

**ABA SECTION OF LABOR & EMPLOYMENT LAW CLE CONFERENCE**

**INTRODUCTION TO THE LAW AND PRACTICE BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

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**NLRB REPRESENTATION CASE PROCEDURES**

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**I. Ways Unions Achieve Recognition as Bargaining Agents**

- A. Voluntary recognition
- B. Representation election
- C. Bargaining order

**II. Beginning An Election Campaign**

- A. Employees express interest in unionizing
- B. Employees sign authorization cards

Example: "I the undersigned employee of \_\_\_\_\_ Company wish to be represented by International Alliance of Theatrical Stage Employees Local Union No. 835 for the purpose of bargaining collectively with my employer over the terms and conditions of my employment."

- 1. Must be signed by employee
  - 2. Must be dated -- not over one year old
- C. Showing of interest -- at least 30% of the employees in the proposed bargaining unit

**III. Appropriate Bargaining Units**

- A. Section 9(a), 29 U.S.C. § 159(a) -- representatives designated or selected for purposes of collective bargaining by a majority of employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in the unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment
- B. Factors in unit determination

1. Community of interest among employees is fundamental factor -- similarity in method of compensation, hours, benefits, working conditions; common supervision; similar qualifications, training, skills, functions; contact or interchange with other employees; time spent away from job situs; integration of functions
2. Extent of organization can be considered -- can't be sole basis
3. Desires of employees, if there are two or more equally appropriate units -- *Globe* election allows employees to choose
4. Bargaining history
5. Employer's organizational structure

C. Types of units

1. Craft
2. Plantwide
3. Employerwide
4. Multi-employer
5. Special situations
  - a. Professionals -- unit including both professionals and other employees is inappropriate unless professionals vote for inclusion
  - b. Guards -- Board cannot include guards in unit with non-guards
  - c. Health care -- Board rulemaking established eight presumptively appropriate units (physicians; RNs; other professionals; technicals; office clericals; service and maintenance; stationary engineers or maintenance; guards)

**IV. Filing a Representation Petition**

- A. Union files an "RC" (Representation Petition Seeking Certification) at NLRB Regional Office, with showing of interest (cards submitted only to NLRB)
- B. Regional Director schedules "R" case hearing in 10 days (very limited extensions possible)
- C. Board agent contacts parties, tries to discover and narrow the issues in dispute
- D. Issues resolved by one of several means

1. Formal procedures -- representation case hearing (see below)
2. Stipulation of parties -- Stipulated Election Agreement
3. Agreement for Consent Election (differs from Stipulation in that Regional Director has final authority to resolve post-election objections and challenges, instead of NLRB)
4. Full Consent Election Agreement (Regional Director also has full authority to resolve all pre-election factual and legal disputes; right to file Request for Review of RD's decisions with NLRB is waived)

E. Other types of petitions

1. Decertification Petition (RD)
2. Employer Petition (RM) (if one or more unions has demanded recognition)
3. Union-Security Deauthorization (UD)
4. Petition for Unit Clarification (UC)
5. Petition for Amendment of Certification (AC)

**V. Representation Case Hearing -- Main Issues**

- A. Existence of a QCR (question concerning representation)
- B. Commerce/jurisdiction
- C. Labor organization status
- D. Appropriate bargaining unit
- E. Unit placement (which employees are in and out of unit)
  1. Included in the unit
    - a. lead workers
    - b. regular part-time employees depending on community of interest and frequency of work
    - c. laid-off employees with reasonable expectation of recall
    - d. employees out of work due to labor dispute
  2. Excluded from the unit (statutory exclusions)
    - a. supervisors
    - b. domestic workers
    - c. agricultural laborers
    - d. independent contractors
    - e. someone employed by a parent or spouse (or close relatives of owners)
    - f. employee of an employer covered by the Railway Labor Act
    - g. guards (cannot be combined with non-guards)

3. Other exclusions
  - a. managerial employees
  - b. confidential employees
  - c. casual employees
  - d. office clericals not usually combined with plant clericals
- F. Issues and burdens of proof
  1. Statutory exclusions -- party seeking to exclude employees bears burden of proof
  2. Presumptions -- party seeking to rebut a presumption under Board law, such as the appropriateness of a single facility unit, bears burden of proof
- G. History of collective bargaining
- H. Bars to conduct of an election
 

Contract bar doctrine -- a signed agreement bars another election, if it:

