regions should immediately commence sending out notification of the new rule to employers involved in all petitions filed henceforth. With respect to elections already scheduled for 12 August or thereafter, it will be necessary for the Regions to notify those employers in writing of the new posting requirements, inasmuch as the rule provides for the employer to notify the Regional Office, at least 5 working days prior to the commencement of the election, if it has not received the notices. 12 August is the fifth working day after 5 August, the effective date of the rule. The Regions should thereafter followup with an oral reminder to those employers of their posting obligation, at least 5 working days prior to the commencement of the election.

Each Regional Office should conduct a staff meeting to discuss the new rule and its implementation.

Any questions concerning this memorandum should be directed to your Assistant General Counsel.

J. S. D.

Attachment:
3-Day Notice Posting Rule

cc: NLRBU

MEMORANDUM OM 87-47

226
2090

**PART 520—ORAL DOSAGE FORM
NEW ANIMAL DRUGS NOT SUBJECT
TO CERTIFICATION**

1. The authority citation for 21 CFR Part 520 continues to read as follows.

Authority: Sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i)); 21 CFR 5.10 and 5.83.

§ 520.680 [Removed]

2. Section 520.680 *Dimetridazole oral dosage forms* is removed.

§ 520.680a [Removed]

3. Section 520.680a *Dimetridazole drinking water* is removed.

§ 520.680b [Removed]

4. Section 520.680b *Dimetridazole tablets* is removed.

**PART 556—TOLERANCES FOR
RESIDUES OF NEW ANIMAL DRUGS IN
FOOD**

5. The authority citation for 21 CFR Part 556 continues to read as follows:

Authority: Sec. 512, 82 Stat. 343-351 (21 U.S.C. 360b); 21 CFR 5.10 and 5.83.

§ 556.210 [Removed]

6. Section 556.210 *Dimetridazole* is removed.

**PART 558—NEW ANIMAL DRUGS FOR
USE IN ANIMAL FEEDS**

7. The authority citation for 21 CFR Part 558 continues to read as follows:

Authority: Sec. 512, 82 Stat. 343-351 (21 U.S.C. 360b); 21 CFR 5.10 and 5.83.

§ 558.4 [Amended]

B. Section 558.4 *Medicated feed applications* is amended in paragraph (d) under the "Category II" table by removing the entry for "Dimetridazole."

§ 558.240 [Removed]

B. Section 558.240 *Dimetridazole* is removed.

Dated: June 29, 1987.

Gerald B. Guest,

Director, Center for Veterinary Medicine.

[FR Doc. 87-15201 Filed 7-2-87; 8:45 am]

BILLING CODE 4160-01-M

**NATIONAL LABOR RELATIONS
BOARD**

29 CFR Part 103

Election Procedures

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: This final rule establishes the requirement that an employer must post,

3 days prior to an election, a notice notifying employees of an election conducted under section 9 of the National Labor Relations Act, 29 U.S.C. 159. This new provision will both facilitate the election process and eliminate litigation over the issue of the appropriate time period for posting an election notice.

EFFECTIVE DATE: August 5, 1987.

FOR FURTHER INFORMATION CONTACT: John C. Truesdale, Executive Secretary, 1717 Pennsylvania Avenue NW., Room 701, Washington, DC 20570, Telephone: (202) 254-9430.

SUPPLEMENTARY INFORMATION: On March 11, 1987, a notice of proposed rulemaking was published in the Federal Register (52 FR 7450) wherein the Board proposed to amend its rules to include a provision requiring employers to post a notice of election 3 days before an election is conducted. The proposed rule provided that the employer shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to the commencement of an election. The term "working days" was defined as all days other than Saturdays, Sundays, and holidays. The rule further provided that a party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting, and that an employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office to the contrary at least 5 working days prior to the commencement of the election.

The supplementary information accompanying the proposed rule recognized that the official Board Notice of Election contains important information with respect to employee rights under the Act and that such information should be conveyed to the employees far enough in advance of the election so that employees will be adequately apprised of their rights. By establishing a specific length of time for posting, the provision made clear to the parties their respective responsibilities and obligations with respect to notice posting and attempted to eliminate unnecessary and time-consuming litigation on this issue.

In response to the Board's proposal, nine written comments were received from individuals and organizations. All but one spoke favorably of the Board's proposal and commended its efforts to establish clarity and uniformity in this area. Comments from the Board's Regional Offices noted that the proposal was generally in accord with current

vice and thus could easily be implemented.

Most of the comments, however, also contained suggestions for amending the proposed rule. Two suggestions clearly had merit. One pointed out that the proposed rule referred, in the summary preceding the rule, only to elections conducted under section 9(c) and thus would not apply to UD elections under section 9(e) and recommended that the rule refer simply to elections conducted under section 9 of the Act. As the Board did not intend that 9(c) elections be conducted differently from 9(e) elections, this suggestion was adopted in the summary, as set forth above, and was redrafted accordingly. The other suggestion was that, although the proposed rule implied that the failure to post the notice would be objectionable conduct, the rule should affirmatively state that failure to post will be grounds for setting aside an election upon timely filing of an objection. Such an addition would remove any doubt as to the objectionable nature of the conduct as well as clearly place the burden of fixing the failure to post on the other parties to the election thereby eliminating any argument that the Regions should police the rule. The Board agreed with that position. Accordingly, the following sentence has been added as a separate paragraph (d) at the end of § 103.20:

Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a).

