objections and challenges without a hearing. If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the Regional Director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the Regional Director determines that any determinative challenges do not raise substantial and material factual issues, the Regional Director shall issue a decision disposing of the objections and determinative challenges, and a certification of the results of the election, including certification of representative where appropriate.

* * * * *

(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. Any party desiring to submit a brief to the Hearing Officer shall be entitled to do so within 5 business days after the close of the hearing. Prior to the close of the hearing and for good cause the Hearing Officer may grant an extension of time to file a brief not to exceed an additional 10 business days. 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.

(2) *Regional Director decisions and Board review.* The decision of the Regional Director disposing of challenges and/or objections may include a certification of the results of the election, including certification of representative where appropriate, and shall be final unless a request for review is granted. If a consent election has been held pursuant to §§ 102.62(a) or (c), the decision of the Regional Director is not subject to Board review. If the election has been conducted pursuant to § 102.62(b), or by a direction of election issued following any proceeding under § 102.67, the parties shall have the right to Board review set forth in § 102.67, except that in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to §§ 102.62(b) or 102.67, the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the Administrative Law Judge's decision, and a request for review of the Regional Director's decision and direction of election shall be due at the same time as the exceptions to the Administrative Law Judge's decision are due.

* * * * *

(h) *Final Disposition.* For the purposes of filing a request for review pursuant to § 102.67(c) or to paragraph (c)(2) of this section, a case is considered to have reached final disposition when the Regional Director dismisses the petition or issues a certification of results (including, where appropriate, a certification of representative).

Dated: March 6, 2023.

Roxanne L. Rothschild,

Executive Secretary.

[FR Doc. 2023–04840 Filed 3–9–23; 8:45 am]

BILLING CODE 7545–01–P

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

RIN 3142–AA12

Representation Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Final rule; stay.

SUMMARY: The National Labor Relations Board (Board) is staying two provisions of its 2019 final rule (''Final Rule'') amending its representation case procedures to account for new court decisions. The two provisions, which have never been in effect, are stayed until September 10, 2023. This stay is necessary to accommodate pending litigation over remaining challenges to the Final Rule and because the Board is currently considering whether to revise or repeal the Final Rule, including potential revisions to the two provisions.

DATES: As of March 10, 2023, the amendments to 29 CFR 102.64(a) and 29 CFR 102.67(b) in the final rule that published at 84 FR 69524, on December 18, 2019, and delayed at 85 FR 17500, March 30, 2020, are stayed from May 31, 2020, until September 10, 2023.

FOR FURTHER INFORMATION CONTACT: Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half St. SE, Washington, DC 20570–0001, (202) 273–2940 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: On December 18, 2019, the National Labor Relations Board published a final rule amending various aspects of its representation-case procedures. (84 FR 69524, Dec. 18, 2019.) The Board published the Final Rule as ''a procedural rule which is exempt from notice and public comment, pursuant to 5 U.S.C. 553(b)(3)(A), as a rule of 'agency organization, procedure, or practice.' '' 84 FR at 69587. On March 30, 2020, the Board delayed the effective date of the final rule to May 31, 2020, upon request of the United States District Court for the District of Columbia and to ''facilitate the resolution of the legal challenges that have been filed with respect to the rule.'' (85 FR 17500, Mar. 30, 2020.)

On May 30, 2020, the United States District Court for the District of Columbia issued an order in *AFL–CIO* v. *NLRB,* Civ. No. 20–cv–0675, vacating five provisions of the Final Rule and enjoining their implementation. 466 F. Supp. 3d 68 (D.D.C. 2020). The District

Court concluded that each of the five provisions was substantive in nature, not procedural, and that the Board therefore violated the Administrative Procedure Act by failing to use notice and comment rulemaking. Id. at 92.

