

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**ARIA RESORT & CASINO, LLC
d/b/a ARIA**

Employer,

and

**INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 501,**

Petitioner.

Case No. 28-RC-154093

**EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION**

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I. INTRODUCTION

Aria Resort & Casino, LLC d/b/a Aria (“The Employer” or “Aria”), pursuant to Section 102.67(c), requests that the National Labor Relations Board (“Board”) review the Decision and Direction of Election (“DDE”) issued by the Regional Director of Region 28 on June 30, 2015.

The basis for granting review is compelling. The Regional Director’s decision to process the International Union of Operating Engineers Local 501’s (“Petitioner” or the “Union”) June 12, 2015 Petition for Representation (“Petition”) and direct an election violated the Board’s recently amended Representation Case Procedures Rules and Regulations. Section 102.61(a)(8)’s meaning is plain and unambiguous: a petition for representation “*shall contain ... a statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the Act.*”

There is no dispute that the Petition did not comply with Section 102.61(a)'s mandatory requirements. The relevant portion of the Petition was left blank, and during the hearing, the Union neither amended the Petition so that it would be complete, nor submitted any evidence which could establish that it complied with the substantive requirements of the rule. As such, the Petition violated the Board's Rules and Regulations and should have been dismissed. The Regional Director's decision to direct an election notwithstanding this unexcused violation of the Board's Rules and Regulations resulted in a denial of due process. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (holding that an administrative agency's failure to comply with its own rules is a violation of due process).

The DDE therefore warrants review under Section 102.67(c). A substantial question of law and policy is raised by the Regional Director's departure from Board law. The Regional Director's decision resulted in a prejudicial error: processing a defective petition in contravention of Board regulations. And to the extent that the Regional Director relied on *Advance Pattern Co.*, 80 NLRB 29, 31-38 (1948), there are compelling reasons for reconsideration of that decision. It was decided before the U.S. Supreme Court's decision in *Accardi v. Shaughnessy*, and it was abrogated by the Board's promulgation of the newly amended representation rules.

II. STATEMENT OF FACTS

A. The Petition Is Incomplete. Section 7 Is Blank, And It Does Not Otherwise Contain A Statement Satisfying The Requirements Of Section 102.61(a).

The Union filed the petition with Region 28 on June 12, 2015. *See* Bd. Ex. 1. The Union left Section 7 of the petition blank, failing to state whether it had or had not requested recognition from the Respondent. *Id.* As was set forth in Aria's June 16, 2015 Motion to Dismiss, the first contact that anyone at Aria had with the Union regarding the petition occurred

on June 12, 2015 when the Union emailed a copy of the petition to Tamara Lelyk, Aria's Senior Human Resources Business Partner. *Id.* The Union did not request that the Employer recognize it as the bargaining representative of the petitioned for unit prior to filing the Petition. *Id.*

B. Aria Moved To Dismiss The Petition And, Because The Regional Director's Order Denying The Motion Did Not Address The Substance Of Aria's Argument, Restated That Motion In Its Statement Of Position.

On June 16, 2015, Aria moved to dismiss the Petition because the Union had not supplied the information required by Section 102.61(a). The Regional Director denied the Motion on July 12, 2015. He recognized that Section 102.61(a)(8) "describes the contents that *must* accompany a petition for certification at the time of service[.]" 6/12/2015 Order at 2 (emphasis added). The Regional Director's Order Denying the Motion to Dismiss did not address the Union's failure to provide the information mandated by the Board's Rules and Regulations, however. He simply found that a request for recognition is not required. *Id.* As such, Respondent referenced the Motion to Dismiss in its June 19, 2015 Statement of Position, and put the Union on notice that it intended to reassert its argument at the hearing. *See* Board Ex. 2(d) (R. Stat. of Pos. at 4).

C. The June 22, 2015 Hearing

The Region conducted a hearing regarding the Petition on June 22, 2015. The Petition was introduced as Board Ex. 1.¹ After noting that the Petition remained defective, Respondent

¹ During the hearing, the Union made a belated request for recognition. Tr. 6-7. It did not, however, seek to amend the Petition. *Id.* Given the plain language of Section 102.61(a)(8), the Union's request did not satisfy the Board's requirements. More importantly, even after making this request, the Union knowingly failed to amend the Petition, meaning that the document remains incomplete and in violation of Section 102.61(a)(8)'s mandatory requirements.

once again moved to dismiss the Petition. Tr. 8-9. When asked for a response to the Petition's inadequacy, the Union indicated that it had none.² Tr. 9.