Two nurses' associations suggested that the 3-day period be increased to 5 or 7 days as employees in the health care field frequently do not work a normal 5-day week but instead work long hours for 3 or 4 days and then have 1 to 4 days off. The Board considered his suggestion but still concluded that a posting of 3 full working days is a sufficient period of time to adequately apprise most voters of their rights. The Board was reluctant to complicate the rule by establishing different posting periods for different industries. However, because of other suggestions relating to how the "3 full working days" is defined, as discussed below, we have changed the definition of "working days"; as a practical matter, because of the way "working days" is defined, the actual posting period will normally be longer than 72 hours.

As indicated, several commentators had problems with the language in the proposed rule requiring that notices be posted "at least 3 full working days prior to the commencement of the

election." "Working days" was defined in the proposed rule as "all days other than Saturdays, Sundays, and holidays." Commentators thought that the rule was confusing as it was unclear as to whether the day of the election was included in the 3 days and also as to exactly when the 3 days would begin, i.e., 12:01 a.m. on the first day or when employees actually arrived for work on the first day. One commentator suggested that the rule require a period of at least 72 consecutive hours during the preceding 3 working days. The Board considered these suggestions and agreed that the proposed language could be improved to make clear that the rule specifically excludes the day of election. Accordingly, the first sentence in § 103.20(a) has been rewritten to require that notices be posted at least 3 full working days prior to 12:01 a.m. of the day of the election. The Board did not adopt the suggestion that the rule should describe the time period in hours rather than 3 working days because requiring consecutive hours does not allow for Saturdays, Sundays, and holidays. We recognized, however, that the phrase "3 full working days" needed a more precise definition. Accordingly, the definition of "working days" in § 103.20(b) has been revised to equate a full working day with an entire 24-hour period excluding Saturdays, Sundays, and holidays. As noted above, these changes make longer posting likely, as an employer will no doubt post the day before rather than stay up until 12:01 a.m. of the first day to post the notice.

Two comments took issue with the burdens placed on the employer by the rule. One commentator decried the mandatory nature of the requirement as it includes situations in which the employer has acted in good faith. This commentator argued that such a requirement would increase rather than decrease litigation especially over issues such as who removed or tampered with the notice and when. Another opposed the idea that an employer is presumed to have received notices unless it notifies the Regional Office 5 days before the election, and that an employer is presumed to have knowledge of the Board's posting requirements. This commentator suggested that the notice be sent by certified mail.

The Board recognized that the proposed rule does not solve all notice-posting problems and that various issues, including tampering with a timely posted notice, will still have to be litigated if raised. With respect to adequately informing employers of their notice-posting obligations, the Board has again rejected the use of certified mail as it would impose an undue extra

burden on the Regions. It was the Board's intention to discuss with the Regional Offices what method of notification would be practicable, and that has now been done. The Board considered adding a footnote to the Decision and Direction of Election, much like the *Excelsior* footnote, describing when the notices would be mailed, the employer's obligation to post the notices when received, and the employer's obligation to notify the Regional Office if not received; or, alternatively, including such information in any cover letter to employers that accompanies the Decision and Direction of Election or the cover letter that is sent to all parties with a copy of the petition. The Board rejected the first suggestion on the grounds that many Decisions and Directions of Election were already rather lengthy and thus should not be further burdened and the second on grounds that not all Regions send a cover letter with the Decision and Direction of Election. The Board did believe, however, that the last suggestion is a good idea in that the cover letter accompanying service of the petition already recites various obligations of the parties with respect to the petition and thus could easily be amended to include reference to the new notice posting requirement. This makes the employer aware of its obligations at an early date, and the petition and cover letter are already being sent by certified mail and consequently the Region would be assured that the employer had been adequately apprised of its obligations. The Board also has informed the General Counsel's Division of Operations to add a line to the Election Order Sheet (Form 700), which the Board agent would initial when he or she orally reminds the employer of its notice-posting obligations shortly before the notices are mailed.

Lastly, the Board rejected the suggestion made in one of the comments that the rule specifically define the term "conspicuous" as that location normally utilized by an employer to post notices to employees. That the notice be posted in a conspicuous place has long been a requirement of notice posting, and the Board saw no need specifically to describe the term or limit the number of places that could be called "conspicuous."

As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on small business entities.

List of Subjects in 29 CFR Part 103

Administrative practice and procedure, Labor management relations.

For the reasons set forth in the preamble, 29 CFR Part 103 is amended as follows.

PART 103—OTHER RULES

1. The authority citation for 29 CFR Part 103 is revised to read as follows:

Authority: Sec. 8, National Labor Relations Act, as amended (29 U.S.C. 151, 156) and sec. 553 of the Administrative Procedure Act (5 U.S.C. 500, 553).

2. Part 103 is amended by adding Subpart B, consisting of §103.20, to read as follows:

Subpart B—Election Procedures

§ 103.20 Posting of election notices.

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

(d) Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a).

Dated, Washington, DC June 30, 1987.

By direction of the Board.

National Labor Relations Board.

John C. Truesdale,

Executive Secretary.

[FR Doc. 87-15228 Filed 7-2-87; 8:45 am]

BILLING CODE 7545-01-M