On January 17, 2023, the United States Court of Appeals for the District of Columbia Circuit issued a decision and order reversing the District Court as to two of the five provisions, agreeing with the Board that those provisions were procedural in nature and not subject to notice and comment rulemaking. *AFL–CIO* v. *NLRB,* 57 F.4th 1023, (D.C. Cir., 2023). The two provisions are: (1) an amendment to 29 CFR 102.64(a) allowing the parties to litigate disputes over unit scope and voter eligibility prior to the election; [1] and (2) an amendment to 29 CFR 102.67(b) instructing Regional Directors not to schedule elections before the 20th business day after the date of the direction of election.[2] The D.C. Circuit remanded the case to the District Court to consider two counts in the complaint that challenge these two provisions and that remain viable in light of its decision.

Due to the District Court's injunction, these two provisions have never taken effect. The time for filing a petition for rehearing with the D.C. Circuit under Federal Rule of Appellate Procedure 40 has passed, and, once the District of Columbia Circuit's mandate issues on or about March 10, 2023, the District Court's injunction will be lifted. At that point, the two previously enjoined provisions will go into effect pursuant to the original May 31, 2020 effective date. The District Court will also begin its consideration of the challenges to the two provisions remaining for decision.

The Board has decided to stay the effective date of the two provisions to September 10, 2023, six months from the expected issuance of the District of Columbia Circuit's mandate. The Board has determined that staying those provisions until September 10, 2023 would accommodate the pending legal challenges before the District Court. 5 U.S.C. 705. Moreover, a stay is necessary and appropriate because the Board is currently considering whether to revise or repeal the Final Rule, including potential revisions to these two provisions. Delayed implementation of these provisions will permit further consideration by the Board of the merits of the Final Rule and will avoid the possible waste of administrative resources and public uncertainty if the provisions were to go into effect only for a short period of time before being impacted by forthcoming revisions. The stay of the two provisions' effective date merely extends the status quo.

We disagree with the dissenting position of Member Kaplan, who argues a stay in the effective date of the two provisions is unwarranted. His position is based on his view of the policy merits of the provisions and the legal merits of the pending challenge to them in the District Court. At this juncture, however, consideration of the provisions' merits by the Board is premature. Resolution of the legal challenge to the provisions, in turn, is a matter for the District Court. As explained, a stay of the effective date of the provisions facilitates both processes, by preserving the status quo.

This stay is published as a final rule. The Board considers this rule to be a procedural rule that is exempt from notice and public comment, pursuant to 5 U.S.C. 553(b)(3)(A), because it concerns a rule of ''agency organization, procedure, or practice.'' *AFL–CIO* v. *NLRB,* 57 F.4th at 1035.

Dissenting Opinion of Member Kaplan

In 2019, the Board issued a final rule [1] amending certain provisions of its representation-case rules, which had been extensively modified in a final rule enacted in 2014.[2] It did so without first issuing a notice of proposed rulemaking because it viewed the amendments as pertaining to ''rules of agency . . . procedure,'' and such ''procedural rules'' are exempt from notice-and-comment requirements under 5 U.S.C. 553(b)(3)(A). The AFL–CIO challenged the 2019 Rule in the United States District Court for the District of Columbia on several grounds, including that five provisions of the 2019 Rule were not procedural and therefore not exempt from notice-and-comment rulemaking. The district court agreed with the AFL–CIO and vacated all five.[3] Recently, a divided Court of Appeals for the District of Columbia Circuit (''D.C. Circuit'' or ''court of appeals'') reversed in part, holding that two of the five are procedural but three are not.[4] ''Those three provisions,'' said the court, ''must remain vacated unless and until the Board repromulgates them with notice and comment.'' [5] In dissent, Judge Rao said that the majority had applied an ''obsolete legal standard'' and that ''[u]nder the correct standard,'' all five ''are classic procedural rules.'' [6]

In a separate final rule issued today, my colleagues rescind the three provisions of the 2019 Rule that the D.C. Circuit held to be not procedural. As I explain in my dissent to that rule, I would have asked the Solicitor General to file a petition for certiorari from the D.C. Circuit's decision because the controlling legal test for determining when rulemaking is procedural and therefore exempt from notice-and-comment requirements under the Administrative Procedure Act presents ''an important question of federal law that has not been, but should be, settled by'' the Supreme Court.[7] But since my colleagues did not join me in that regard, I would pursue the option the D.C. Circuit suggested and repromulgate the three provisions the court held not procedural for notice-and-comment rulemaking.[8] I would do so because I believe, subject to comments, that those three provisions are superior to the rules that my colleagues have snapped back into place.