D. The Regional Director's Decision And Direction Of Election.

The Regional Director issued his Decision and Direction of Election on June 30, 2015. He once again observed that that Section 102.61(a)(8) "describes the contents that *must* accompany a petition for certification at the time of service[.]" DDE at 2 (emphasis added). Although the Union did not amend the Petition or explain why it had not provided the mandatory information, the Regional Director once again rejected Respondent's argument and directed that an election be held seven days later. In addressing the insufficiency of the Petition, he also once again made no effort to explain how the mandatory language of the regulation, could be reconciled with processing the Petition. The Regional Director merely contended that a "strictly literal interpretation" of Section 102.61(a) was contrary to Board law under *Advance Pattern Co.*, 80 NLRB 29, 31-38 (1948).

III. ARIA'S REQUEST FOR REVIEW SHOULD BE GRANTED. THE PETITION SHOULD HAVE BEEN DISMISSED BECAUSE IT DOES NOT COMPLY WITH SECTION 102.61(a) OF THE BOARD'S RULES AND REGULATIONS.

A. Section 102.61(a) Mandates That The Petition Contain A Statement That The Employer Has Declined To Recognize The Union Under Section 9(a) Of The Act.

Section 102.61(a) of the Board's Rules and Regulations sets forth the requirements for RC petitions.³ It provides in relevant part:

² The Union's representative asserted that "we didn't receive a response" but he did not offer that statement under oath as Section 102.61(a) requires. Tr. 10.

³ It is important to note that Section 9(c)(1) of the Act specifically provides that petitions must be filed "in accordance with such regulations as may be prescribed by the Board[.]"

Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.

(a) *RC Petitions*. A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, **shall contain the following**:

...

(8) A statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the Act.

§ 102.61 (emphasis added).

Section 102.61(a)'s use of the phrase shall contain "indicates an intent to impose discretionless obligations." *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008). Put another way, the requirement of Section 102.61(a)(8) must be satisfied or the petition is invalid. The Board's newly adopted petition form – Form NLRB-502 (RC) – effectuates that mandate. Section 7 requires the petitioner to record the actual date on which recognition as Bargaining Representative was requested as well as the date on which the Employer declined representation (or failed to answer).

In this case, there is no dispute that the petition does not satisfy the mandatory obligations imposed by Section 102.61(a). The petition does not include a "statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a)." The Union left Section 7 of the petition completely blank and failed to ever request that the Employer recognize it as the representative of the petitioned for unit. Indeed, the Union refused to amend the petition. And, when confronted with the option of correcting the petition and presenting evidence, the Union's representative declined to go under oath and offer testimony or other evidence which might establish compliance with Section 102.61(a).

It is conceivable that an argument could be made that the Union's blatant failure to comply with Section 102.61(a) can be excused. That conclusion, however, is not permitted by the language in the Board's Rules and Regulations. Several other sections of the Board's newly adopted representation regulations use the word "shall" to denote mandatory obligations, including the sections pertaining to the voter list, the Notice of Election and the statement of position.⁴ As the Supreme Court has noted, "identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). In drafting and adopting the amended representation election rules, the Board used the word *shall* to signify a *mandatory* obligation. If the Board were now to hold that compliance with the mandatory language of Section 102.61(a) was not obligatory, it would be required to find that Sections 102.62(d) (voter list), 102.62(e) (Notice of Election), and 102.63 (Notice and Statement of Position) are also permissive. The language of the regulation does not permit a different result.

⁴ For example, Section 102.60 provides that a petition "*may* be filed by any employee or group of employees or any individual or labor organization acting in their behalf." (emphasis added). It also provides that "[p]etitions under this section *shall* be in writing and signed, and either *shall* be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or *shall* contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct (see 28 U.S.C. 1746)." Section 102.62(d), which establishes the requirements for the voter list similarly provides that the employer "*shall* provide to 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 ("cell") telephone numbers) of all eligible voters. The employer *shall* also include in a separate section of that list the same information for those individuals whom the parties have agreed should be permitted to vote[.]" Section 102.62(e), which concerns the notice of election, uses the word *shall* repeatedly including in the sentences which provide "The employer *shall* post and distribute the Notice of Election in accordance with § 102.67(k)."

