

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 20-11

July 30, 2020

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

FROM: Peter B. Robb, General Counsel

SUBJECT: Guidance Memorandum on Representation Case Procedure Changes Regarding Blocking Charge Policy, Voluntary Recognition Bar, and Section 9(a) Recognition in the Construction Industry

I. Introduction

On March 24, 2020, the Board announced three modifications to its Rules and Regulations governing the filing and processing of petitions for Board-conducted representation elections and proof of majority support in construction-industry collective-bargaining relationships. Although implementation of the rule as originally announced was scheduled for June 1, 2020, the Board subsequently delayed its introduction until July 31, 2020. This Memorandum will explain these amendments in further detail.

II. Section 103.20: Blocking Charge Policy

The final rule amendment at Section 103.20 replaces the current blocking charge policy with either a vote-and-count or a vote-and-impound procedure. Elections will no longer be blocked by pending unfair labor practice charges. Rather, depending on the nature of the charge allegations, once a request to block has been filed and granted, ballots will either be impounded prior to the count or counted with further proceedings suspended after issuance of the tally. Regardless of the nature of the charge, a certification of results (including, where appropriate, a certification of representative) will not issue until there is a final disposition of the charge, and a determination of its effect, if any, on the election petition.

The rule sets forth different impacts on the election process visited by distinct types of unfair labor practice allegations. Charges under Section 103.20(c) (*paragraph (c) charges*) either (1) allege violations of Sections 8(a)(1) and 8(a)(2) or Section 8(b)(1)(A) of the Act, which challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition; or (2) allege that an employer has dominated a union in violation of Section 8(a)(2) and seeks to disestablish a bargaining relationship. Ballots will be impounded for up to 60 days following the election, giving the Regional Office the opportunity to fully investigate the paragraph (c) allegation. If complaint issues and the Regional Director separately determines that the allegations in the complaint affected the petition, the ballots will remain impounded as the case proceeds to settlement or hearing through, for instance, a consolidated unfair labor practice/election objections proceeding. The ballots are impounded until a final determination of the merits of the unfair labor practice allegations is reached, typically through adjudication before an Administrative Law Judge and/or the Board, upon filing of exceptions to an ALJ decision. Ballots will also be promptly opened and counted if the allegations are dismissed (with approval from the Office of Appeals, if applicable) or withdrawn prior to the expiration of the 60-day period. The Board did not state whether or not the rule would be applied to pending cases.

Charges under Section 103.20(b) (*paragraph (b) charges*) allege unlawful conduct not otherwise covered in Section 103.20(c). The ballots will be opened and counted at the end of the election, but the Regional Director will not issue a certification of results (including, where appropriate, a certification of representative) until a final disposition of the allegation(s) has been reached, so long as the Regional Director has determined that the alleged unfair labor practice(s), if meritorious, had an effect on the election petition. If the Regional Director concludes that the alleged unlawful conduct did not affect the election petition regardless of possible merit to the charge, the petition will be unblocked, and processing will continue unimpeded. Review of the merits of a charge and its effect on the election process under Section 103.20 is contingent on a party's filing of a request to block and the required offer of proof.

III. Section 103.21: Voluntary Recognition and Contract Bar

Under the final rule, the Board introduced a limited exception to the principles of recognition bar and contract bar. In Section 103.21, the Board declared that an employer's voluntary recognition of a labor organization and a post-recognition collective-bargaining agreement does not bar a decertification or rival union petition that is filed within 45 days of unit employees' receiving notice of the voluntary recognition. The Rule established a new requirement for parties to notify a Regional Office of the recognition agreement and to post a Notice to Employees regarding the agreement that is provided by the Regional Office.

Section 103.21 modifies two aspects of the recognition-bar doctrine. First, there will be no bar to an election following a grant of voluntary recognition unless affected unit employees receive an NLRB-provided notice informing them of the recognition and of their opportunity to file a Board election petition within 45 days of their receiving the notice. Second, if 45 days pass from the date that unit employees are provided the requisite notice of the voluntary recognition without the filing of a petition, then the recognized union's status will irrebuttably be presumed for a reasonable period of time pursuant to extant recognition-bar principles. In Section 103.21(a), the Board provided that these rules apply notwithstanding the execution of a first collective-bargaining agreement following voluntary recognition. Under Section 103.21(b), the rule will apply only prospectively to an employer's voluntary recognition extended on or after the July 31, 2020, effective date of the rule, and to any post-recognition collective-bargaining agreement, where voluntary recognition was extended on or after the effective date of the rule.

The Board crafted the following procedure for providing unit employees with the required notice of a voluntary recognition sufficient to trigger the 45-day window period.

- An employer and/or union that is a party to the voluntary recognition must "notif[y] the Regional Office that recognition has been granted." Section 103.21(a)(1). Parties may provide the Regional Office with notice of the extension of voluntary recognition through submission of a form available through the e-filing portal on the NLRB's website, www.nlr.gov.
- Upon receipt of the requisite notice of voluntary recognition, the Region will send an official NLRB notice to the employer "informing employees that recognition has been granted and that they have a right to file a petition during a 45-day 'window period' beginning on the date the notice is posted." Section 103.21(a)(2). Language of the notice is set forth in Section 103.21(a)(5).

- The employer must post the NLRB notice in conspicuous places at its facility, and must further distribute the notice “electronically to employees in the petitioned-for unit, if the employer customarily communicates with its employees electronically.” Section 103.21(a)(3).
- Recognition and contract bar principles will attach if “45 days from the posting date pass without a properly supported petition being filed.” Section 103.21(a)(4).

When a Regional Office receives formal notice of a voluntary recognition as described in Section 103.21, the Region will track compliance with the rule. Upon expiration of the 45-day window period, as documented by the employer through a Certificate of Posting, the voluntary recognition and any post-recognition collective bargaining agreement will act as a bar to the processing of further election petitions regarding the bargaining-unit employees, assuming no intervening petition had been filed.

IV. Section 103.22: Proof of Majority-Based Recognition in the Construction Industry

The final rule at Section 103.22 provides that in the construction industry, where bargaining relationships established under Section 8(f) cannot bar petitions for a Board election, proof of a Section 9(a) relationship, which can bar subsequently filed petitions, will require “positive evidence” to prove that a union demanded recognition as the exclusive bargaining representative and that the employer granted it based on a demonstration of majority support. At Section 103.22(a), the Board specified that contract language alone will be insufficient to constitute positive evidence, thereby overruling *Staunton Fuel & Material, Inc.*, 335 NLRB 717 (2001).

The Board explained that, “the rule will restore the protection of employee free choice that Congress intended to ensure when it enacted Section 8(f).” Supplementary Information at 85 Fed. Reg. 18388. This restoration is premised on the “fundamental” proposition that, “8(f) relationships could develop into 9(a) relationships only through Board election or voluntary recognition—and, in the latter case, only ‘where that recognition is based on a clear showing of majority support among the unit employees, e.g., a valid card majority.’” Supplementary Information at 85 Fed. Reg. 18388, citing *John Deklewa & Sons*, 282 NLRB 1375, 1387 fn. 53 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

Under Section 103.22(b), the final rule applies to an employer’s voluntary recognition extended on or after the effective date of the rule, July 31, 2020, and to any collective-bargaining agreement entered into on or after the effective date of voluntary recognition extended on or after the effective date of the rule.

V. Conclusion

It is my belief that this guidance memorandum will effectuate the Board’s goal of protecting employees’ statutory right of free choice on questions concerning representation. If you have questions related to this memorandum, please direct them to your Assistant General Counsel or Deputy.

/s/
P.B.R.