In the instant final rule, the majority addresses the two provisions of the 2019 Rule that the D.C. Circuit held to be procedural and therefore properly implemented without notice and comment. The AFL–CIO's challenge to those two provisions was not limited to its claim that they are not procedural, but the district court, having vacated them (erroneously) as not procedural, did not address the AFL–CIO's remaining contentions. Accordingly, the D.C. Circuit remanded the two provisions to the district court to address those contentions. Meanwhile, because the D.C. Circuit has held that those two provisions *are* procedural and therefore were properly enacted without notice and comment, they will take effect when the court of appeals issues its mandate. To prevent that from happening, my colleagues issue this rule to stay the effective date of the two provisions to September 10, 2023.

[1] 84 FR at 69593.

[2] 84 FR at 69595.

[1] ''Representation-Case Procedures,'' 84 FR 69524 (Dec. 18, 2019) (the ''2019 Rule'').

[2] ''Representation-Case Procedures,'' 79 FR 74307 (Dec. 15, 2014) (the ''2014 Rule'').

[3] *AFL–CIO* v. *NLRB,* 466 F. Supp. 3d 68 (D.D.C. 2020).

[4] *AFL–CIO* v. *NLRB,* 57 F.4th 1023, 1034–1046 (D.C. Cir. 2023).

[5] Id. at 1049.

[6] Id. at 1050 (Rao, J., concurring in the judgment in part and dissenting in part).

[7] Supreme Court Rule 10(c).

[8] The D.C. Circuit also vacated a fourth provision of the 2019 Rule, which mandated impoundment of ballots if a request for review of a regional director's decision and direction of election is filed within 10 days of issuance of the decision and direction, and the Board has either granted or not ruled on the request for review before the conclusion of the election. The court held this provision unlawful as contrary to Sec. 3(b) of the Act. Interpreting Sec. 3(b) differently than the majority, Judge Rao would have upheld this provision as well. Although I agree with Judge Rao's interpretation, I recognize that repromulgating the ballot-impoundment provision for notice and comment is not an option.

I disagree with their decision to do so. My colleagues state two reasons for issuing this stay: to give the district court time to consider the AFL–CIO's remaining arguments on remand, and to give themselves time to decide whether to revise or repeal the 2019 Rule, including the two provisions that have been sent back to the district court. I will not take this occasion to mount a comprehensive defense of the 2019 Rule. There is not time for me to do so; the court of appeals will issue its mandate on March 10, and my colleagues are determined to issue this rule before that happens. I will, however, explain why the two provisions of the 2019 Rule at issue here should be allowed to take effect when the court issues its mandate.

The two provisions are these: (1) a rule providing that unit scope and voter eligibility (including supervisory status) normally will be litigated and resolved by the regional director before he or she directs the election (the ''unit-scope-and-eligibility rule''), and (2) a rule providing that normally, the regional director will not schedule an election before the 20th business day after the date of the direction of election (the ''20-days rule''). As the Board said in the 2019 Rule, these two provisions go hand in hand: the regional director will resolve disputes over unit scope and voter eligibility before directing the election, and the 20-days rule will give the Board time to act on a request for review of the regional director's decision if one is filed. They should be allowed to take effect when mandate issues for two reasons. They promote important interests that the 2014 Rule subordinated to speed. And there is no good reason to wait for the district court to rule on the AFL–CIO's remaining arguments for vacating these provisions because those arguments are meritless.

