CHAPTER ONE

OVERVIEW OF THE NATIONAL LABOR RELATIONS ACT

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I. BACKGROUND

The National Labor Relations Act (NLRA) was introduced in Congress in 1934 and passed in 1935. The Act was drafted by Senator Robert Wagner in the midst of the Great Depression. The purpose of the Act was to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing an interference by either employers and employees with the legitimate rights of the others, to protect the rights of individual employees in their relations with labor organizations, to define and prescribe practices on the part of labor and management and to protect the rights of the public in connection with labor disputes affecting commerce. That term, “industry affecting commerce” is key to the jurisdiction of the NLRA. “Industry affecting commerce” means an industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

In 1937, the Supreme Court confirmed the constitutionality of the National Labor Relations Act in the case of NLRB v. Jones & Laughlin Steel Corporation,\(^1\) holding that the Commerce Clause of the Constitution gave Congress the power to regulate industrial relations of employers whose activities “affected” interstate commerce. The Act’s basic purpose was to serve as a weapon against the disruption of industry by labor-management disputes. Section 1 of the Act lists activities which disrupt commerce. Congress found that denial of the right of employees

\(^1\) 301 U.S. 1, 57 S.Ct. 615 (1937).
to organize and the refusal of some employers to accept collective bargaining led to strikes and industrial unrest and had the effect of burdening and obstructing commerce. The Supreme Court concluded, therefore, that Congress acted properly in legislating concerning matters affecting interstate commerce.

The general jurisdiction of the Act extends to “labor disputes . . . affecting interstate commerce” and from this broad jurisdictional base the National Labor Relations Board gets its power. The National Labor Relations Board cannot act in the absence of a “labor dispute.” Its jurisdiction, however, is exclusive when an unfair labor practice affecting commerce is present.

The National Labor Relations Act does not apply to the United States or any wholly owned government corporation or any state or political subdivision thereof, or any person subject to the Railway Labor Act. Those entities are excluded from the definition of the term “employer” under the Act. The Act also limits the jurisdiction of the Board by its definition of the term “employee.” It does not cover individuals employed in agricultural labor, domestic service of any family or person in his or her home, any individual employed by his or her parents or spouse, independent contractors or individuals employed as a supervisor. A person not in an excluded category may be assumed to be an employee if he or she works for an employer. The Board has found that aliens are employees over whom it may assert jurisdiction, even though the aliens are undocumented.

Besides the statutory definitions of labor dispute, employer and employee, the National Labor Relations Board established general jurisdictional standards representing a minimum annual dollar volume of business to judge whether an employer is engaged in interstate commerce. In non-retail enterprises, the Board asserts jurisdiction where gross outflow or inflow of revenue is at least $50,000. In retail establishments, the Board exercises jurisdiction where
gross business volume is at least $500,000 per year with substantial purchases from or sales to other states on a direct or indirect basis.

As set forth above, the original purpose of the Act was to stop industrial strife by curbing the disruption of industry by labor-management disputes. To accomplish this purpose, Congress created a legally enforceable right for employees to organize, the right to bargain collectively and the right to engage in strikes, picketing and other concerted activities. To enforce these rights, Congress created the National Labor Relations Board (NLRB). It gave the Board exclusive jurisdiction over unfair labor practices it defined and also set forth outlines for NLRB procedure. The Act also provides for judicial review and court enforcement of Board orders. The initial National Labor Relations Board consisted of three members appointed by the President with the advice and consent of the Senate.

The first amendment to the National Labor Relations Act came in 1947 with the Labor Management Relations Act of 1947 (The Taft-Hartley Act). This Act increased the number of members on the National Labor Relations Board from three to five, and established the position of general counsel of the Board who, like the Board members, is appointed by the President with the advice and consent of the Senate. The General Counsel has general supervision over all attorneys employed by the Board and over the officers and employees in the regional offices. The Taft-Hartley Act also established the Federal Mediation and Conciliation Service (FMCS) and set forth the functions of that service. It also contained a provision allowing the President to intervene where a threatened or actual strike or lockout will affect an entire industry, or imperil the national health or safety.