B. The Regional Director's Decision And Direction Of Election Was Arbitrary And Capricious.

The Regional Director made no effort to interpret the wording of Section 102.61(a). In fact, in the DDE, the Regional Director unwittingly confirmed the plain meaning of the regulation when he reasoned that the provision “describes the contents that *must* accompany a petition for certification at the time of service[.]” DDE at 2 (emphasis added). Without a textual basis for his conclusion that the Union could escape Section 102.61(a)'s mandatory requirements, the Regional Director relies completely on his contention that holding petitioners to the requirements of Section 102.61(a) is inappropriate because it will lead to “the atmosphere of a tensely litigated law suit in which all sides will be quick to seize upon technical defects in pleadings to gain substantive victories.” DDE at 2 (quoting *Advance Pattern Co.*, 80 NLRB at 35).

The Regional Director's reasoning is arbitrary and capricious. The plain meaning of a duly adopted regulation cannot be jettisoned due to individualized concerns over potential litigation. The wisdom of the regulation and its potential for spurring challenges regarding technical compliance with its provisions is *precisely* what is supposed to be considered during the notice and comment period of the rule making process – a fact made clear by the extensive discussion contained in the materials accompanying the Board's Final Rule. *See* Federal Register Vol. 79, No. 240 at 74308 (background on rulemaking). Although the Final Rule contains a lengthy explication of Section 102.61 and its various *mandatory* requirements, there is no discussion whatsoever of the potential for frivolous litigation resulting from technical noncompliance. *Id.* at 74328-10. Nor is there any discussion suggesting that the Final Rule grants the Board or the Regional Director discretion to excuse complete failure to satisfy any of the Final Rule's obligations. *Id.*

Even if one assumed that the Regional Director's anxiety over the potential for litigation was entitled to some weight despite the clear language of the regulation, there should be little doubt that his concern is overstated. Completion of the petition requires nothing more than filling out a one page form containing thirteen boxes seeking basic information. *See* FORM NLRB-502 at sections 1-13(e). Petitioners, including unions and their organizers, have both the experience with Board procedures and the wherewithal to complete the form accurately. Because the form is signed under penalty of perjury, one would expect that it would be reviewed with care and that the necessary information would be provided or its absence would be explained. This case, which involves a recalcitrant petitioner who not only failed to complete the Petition but who also has refused to correct or even seek to amend its Petition, demonstrates how infrequently litigation will actually arise.

Any concern about litigation over technical compliance with pleading-type requirements is also artificial. As noted above, the Final Rule is replete with newly adopted "pleading requirements" which, if violated, will have a dramatic effect on the responding party's rights which cannot be ameliorated by simply filing an amended petition as the Union could have done in this case. The sections of the Final Rule which concern the provision of the voter list, the Notice of Election and the statement of position all provide that technical noncompliance will minimize or even preclude the employer from presenting substantive arguments or evidence. "The Final Rule treats the employer Statement of Position like a formal pleading, binding on the employer as both admission and limitation ... virtually precluding subsequent changes in position and subject to restrictive standards regarding amendment. The Final Rule provides no rational basis for the imposition of such one-sided and onerous requirements with such severe consequences attendant on any failure to meet them." Federal Register, Vol. 79, No. 240 at

74443.

The information required by Section 102.61(a)(8), a statement regarding whether the petitioner has requested voluntary recognition, is derived from the language of Section 9(c)(1) of the Act. It serves a useful purpose, putting employers on notice that the Union likely represents a majority of the petitioned for unit and potentially streamlining pre-election hearings or even dispensing with the need for any Board involvement whatsoever. It was rational for the Board to adopt the regulation and make satisfaction of its requirements necessary before further processing of the petition is permitted. The Regional Director's disregard for the section's requirements due to his consternation over the hypothetical potential for litigation was arbitrary and capricious and warrants Board review.

C. The Regional Director And The Board Are Bound To Comply With The Board's Own Regulations, And Failure To Do So Would Violate Due Process.