The rules at issue promote important interests.

Under the 2014 Rule, regional directors were instructed to schedule elections on ''the earliest date practicable,'' and litigation of disputes over unit scope and voter eligibility, including supervisory status, were largely postponed until after the election. Speed—*i.e.,* shortening the time between the filing of the representation petition and the election—was prioritized over other interests. In the 2019 Rule, the Board acknowledged that speed is an important interest and that some of the changes it was making to the Board's representation-case procedures would unavoidably result in some delay between the filing of the petition and the election. But the Board made clear that none of the changes had a *purpose* of delay but were being made to serve other important interests.

Specifically as to the provisions of the 2019 Rule at issue here, I cannot improve on the concise explanation the Board furnished there of the interests those rules serve. The italics are mine.

> By permitting the parties—where they cannot otherwise agree on resolving or deferring such matters—to litigate issues of unit scope and employee eligibility at the pre-election hearing, by expecting the Regional Director to resolve these issues before proceeding to an election, and by providing time for the Board to entertain a timely-filed request for review of the regional director's resolution prior to the election, the final rule promotes *fair and accurate voting* by ensuring that the employees, at the time they cast their votes, know the contours of the unit in which they are voting. Further, by permitting litigation of these issues prior to the election, instead of deferring them until after the election, the final rule removes the pendency of such issues as a barrier to reaching *certainty and finality of election results.* Under *the 2014 amendments,* such issues could linger on after the election for weeks, months, or even years before being resolved. This state of affairs plainly *did not promote certainty and finality.*
>
> Relaxing the timelines instituted by the 2014 amendments also promotes *transparency*. . . . Providing employees with more detailed knowledge of the contours of the voting unit, as well as resolving eligibility issues, self-evidently promotes transparency; leaving issues of unit scope and employee eligibility unresolved until after an election (absent agreement of the parties to do so) clearly does a disservice to transparency. Relatedly, resolving issues such as supervisory status before the election ensures that the parties know who speaks for management and whose actions during the election campaign could give rise to allegations of objectionable conduct or unfair labor practice charges.

84 FR at 69529. I agree that the unit-scope-and-eligibility rule and the 20-days rule serve these important interests, and I believe these interests outweigh the interest in speed. Since I can think of no other reason my colleagues might have for repealing these rules than once again promoting speed at the expense of certainty, finality, and transparency, I would not delay their effective date to provide time to consider taking that step.

The AFL–CIO's remaining arguments are meritless.

The other reason the majority gives for staying of the unit-scope-and-eligibility rule and the 20-days rule is to provide time for the district court to rule on remand concerning the AFL–CIO's remaining grounds of attack on those rules. The AFL–CIO contends that both provisions must be vacated as arbitrary and capricious, and that the 20-days rule must additionally be vacated as contrary to Section 3(b) of the Act. There is no good reason to wait for the district court to dispose of these contentions because they will not succeed.

Regarding the AFL–CIO's arbitrary-and-capricious attack, one need look no further than the D.C. Circuit's decision to see that it will fail. The AFL–CIO had also argued before the district court that the 2019 Rule as a whole was arbitrary and capricious. Affirming the district court's dismissal of that argument, the court of appeals wrote as follows:

> The Board gives a rational account of how the 2019 Rule advances interests apart from speed. For example, the Board adequately explains that the election-scheduling provision—which supplements the ''earliest date practicable'' language with a default minimum period of twenty business days—promotes transparency and uniformity by making the timing of elections more predictable for parties. *See* [84 FR] at 69,546. It also explains that the provision regarding pre-election litigation of voter eligibility, unit scope, and supervisory status could provide employee-voters with more complete information about ''who they are voting to join in collective bargaining.'' *Id.* at 69,541.[9]

In other words, in explaining why the district court correctly rejected the AFL–CIO's contention that the 2019 Rule as a whole was arbitrary and capricious, the D.C. Circuit singled out the very provisions that are now back before the district court to determine whether they are arbitrary and capricious. The court of appeals could not have sent a clearer signal to the lower court that any other resolution besides dismissal is out of the question.