In 1959, the Labor Management Reporting and Disclosure Act was passed, also called the Landrum-Griffin Act. Part 1 of that Act contains a bill of rights for union members and
requires reporting elections and miscellaneous provisions by unions. The second part of the Act closed loopholes in The Taft-Hartley Act and also added Section 8(f) which permitted pre-hire agreements in the construction industry and other agreements in the construction industry which required membership in a labor organization after the 7\textsuperscript{th} day following the beginning of employment.

The NLRA was primarily enacted as a means to prevent disruptions to the United States economy by regulating the often contentious relationship between labor unions and management. For much of its history, the NLRB focused its attention on this purpose and the ongoing relationship between unions and employers. However, over the past several years as the number of union elections has declined, the NLRB has taken an increasing interest in expanding the protections provided under Section 7 to more and more employees in non-union environments. In doing so, the NLRB applies language that long existed in Section 7 of the Act to create ever expanding protections for employees in both the non-union and union workforces.

During President Obama’s administration, the NLRB took a variety of steps to increase employee awareness of the protections provided under Section 7 of the NLRA. For example, in August 2011, the NLRB attempted to promulgate a new posting requirement for employers, which would have required nearly all private employers in the United States to post, for the first time, a notice to employees of their rights under Section 7 of the Act. However, the NLRB’s posting requirement was struck down by the Court of Appeals in the D.C. Circuit and the Fourth Circuit after these courts concluded that the Board’s action in promulgating the rule was invalid.\textsuperscript{2} The NLRB is taking other steps, however, to publicize these employee rights, including the

establishment of a “mobile app” that provides employees with information concerning their rights under the Act. As a result of these initiatives, the number of unfair labor practice charges filed by employees in non-union workplaces – and unrelated to any form of union organizing – increased significantly over the past decade.

II. EMPLOYEES’ RIGHTS TO ENGAGE IN PROTECTED ACTIVITY

A. Interference with Protected Rights

1. Rights of Employees

As stated above, one of the principal purposes of the National Labor Relations Act was to protect the rights of workers to associate, self-organize and designate representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other “mutual aid or protection.” These rights are set forth in Section 7 of the Act, which protects the rights of non-supervisory employees. The Act makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of these rights. Amendments to the National Labor Relations Act also guarantee the right of employees to refrain from any and all such activities and makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of their rights.

Employees’ rights are not limited to the right to join or assist or refrain from joining or assisting unions. They also include activity engaged in for “other mutual aid or protection.” In recent years, the NLRB significantly expanded the protections provided under the “mutual aid or protection” clause of Section 7. To be protected under this clause, the activity engaged in for “other mutual aid or protection” must be both “concerted” and “protected.” For an employee’s action to be “concerted,” he or she must act with, or for the benefit of, other employees. Concerted employee activity ranges from large groups of employees acting together to one

3 http://www.nlrb.gov/apps.
employee acting alone in the interest of other employees. A purely individual protest is not protected. Accordingly, the activity is not concerted if it is carried out by a single employee for his or her own benefit.

Although the protections provided by this Section are broad, the protections do have limits. Employees lose the NLRA’s protection if they engage in certain conduct or behavior, such as: (a) engaging in threats or acts of violence; (b) breaching confidentiality regarding sensitive company information that is not related to an employee’s terms and conditions of employment; (c) making deliberately or maliciously false allegations about the employer; (d) engaging in a sit down, partial, or intermittent strike; or (e) blocking public streets or access to the employer’s premises. However, as recent NLRB decisions have demonstrated, the use of vulgar or profane language in the workplace does not necessarily destroy the Act’s protections.4

2. Employer Interference

Section 8 of the National Labor Relations Act forbids employers from interfering with, restraining or coercing employees in the exercise of their Section 7 rights. As discussed below, an employer’s motive is not an essential element of a Section 8 violation.

a. Employment Policies and Rules

Generally, it is unlawful to maintain any rule that would “reasonably tend to chill employees in the exercise of their section 7 rights,” even if the rule is not enforced.5 Further, it is separately unlawful to enforce such a rule against an employee.6 Additionally, even if a rule is

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4 *Pier Sixty, LLC*, 362 NLRB No. 59 (Mar. 31, 2014)
facially valid, an unfair labor practice can be established based on either the timing of implementation of the rule, or the discriminatory enforcement of the rule.⁷

