



# AFL-CIO

AMERICA'S UNIONS

**American Federation  
of Labor and  
Congress of Industrial  
Organizations**

815 16th St. NW  
Washington, DC 20006  
202-637-5000  
aflcio.org

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March 30, 2020

By email to the Executive Secretary at [Roxanne.Rothschild@nlrb.gov](mailto:Roxanne.Rothschild@nlrb.gov)

Chairman John Ring  
Executive Secretary Roxanne Rothschild  
General Counsel Peter Robb  
Chief Administrative Law Judge Robert Giannasi  
National Labor Relations Board

Re: Resumption of case processing remotely

Dear Chairman Ring, Executive Secretary Rothschild, General Counsel Robb and Chief Judge Giannasi:

We write to follow-up on President Trumka's request that the operations of the National Labor Relations Board be resumed as quickly as possible consistent with the health and safety of Board staff, employees, and employer and labor organization representatives. We believe this is possible according to the following procedures.

## Representation Cases

### Pre- and Post-Election Hearings

As you know, more than 90% of all representation petitions result in stipulated election agreements. Historically, such agreements have been largely negotiated over the telephone and, more recently, via email as well, and Board agents can and should continue to work out such agreements with the parties as before once the processing of petitions resumes.

With respect to hearings when they are necessary, all pre- and post-election hearings should be conducted via video conference.

The Act provides only that upon the filing of a petition

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. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. 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.

Under the present circumstances, a hearing conducted using video conference technology is certainly “an appropriate hearing.”

Under the regulations, Section 102.66 (a) provides, “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. . . .” Read in context, the term “appear at any hearing in person” means a party can appear without representation. It does not mean a party has a right to appear at a face-to-face hearing. The Board should construe the term to be satisfied by permitting parties to appear via video conference when the hearing is being held exclusively by that means.

Section 102.64 provides that hearings “shall be open to the public unless otherwise ordered by the hearing officer.” Given limited capacity on video conferences, the Board should instruct all hearing officers to order that hearings shall not be open to the public although all records from the hearings will be accessible unless specifically subject to a protective order.

Videoconferencing for pre- and post-election hearings is not novel. The General Counsel has recognized that Regional Directors have had the authority to order video testimony in representation cases where appropriate, even over objections by parties, since at least the institution of the pilot video testimony program for representation cases in 2008. *See* OM 08-20. That authorization has continued, and been expanded to ULP hearings. *See* OM 11-42. OM 08-20 provided practical guidance for conducting video testimony. The Board and General Counsel should immediately adapt the practical guidance in OM 08-20 to the current situation, taking into account technological advancements and experience since issuance of OM 08-20, and issue a new memorandum to Regional offices to implement a temporary video conferencing program for all representation case hearings.

## **Elections**

While we recognize that generally applicable Board policy makes manual, in-person balloting the preferred method for conducting elections, given the limitations on public gatherings and the fact that many employees are now working remotely in light of the coronavirus, all elections should be conducted by mail ballot.

In order to properly conduct all elections by mail ballot, the Board should issue a statement declaring that the novel coronavirus outbreak in the United States constitutes an extraordinary circumstance during which in-person elections will raise public health concerns such that Regional Directors should presumptively order the use of mail ballot elections in all representation proceedings.

Under longstanding Board law, reflected in the Board’s Casehandling Manual, a Regional Director may direct the use of a mail ballot election for, *inter alia*, “extraordinary

circumstances.” *San Diego Gas and Elec.*, 325 NLRB 1143, 1145 (1998); CHM 11301.2. In deciding whether to direct a mail ballot election in a particular case, the Regional Director is to consider the desires of the parties, the likely ability of employees to read and understand the mail ballots, the availability of employee addresses, as well as the efficiency interests of the Board. The ultimate decision whether to order a mail ballot election, however, lies within the Regional Director’s discretion, exercised within guidelines set forth by the Board.

The current circumstances present a textbook case of extraordinary circumstances for which use of mail ballot elections is appropriate. President Donald Trump issued a proclamation declaring a national emergency based on the novel coronavirus outbreak on March 13, 2020. Soon thereafter, virtually every U.S. state declared an emergency as well. And, on March 19, the Board issued a statement suspending all representation elections for two weeks, until April 3.