The AFL–CIO's claim that the 20-days rule is also unlawful as contrary to Section 3(b) of the Act also fails. Section 3(b) relevantly provides:

> [U]pon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

29 U.S.C. 159(b). The clear language of this provision indicates that it is triggered only ''upon the filing of a request [for review of a regional director's action] . . . with the Board.'' Even assuming that the 20-days rule ''operate[s] as a stay'' of an action taken by the regional director—namely, tallying the ballots—this alleged ''stay'' is not triggered by the filing of any request for review with the Board. Rather, it results from the 20-days rule

[9] *AFL–CIO* v. *NLRB,* 57 F.4th at 1047.

itself. Section 3(b) does not speak to that delay.[10]

In sum, my colleagues have failed to provide a persuasive reason for staying the effective date of the unit-scope-and-eligibility and 20-days rules. I favor allowing these rules to take effect just as soon as the D.C. Circuit issues mandate. Accordingly, from the majority's final rule, I dissent.

Dated: March 6, 2023.

Roxanne L. Rothschild,

Executive Secretary.

[FR Doc. 2023–04839 Filed 3–9–23; 8:45 am]

BILLING CODE 7545–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0163]

RIN 1625–AA00

Safety Zone; Missouri River Mile Markers 175.5–176.5, Jefferson City, MO

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters in the Missouri River at Mile Marker (MM) 175.5 to 176.5. The safety zone is needed to protect personnel, vessels, and the marine environment from all potential hazards associated with electrical line work. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Upper Mississippi River (COTP) or a designated representative.

DATES: This rule is effective from March 13, 2023, until March 24, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0163 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MSTC Nathaniel Dibley, Sector Upper Mississippi River Waterways Management Division, U.S. Coast Guard; telephone 314–269–2550, email *Nathaniel.D.Dibley@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of The Port Sector Upper Mississippi River
DHS Department of Homeland Security
FR Federal Register
MM Mile marker
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. We must establish this temporary safety zone immediately to protect personnel, vessels, and the marine environment from potential hazards created by the electrical work and lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying this rule would be contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with the ongoing construction work.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port Sector Upper Mississippi River (COTP) has determined that potential hazards associated with electrical line work will be a safety concern for anyone operating or transiting within the Missouri River from MM 175.5–176.5. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while electrical line work is being conducted.

IV. Discussion of the Rule

Electrical line work will be occurring near MM 175.5–176.5 beginning March 13, 2023. The safety zone is designed to protect waterway users until work is complete.

No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard (USCG) assigned to units under the operational control of USCG Sector Upper Mississippi River. To seek permission to enter, contact the COTP or a designated representative via VHF–FM channel 16, or through USCG Sector Upper Mississippi River at 314–269–2332. Persons and vessels permitted to enter the safety zone must comply with all lawful orders or directions issued by the COTP or designated representative. The COTP or a designated representative will inform the public of the effective period for the safety zone as well as any changes in the dates and times of enforcement, as well as reductions in the size of the safety zone as conditions improve, through Local Notice to Mariners (LNMs), Broadcast Notices to Mariners (BNMs), and/or Safety Marine Information Broadcast (SMIB), as appropriate.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on a safety zone located on the Missouri River at MM 175.5–176.5, near Jefferson City, MO. The Safety Zone is expected to be active only during the hours of 9 a.m. through 4 p.m., or only when work is being conducted, every day until March 24, 2023.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended,

[10] As stated above, the court of appeals found that the ballot-impoundment provision in the 2019 Rule is contrary to Sec. 3(b). That provision, however, is expressly triggered only when a party *files a request for review* within ten business days of the issuance of the direction of election and when certain other conditions are met.