The NLRB developed a standard to determine whether the maintenance of a challenged rule is a violation of the NLRA. First, the NLRB will examine whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful.⁸ If the rule does not explicitly restrict activities protected by Section 7, a violation must be established by one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.⁹ Over the past several years, the NLRB has taken a broad view as to what type of language could be construed by employees as restricting Section 7 rights. Significantly, it is not only written rules that can run afoul of Section 7, but oral statements made by supervisors.¹⁰

Over the past several years, the NLRB has found a broad range of rules and policies violate Section 7’s prohibition on employee interference:

**Policies Regarding Confidentiality**

- Prohibiting the discussion of “confidential information,” which is defined to include personal and/or sensitive information regarding any employee with particular emphasis on salary/hourly wage rate, benefits, promotions, demotions, disciplinary actions, bonuses, or other actions which are clearly the authority of the Human Resources Department.¹¹
- A policy that prohibits any unauthorized disclosure of information from an employee’s personnel file is a ground for discipline, including discharge.¹²

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⁸ *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.
⁹ *Id.*
¹⁰ *Room-store*, 357 NLRB No. 143 (Dec. 20, 2011)
¹¹ *Security Walls, LLC*, 356 NLRB No. 87 (February 2, 2011)
¹² *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80 (August 26, 2011).
• A policy requiring employees to keep information “they may learn private” and stating if employees learn “confidential information on the job, [they] may use it for...business purposes only.”

Rules Regarding Speaking to the Media

• A rule stating that only the employer’s Chief Executive Officer, Chief Operating Officer, General Manager or Public Relations Director/Manager are authorized to speak with the media.

• A rule stating that “[s]hould any incident occur that generates significant public interest or press inquiries, all press releases and other statements of information will be handled by the General Manager, or designated representative of the General Manager. Under no circumstances will statements or information be supplied by any other employee.”

Rules Regarding On Duty Conduct

• A policy stating that employees will face disciplinary action for performing activities other than Company work during working hours.

• A policy prohibiting “[a]ctions or statements . . . against the company’s interests which expose the company to public contempt and/or ridicule or damage its business reputation or interfere with its ability to expand and grow shall be considered disloyalty.”

Policies Regarding Chain of Command

• A policy prohibiting employees dissatisfied with any aspect of their employment from registering complaints with any representative of the client.

• A policy directing employees to bring any work-related complaint, concern, or problem of any kind to the attention of the facility director immediately or to use the company problem solving procedures in this handbook.

Rules Requiring Maintenance of Confidentiality in Company Investigations

13 *Fresh & Easy Market, Inc.*, 361 NLRB No. 12 (August 11, 2014).


15 *Crowne Plaza Hotel*, 352 NLRB No. 382, 385-386 (2008).

16 *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80 (August 26, 2011).

17 *GHR Energy Corp.*, 294 NLRB No. 1011 (June 13, 1989).

18 *Guardsmark, LLC*, 344 NLRB No. 809, 810, 817 (June 7, 2005).

19 *Kinder-Care Learning Centers*, 299 NLRB No. 1171, 1172 (Sept. 27, 1990).
• A provision in a harassment policy that states “[e]mployees who assist in an investigation are required to maintain the confidentiality of all information learned or provided. Violation of confidentiality will result in disciplinary action.” 20

b. Social Media

With the explosion of internet use over the past twenty years, employees increasingly turn to social media to discuss the terms and conditions of their employment. In response, employers often implement social media policies, which outline corporate guidelines and principles for online communications. These rules and policies deal with both the use of the employer’s electronic communications, as well as posting on social media sites, such as Facebook, Twitter or LinkedIn. Most of these employer policies apply to both on and off-duty conduct.

As the use of social media permeates the workplace, the NLRB is taking steps to extend Section 7’s protections to employees’ online activities. In doing so, the NLRB focuses on employer policies that, in its view, interfere with the rights of employees to engage in protected, concerted activities online. Many of these policies cover problematic subjects that the NLRB addressed in other contexts, such as confidentiality and non-disparagement. The NLRB has found a number of social media policies unlawful, including policies containing the following language:

• A policy stating that, “The Company supports the free exchange of information and supports camaraderie among its employees. However when internet blogging, [engaging in] chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment.”21

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20 Security Walls, 356 NLRB No. 87 (February 2, 2011).
• A social media policy stating, “Employees should be aware that statements posted electronically (such as to online message boards or discussion groups) that damage the Company, defame any individual or damage any person’s reputation, or violate the policies outlined in the Employee Agreement, may be subject to discipline, up to and including termination of employment.”