There can be no dispute that the Petition does not comply with Section 102.61(a). There also can be no dispute that the Regional Director's DDE contravenes the regulation's text. Although the Regional Director concluded that disregard for the regulation's plain meaning could be justified on policy grounds, this was arbitrary and capricious. Procedural due process requires the government to adhere to its own rules. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). As the Ninth Circuit has explained:

When administrative bodies promulgate rules or regulations to serve as guidelines, these guidelines should be followed. Failure to follow such guidelines tends to cause unjust discrimination and deny adequate notice contrary to fundamental concepts of fair play and due process.

NLRB v. Welcome--American Fertilizer Co., 443 F.2d 19 (9th Cir. 1971).

Once the Board has embraced a regulation, it “must live with its commitment.” *Id.* In fact, the rules and regulations of an administrative agency are binding even when the action under review is discretionary in nature. *Service v. Dulles*, 354 U.S. 363, 388 (1959) (“While it is of course true . . . the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, . . . having done so, he could not, so long as the Regulations remained unchanged, proceed without regard to them.”); *Vitarelli v. Seaton*, 359 U.S. 535 (1959) (agency action void because the agency did not comply with its own procedure); *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969) (“An agency of the Government must scrupulously observe rules, regulations or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.”).

The Regional Director’s DDE, as well as his reliance on *Advance Pattern Co.*, were therefore misplaced. First, *Advance Pattern Co.* was issued before the Supreme Court’s decision in *Accardi*. Given that *Accardi* found that an agency’s disregard for a validly promulgated administrative regulation is repugnant to due process – rejecting the exact reasoning relied upon by the Board - *Advance Pattern Co.* can no longer be considered good law. See, e.g., *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002) (reliance on Board decisions without regard to intervening Supreme Court decision inappropriate). Second, *Advance Pattern Co.* did not survive the Board’s reissuance of Section 102.61(a). Under *Chevron U. S. A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), formal rulemaking which is subject to notice and comment procedures trumps adjudicative decisions. See *U.S. v. Mead Corp.*, 533 U.S. 218, 226-234 (2001). Because the Board chose against correcting the plain language of Section 102.61(a) when it was amended, and instead added additional items of information which are also deemed mandatory by the provision’s text, the regulation must be applied and enforced as

written. Doing otherwise violates Respondent’s due process whereas the concomitant burden imposed on the Petitioner – refiling an amended version of the Petition – is negligible.⁵

Finally, extending the reasoning in *Advance Pattern Co.* is barred by modern Supreme Court precedent. Validly promulgated regulations like Section 102.61(a) cannot be amended through adjudicative decision making. To the contrary, as long as a regulation “is extant it has the force of law.” *United States v. Nixon*, 418 U.S. 683, 695-696 (1974); *see also Bourjaily v. United States*, 483 U.S. 171 (1987) (recognizing that portions of *Nixon*’s holding were abrogated by the amendment of Fed. R. Evid. 801). Thus, while it may be “theoretically possible for the [agency] to amend or revoke the regulation ... so long as [the] regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.” *Id.*

The Board consciously adopted the current form of Section 102.61(a) in the recently issued Final Rule, using the same mandatory language utilized in other sections of the Final Rule. The Final Rule was subjected to two different notice and comment periods and almost unparalleled scrutiny. The Board chose not to amend its text or enact a provision which would permit Section 102.61(a)’s requirements to be excused on a case by case basis. The Regional Director lacked the authority to grant such an exception in this case. In issuing the DDE, he deprived Respondent of due process, usurped the Board’s responsibility for processing petitions under the Act and contravened the plain meaning of the Final Rule.

⁵ The Union may argue that the results of the election should not be set aside based on what it will doubtlessly describe as a technical mistake. The reasoning behind such an argument is not sound and would strip Respondent’s right to due process of all weight. Had the Union and the Regional Director complied with Section 102.61(a), there would be no reason to do so. It is also clearly contemplated by the Final Rule, which eliminated the built in time for a party to seek review of a decision and direction of election and preserved a party’s right to obtain such review even if the election had already taken place.

IV. CONCLUSION

It is undisputed that the Union's petition does not satisfy the mandatory obligations in Section 102.61(a)(8). Processing the petition in violation of the Board's regulations violates due process. For the reasons set forth above, the Board should grant Aria's request for review and dismiss the petition.

Dated this 14th day of July, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In addition to filing this Request for Review via the NLRB's electronic filing system, we hereby certify that copies have been served this 14th day of July, 2015, by email upon:

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