The Board should thus issue a statement declaring that the novel coronavirus outbreak constitutes an extraordinary circumstance and advising Regional Directors that mail ballot elections should be considered presumptively appropriate in all cases. As has always been true, Regional Directors should still consider any countervailing factors raised by the parties in each particular case. However, due to the specific dangers presented by the coronavirus – specifically, the risk to Board employees, voting employees, and other employer personnel of conducting an in-person election, the general need for social distancing at the workplace, and the fact that some members of the voting unit may be absent from the workplace because of the need to quarantine – Regional Directors should apply a strong presumption that a mail ballot election is appropriate in all cases, a presumption that can only be overcome by a fact-based showing that a mail ballot election is impractical in the specific circumstances of the workplace. Given the dangers presented by the coronavirus, the mere preference of one party to hold an in-person election rather than a mail ballot shall be insufficient to overcome the presumption while the emergency circumstances persist.

### **Unfair Labor Practice Cases**

All unfair labor practice case hearings where time is of the essence, including all cases where Section 10(j) relief is sought, should be conducted using video conferencing and hearings in all other cases should so proceed with the consent of all parties.

Section 10(b) of the Act contains language similar to regulation section 102.66(a) discussed above and should be construed similarly. Specifically, Section 10(b) provides in part:

The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint.

The regulations, in section 102.38, similarly provide:

Any party has 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 documentary or other evidence, except that the Administrative Law Judge may limit the participation of any party as appropriate

Permitting parties to appear via video conference and to call, examine, and cross-examine witnesses and introduce evidence by that means is clearly consistent with both the statutory and regulatory provisions and principles of due process. As explained above, when read in context, the term “appear at the hearing in person” means appear without a representative. Moreover, the qualifying language “or otherwise” permits the Board to allow appearance through other means consistent with due process. Finally, the phrase “at the place . . . fixed in the complaint” is appropriately read to permit a complaint to fix a virtual place by designating the means of signing into the video conference.

In addition, as in the regulation governing hearings in representation cases, section 102.34 of the regulations provides, “Hearings will be public unless otherwise ordered by the Board or the Administrative Law Judge.” Thus, as explained above, the Board or the ALJ should order the video conference hearings closed to the public for reasons of impracticality while all records thereof will remain available unless subject to a protective order.

Both the Board and the D.C. Circuit have upheld the use of video testimony in unfair labor practice hearings. *See, e.g., E.F. Int’l Language Schools, Inc.*, 363 NLRB No. 20 at 1 n. 1 (Oct. 1, 2015), *enf’d*, *E.F. Int’l Schools, Inc.*, 673 Fed. Appx. 1, 3-4 (D.C.Cir. 2017). In *MPE, Inc.*, 09-CA-084228 (unpub. Board order dated Jan. 29, 2015), the Board overturned an ALJ’s denial of video testimony, and ordered, over objections, that testimony of an incarcerated witness be taken via video, subject to the type of procedural safeguards described in OM 08-20. *See also Oncor Electric Delivery Co.*, 364 NLRB No. 58 (2016) (affirming ALJ’s ruling granting GC motion over respondent’s objection, to allow a former employee to testify in Denver NLRB office instead of coming to Fort Worth). Additionally, OM 11-42 recognizes Regional Directors’ authority to accept video testimony, even when parties object.

Lastly, section 102.35(c) of the Board’s Rules states:

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

In discussing the “good cause based on compelling circumstances” requirement, the NLRB Bench Book notes that this phrase is identical to the standard set forth in Fed. R. Civ. P. 43. The 1996 Advisory Committee Notes for Rule, quoted in the Bench Book, state that the “most persuasive showings of good cause and compelling circumstances [warranting video testimony] are likely to arise when a witness is unable to attend the trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place.” Bench Book § 12-400. The current global pandemic compellingly fits this description. The Board should make clear that the global pandemic constitutes a good cause based on compelling circumstances under Section 102.35(c), and the General Counsel should instruct Regions to seek hearings via video conference by written motion to ALJs when all parties consent or time is of the essence.

Section 102.35(c)(2) of the regulations provides that

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

Under the present circumstances, the Board and ALJs can reasonably interpret the words "different location" and "the remote location" to include the virtual locations where all parties and the judge will be able to simultaneously see and hear one another. Additionally, modern video conferencing and camera technology fulfill each of the remaining, minimum safeguards.

Accordingly, ample authority and modern technology allow for ULP hearings to be held via video conference. The General Counsel should seek parties' consent to so proceed in all pending cases and, even absent such consent, move ALJs to so proceed in cases where time is of the essence, including all cases where Section 10(j) relief is sought. ALJs should grant such motions and the Board should affirm these emergency, temporary measures.

### **Duration**

These procedures should remain in place until the public health crises has waned sufficiently to permit safe resumption of ordinary procedures.

Thank you for your attention to these matters. We are happy to discuss them at any time.

Sincerely,

/s/Craig Becker

Craig Becker

General Counsel

AFL-CIO

815 16<sup>th</sup> St., N.W.

Washington, D.C. 20006

(202)637-5310

cbecker@aflcio.org