In 2012, the Acting General Counsel for the NLRB issued the third of a series of reports regarding the legality of language contained in social media policies. The Acting General Counsel’s Third Report provided guidance to employers on what language would be problematic and would lead to the issuance of an unfair labor practice complaint. In the Third Report, the Acting General Counsel stated that all of the following language constitutes an unlawful restriction on the exercise of protected, concerted activity:

• Prohibiting posts discussing the employer’s non-public information, confidential information, and legal matters (without further clarification of the meaning of these terms);
• Prohibiting employees from harming the image and integrity of the company, making statements that are detrimental, disparaging or defamatory to the employer, and prohibiting employees from discussing workplace dissatisfaction;
• Prohibiting posts that are inaccurate or misleading or that contain offensive, demeaning or inappropriate remarks; and instructing employees to use a friendly tone and not engage in inflammatory discussions;
• Requiring employees to secure permission prior to posting photos, music, videos, quotes and personal information of others;
• Prohibiting the non-commercial use of the employer’s logos or trademarks;
• Discouraging employees from “friending” co-workers;
• Prohibiting online discussion with government agencies concerning the company;
• Encouraging employees to solve work problems in the workplace rather than posting about such problems online; and
• Threatening employees with discipline or criminal prosecution for failing to report violations of an unlawful social media policy.

24 Id.
With the Third Report, the Acting General Counsel included a complete sample social media policy deemed to be lawful. The Acting General Counsel explained that a policy is more likely to avoid infringing upon an employee’s right to engage in protected concerted activity if it “provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity.” As an example, the Acting General Counsel found a social media policy that prevented “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct” to be lawful “since it prohibit[ed] plainly egregious conduct, such as discrimination and threats of violence.”

\[\text{Id.}\]
3. The NLRB has also ruled on several cases involving the use of social media by employees. For example, the NLRB found that an employer violated the National Labor Relations Act by discharging two employees for their participation in a discussion on Facebook about their employer’s State income tax withholding mistakes.\textsuperscript{26} In doing so, the NLRB concluded that an employee’s use of Facebook’s “like” option was protected under Section 7.\textsuperscript{27} Additionally, employees’ postings on Facebook about the conduct of their supervisor and about management’s refusal to address the employees’ concerns were protected under Section 7.\textsuperscript{28}

4. **Union Interference**

Section 8(b) of the Act prohibits certain unfair labor practices by labor unions. This Section prohibits a variety of union conduct, including union tactics involving violence, intimidation, and reprisal or threats of reprisal upon employees.

Such conduct constitutes an unfair labor practice by a union and includes such action as threatening an employee with bodily harm or mass picketing that prevents employees from entering their workplace. As with employer interference, a violation of the Act does not require evidence of an unlawful motive.

5. **Section 8(c) – Freedom of Speech**

Section 8(c) of the Act provides that expressing any views, argument or opinion or disseminating those views does not constitute evidence of an unfair labor practice so long as it contains no threat of reprisal or force or promise of benefit. This particular provision applies to

\textsuperscript{26} *Triple Play Sports Bar*, 361 NLRB No. 31 (Aug. 22, 2014).

\textsuperscript{27} *Id.*

\textsuperscript{28} *Design Technology Group, LLC d/b/a Bettie Page Clothing*, 359 NLRB No. 96 (Apr. 19, 2013).
both employers and unions. This section represents the congressional effort to balance the right of free speech and prohibit interference, restraint or coercion of employees in the exercise of their Section 7 rights. Examples of unlawful employer conduct include threats of violence, loss of promotion, reduction in pay or overtime, plant closing or moving, going out of business, or loss of job. Ultimately, in cases where the Board reviews free speech under Section 8(c), the totality of circumstances will be reviewed—including an examination of both what the employer has said as well as what it has done.

B. Discrimination in Employment

1. Discrimination as an Unfair Labor Practice

Section 8(b)(1) of the Act covers both applicants and current employees. It also prohibits discrimination against employees based upon the union-related activities of their relatives. However, it does not protect certain confidential employees and managerial employees, and they may be terminated for union activity or assistance or for refusing to assist the employer in its efforts to defeat a union organizational campaign. This discharge or demotion of supervisors because of union activities is not prohibited.