  1. is a collective agreement
  2. is in writing
  3. is signed by all parties before rival petition filed
  4. contains substantial terms and conditions of employment
  5. covers the employees involved in the petition
  6. covers an appropriate unit

## **VI. Outcome of Hearing**

- A. Regional Director issues Decision and Direction of Election (DDE)
- B. Regional Director dismisses petition
- C. Appeal to the NLRB possible from DDE or dismissal

## **VII. Pre-Election Period**

- A. Parties may campaign, distribute literature
- B. Party conduct can be objectionable, grounds to set aside election (and also an unfair labor practice); critical period is time after filing of petition
  1. Promises of benefits
  2. Threats of reprisals
  3. Surveillance of union activity
  4. Interrogation
  5. Discipline or discharge for union activity
  6. "Captive audience" speeches given by employer within 24 hours of election (*Peerless Plywood Co.*, 107 NLRB 427, 33 LRRM 1151 (1953))

- C. “Blocking charges” -- employer ULPs can delay election unless union requests to proceed despite ULPs

## **VIII. Election**

- A. Details established by agreement of parties, whether after a DDE or Stipulation (or RD decides, if parties cannot)
  - 1. date
  - 2. times (may need multiple sessions to cover all employees)
  - 3. polling place -- usually on employer’s property during work
  - 4. multilingual ballots, if needed
  - 5. release of employees for voting
  - 6. observers for each side
  - 7. payroll eligibility date (period ending just before DDE or stip.)
- B. List of names and addresses of eligible voters must be supplied by employer in advance of election -- Excelsior list, after *Excelsior Underwear, Inc.*, 156 NLRB 1236, 61 LRRM 1217 (1966)
- C. Voting conducted by Board agent (usually in person; can be by mail ballot for remote locations, unusual circumstances)
  - 1. Secret ballot
  - 2. Pre-election conference with Board agent, parties, observers
  - 3. Observers for each side witness procedures, can challenge voters
  - 4. No campaigning at polling place, no speaking to voters in line
  - 5. No supervisor or union interference
  - 6. Count immediately after poll closes
  - 7. Tally of ballots prepared

## **IX. Outcome of Election**

- A. Result conclusive -- one party wins and no objections are filed
  - 1. Regional Director issues Certification of Representative if union won, or Certification of Results if union lost
  - 2. Parties obligated to bargain in good faith if union won
  - 3. Employer may “test certification” by refusing to bargain, committing a “technical 8(a)(5) violation” (refusal to bargain), challenging unit determination; brought to Board via summary judgment; Board order subject to appeal and enforcement in U.S. Court of Appeals
- B. Result inconclusive because one party files objections (see below)
- C. Inconclusive result -- determinative challenges (challenged ballots sufficient in number to affect outcome of election) (see below)

## **X. Post-Election Procedures**

- A. Objections to conduct of election, or to conduct affecting results of election
  - 1. Must be filed within 7 calendar days after tally of ballots prepared
  - 2. Supporting evidence due within next 7 days (list of witnesses, brief description of their testimony)
  - 3. Regional Director may:
    - a. overrule objections without an investigation
    - b. conduct an administrative investigation
    - c. order a fact-finding hearing
    - d. if hearing is held, prepare a report  
(procedures vary depending on whether election was a consent election, stipulated, or directed)
  - 4. Possible outcomes:
    - a. objections dismissed
    - b. objections found to have merit -- rerun election ordered
    - c. objections consolidated with ULPs for trial before an ALJ
- B. Challenges -- similar investigative process
- C. After Regional Director's report, case transferred to Board

## **XI. Requests for Review**

- A. Party can file request for review by Board after DDE, before election; Board may deny review, grant review (where "compelling reasons" exist); may order election to proceed but impound ballots until issue is decided
- B. Party can file request for review after Regional Director's report on objections and challenges
- C. Board may decide issues on existing record if substantial and material factual issues do not exist; if such issues do exist, Board may order another hearing

## **Key Resources for More Information**

How to Take a Case Before the NLRB (Fredric H. Fischer, et al. eds., 8th ed. 2008)

The Developing Labor Law (John E. Higgins, Jr., ed., 5th ed. 2006)

NLRB website [www.nlr.gov](http://www.nlr.gov) (This excellent website has many publications, guides and pamphlets available, including all those listed below.)

An Outline of Law and Procedure in Representation Cases

Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings

NLRB Casehandling Manual

Part One -- Unfair Labor Practice Proceedings

Part Two -- Representation Proceedings

Part Three -- Compliance Proceedings

NLRB Rules and Regulations