In the case of discrimination, an employer’s motive plays a key role. Many unfair labor practice charges center on discrimination in making employment decisions such as hiring and firing. An employer may rebut a charge of discrimination by showing that its motives were not tainted by anti-union animus. It must show that the same personnel action would have taken place regardless of the employee’s protected activity.

An employer may also violate Section 8(a)(3) by locking out employees. Under certain circumstances, a lockout may be used as an economic weapon. However, when the purpose is to

29 Teamsters, Local 282 (Explo, Inc.), 229 NLRB No. 11 (1977).
discourage union membership, a lockout is an unfair labor practice. In this situation, the employer’s motive is clearly determinative.

When an employer changes its business operation by transferring work to contractors or other outside parties in order to avoid obligations imposed by the National Labor Relations Act, a violation of Section 8(a)(3) has also occurred. Many times this involves transfer of work to another corporation or subcontracting out to another company. In order to justify such action, the employer must demonstrate that economic necessity was the reason.

2. Union Inducement of Employer Discrimination

Union conduct resulting in unfair representation of bargaining unit employees constitutes a violation of Section 8(b)(2). This prohibits unions from taking action which is unfair. It also prohibits a union from attempting to cause an employer to take action against an employee for a reason that is arbitrary or in bad faith. Examples of prohibited conduct include a union’s attempt to have an employee divested of seniority, certain super seniority clauses for union officials, selective enforcement of internal rules to require employers to terminate non-dues paying members, refusing to refer a member who held a withdrawal card, refusing to consider nonmembers while members are unemployed, refusal to refer members due to their political activities in the union, refusal to refer individuals due to personal animosity, or refusal to refer applicants who were not employed in a union shop.

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30 NLRB v. Rapid Bindery, 293 F.2d 170, 174 (2d Cir. 1961)
31 See NLRB v. Savoy Laundry, 327 F.2d 370, 371 (2d Cir. 1964); see also Local 57, Intern. Ladies’ Garment Workers’ Union, AFL-CIO v. NLRB, 374 F.2d 295, 299 D.C Cir. 1967) (holding that “the causal nexus between the claimed economic considerations and the move” will be important in determining whether the actions were legitimately taken).
III. THE REPRESENTATION PROCESS AND UNION RECOGNITION

The second right contemplated by the National Labor Relations Act is the right to bargain collectively. However, employees must first select a union to serve as their authorized bargaining agent.

A. Selection of a Bargaining Representative

The three principal means by which a union is selected are (1) a representation election, (2) voluntary recognition, or (3) a bargaining order.

In April 2015, new NLRB regulations took effect that significantly shortened the timeframe for union elections. The new “quickie election” rules also minimized the issues that the parties could litigate prior to an election. Under the new rules, NLRB Regional Directors are instructed to schedule elections “at the earliest date practicable” after a petition is filed. As a result, the time period from the filing of a representation petition to an election is now shortened from as much as 42 days prior to the effective date of the new rules to as little 14 days. The shortened timeframe is widely seen as providing unions with a decisive advantage.

1. The Election Petition

In most cases, the process begins when employees, the employer or a union files an election petition with a regional NLRB office. There are six basic types of petitions:

a. RC Petition – Certification of Representative

Either employees or the union can file an RC Petition. They must show that thirty percent of the employees support the petition and that the employer has refused to recognize the union. The thirty-percent “showing of interest” can be proven by submission of signed and dated union authorization cards but they must be submitted with the petition or within forty-eight hours thereafter.
b. **RM Petition**

Where a union has demanded recognition, an employer may file an “RM Petition” without any showing of interest. The employer must allege and prove that the union has demanded recognition, including submission of a proposed contract or a request for contract renewal by an incumbent union. The employer may also use an RM Petition to test the majority status of an incumbent union but must have a reasonable basis, predicated on objective evidence, that the incumbent union no longer represents a majority of the employees.

c. **RD Petition**

Employees alone may file this petition if they wish to get rid of an incumbent union. They must establish a thirty-percent showing of interest without employer assistance or involvement.

d. **UD Petition**

A UD Petition revokes the union security provisions of a current collective bargaining agreement. Employees who wish to rescind the union’s authority to continue an existing union shop agreement with the employer can file this petition at any time upon a thirty-percent showing of interest.

e. **UC Petition**

A Unit Clarification Petition may be filed by the employer or a union to seek clarification of the employee classifications within an existing bargaining unit if no question concerning representation is pending.
f. **AC Petition – Amendment of Certification**

Either the employer or union may file an AC Petition to resolve an ambiguity in the description of a certified unit or to reflect a change in the duties of certain employees in the unit or to reflect a change in the identity of the bargaining agent.

Once filed, an election petition is docketed and is assigned to a field examiner. The regional office then determines whether the NLRB has jurisdiction, whether there has been a showing of interest and whether the petition is timely. An existing and valid contract generally will bar an election petition for its term or up to three years, whichever is shorter. Under the NLRB’s new rules, upon receiving the petition, the regional office must serve a notice of hearing for eight calendar days from the date of service. The regional director may then postpone the opening of the hearing for more than two business days upon request of a party showing “extraordinary circumstances.” The employer must submit a statement of position to the region and parties named in the petition no later than noon on the day before the hearing.

If the NLRB has jurisdiction and the petition is timely and supported by a showing of interest and if the parties agree on the identity of the bargaining unit, the regional office will attempt to secure a consent election agreement pursuant to which the parties hold a “consent election.” If a consent election agreement is not obtained, the NLRB will hold a representation hearing. The hearing is non-adversarial and investigative in nature and held by a hearing officer designated by the regional director. The issues that may be litigated at the pre-election hearing are significantly limited with the NLRB’s recent promulgations of its “quickie election” rules to only those “questions concerning representation.” A “question concerning representation” includes such issues as the NLRB’s jurisdiction over the employer or the existence of a bar that would prohibit the election. Under the new rules, a regional director need not ordinarily litigate
employee eligibility or inclusion issues during the pre-hearing election. Following the hearing, the hearing officer submits a report to the regional director. The regional director will then issue a decision and direction of election and will schedule the election for a short time thereafter. In rare cases, the regional director may dismiss the petition.

2. **Restrictions on Pre-election Activity**

Section 9 of the National Labor Relations Act vests the National Labor Relations Board with the duty of providing election procedures and safeguards that ensure that the parties do not engage in conduct that prevents employees from making a free choice in the election. When the Board deems that outside influences have interfered with the employee’s free choice, it may set aside the results and order a new election. Conduct that interferes with the choice of the employees in an election may also be an unfair labor practice violating Section 8(a). The major means by which the National Labor Relations Board regulates pre-election activity is through its rulemaking function. Violation of the rules provides grounds for setting aside an election, whether or not the conduct also constitutes an unfair labor practice. Examples of some NLRB rules are prohibitions against electioneering activities at the polling place, prohibiting speechmaking to captive audiences within twenty-four hours preceding the election, and requiring management to provide names and addresses of all employees qualified to vote in the election. The Board’s rules regarding pre-election conduct have been formulated through adjudication in much the same manner as principles of common law in the court system and have similar precedential value.

Following the conduct of the election, and barring any challenged ballots affecting the outcome, the ballots are counted and the regional director issues a certification of the election results. The issuance of certification formally terminates the Board’s representation proceedings.
A final certification of results in an “RC” case formally signifies that the election was valid and that a majority of employees has not elected a collective bargaining representative. A representation case may also end with a certificate of representative, indicating that the employees have chosen a collective bargaining agent. With the issuance of a certification of representative, the obligation to bargain commences. The subject of collective bargaining is dealt with in detail in another chapter in this book.

IV. THE RIGHT TO STRIKE

The third right in the triad of rights sought to be protected by the National Labor Relations Act is the right to engage in strikes, picketing and other concerted activities. This right has been considered essential to establishing a balance of bargaining power between employers and employees and is, therefore, fundamental to the goals of the Act to elimination of industrial strife. The most significant protection of the right to strike is contained in the Section 13 of the NLRA. It provides that nothing contained in the Act, “shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.” Furthermore, under Section 2(3) a worker who strikes in connection with any current labor dispute or because of an unfair labor practice is continued to be regarded as an employee and is accorded the right of reinstatement under certain circumstances. The right to strike is, however, not an unqualified right. In fact, Section 8(b) clearly prohibits strikes for certain objectives. Section 8(b)(4) restricts the right of a union to engage in a strike for secondary purposes, that is, where its dispute is not with the struck employer. It also restricts the right to strike for jurisdictional work assignment purposes and Section 8(b)(7) restricts the right of a union to strike for recognition as a bargaining agent.
A. Strikes Protected under the NLRA

The two types of strikes protected under the Act are economic strikes and unfair labor practice strikes. While Section 2(3) of the Act provides that strikers continue to be considered employees while on strike, the question of whether they are entitled to reinstatement depends on how the strike is classified. Economic strikes are generally initiated to force economic demands on the employer. Unfair labor practice strikes are usually initiated in response to unfair labor practices allegedly committed by the employer.

1. Economic Strikes

Economic strikes are considered to be protected employee activity under Section 7 of the Act. As set forth above, an economic strike is generally instituted for the purpose of compelling the employer to grant economic concessions like shorter working hours, better benefits or improved working conditions. Economic strikers remain employees and cannot be discharged by their employer. However, employers are free to hire permanent replacements for the economic strikers and are under no obligation to reinstate strikers after the strike is over if a permanent replacement has been hired. However, if the economic strikers do not obtain regular and substantially similar employment, they are entitled to be recalled to jobs for which they are qualified when such jobs become open if they (or their union) make an unconditional request for their reinstatement.

As discussed below, the rights of economic strikers differ from the rights of employees who strike in protest of an employer’s unfair labor practices. While a strike may start as an economic strike, the nature of the strike may change if the employer is alleged to have committed unfair labor practices. In those cases, the status and rights of the strikers may change.
2. **Unfair Labor Practice Strikes**

Employees who strike to protest an employer’s unfair labor are called unfair labor practice strikers. These strikers can be neither discharged nor permanently replaced. Unlike economic strikers, those employees who strike because of unfair labor practices must be reinstated upon making an unconditional offer to return to work. If the employer has hired permanent replacements, the permanent replacements must be discharged.

**B. Unlawful and Unprotected Strikes**

Strikes can be unlawful when either the means or the ends are unlawful.

1. **Unlawful Means**

Although work stoppages are not in themselves unlawful, strikes or other actions that prevent access to the employer’s premises or taking possession of the employer’s property are unlawful. A principal example is the so-called sit-down or sit-in strike. Because such strikes are considered to be taking possession of the employer’s property, they are unprotected.

Another example of an unprotected strike is one which does not have the support of a majority of those in the bargaining unit, a so-called “minority” strike. If a majority of the group does not support the strike, the employer can take disciplinary action against participants and is under no obligation to bargain with them.

A third example is a partial or intermittent work stoppage. A “slowdown” is another type of a partial strike. Employees who refuse to perform certain tasks while accepting others are engaged in a partial strike, as are employees who refuse to work overtime. All of these examples are unprotected conduct and the employer may take disciplinary action, including termination.

Finally, unprovoked violence is never protected by the Act. Employers are under no obligation to rehire strikers who engage in property destruction, disruption of the workplace, assaults on non-strikers or threats of serious harm to non-strikers.
2. **Unlawful Ends**

Even though the means may be lawful, a strike for unlawful ends is still prohibited. Any strike which violates the terms of the National Labor Relations Act is prohibited. For example, a strike to compel an employer to assign certain work to the strikers is prohibited by Section 8(b)(4)(D) of the Act. A strike whose aim is “featherbedding,” which is the practice of hiring more workers than are needed to perform a given job, is prohibited under Section 8(b)(6). Where two competing unions have both sought the employees of a single employer, and one has been certified as a result of an election, a strike by the other is also unlawful.

Finally, a strike which is prohibited by the terms of a collective-bargaining agreement is also unlawful. The prohibition in the contract may take the form of a no-strike clause or a clause requiring arbitration of all disputes. When employees strike in the face of such clauses, their action is unprotected and they may be disciplined or discharged. The commission of serious unfair labor practices by the employer may result in a waiver of the no-strike provisions, however.

**C. Picket Lines and Sympathy Strikes**

Section 8(b)(4) of the National Labor Relations Act upholds the rights of the employees to refuse to cross the picket line of the employees lawfully striking another employer. Respecting a picket line has been held to be protected concerted activity. Employers, however, also have the right to continue operating their businesses and may terminate and replace workers refusing to cross a picket line for a necessary period. Similar to no strike clauses, a union may bargain away the rights of employees to respect the picket line by the terms of their collective bargaining agreement. In the same vein, employers may contract away their right to replace sympathy strikers as well.