The Role of Regional Directors in the National Labor Relations Board

By Eileen B. Goldsmith¹

The Regional Directors lead the field offices of the National Labor Relations Board (“NLRB” or “Board”), the federal agency charged with enforcing the National Labor Relations Act (“NLRA” or the “Act”). These field offices are the starting point for every NLRB case. Regional staff investigate petitions for union representation elections, administer elections, investigate unfair labor practice charges, litigate cases before administrative law judges, and litigate injunctions in federal district court. Regional Directors have broad authority to determine whether an election or unfair labor practice charge will proceed, but their decisions are guided by the Board’s case law and various internal guidelines, and are subject to varying degrees of review. This paper introduces the main functions and powers of the Regional Directors and their role within the NLRB.

Appointment and Removal

Within the organizational structure of the NLRB, the regional offices fall under the Office of General Counsel, the investigative and prosecutorial body of the agency. The Regional Directors head their respective regional offices for purposes of substantive enforcement of the National Labor Relations Act and for administrative purposes. They are appointed and may be removed by the General Counsel, subject to Board approval. See 20 FR 2175 (1955).²

Delegated Powers

In representation cases, the Regional Directors exercise quasi-adjudicative powers delegated to them by the Board, the agency’s adjudicative body, including the authority to conduct union representation elections and certify the results. Congress expressly authorized the Board to delegate to the Regional Directors its authority under §9 of the NLRA, 29 U.S.C. §159, including the powers to “determine the unit appropriate for the purposes of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot . . . and certify the results thereof.” 29 U.S.C. §153(b). The Board, in turn, has delegated these powers to the Regional Directors, subject to the Board’s nondelegable authority to review their decisions in these matters. See 26 FR 3911 (1961); 29 U.S.C. §153(b).

In unfair labor practice cases, the General Counsel has “final authority, on behalf of the

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² Except as specifically noted, all materials cited in this paper are available on the NLRB’s website, www.nlrb.gov. The Federal Register materials cited in this section of the paper are available at www.nlrb.gov/sites/default/files/documents/254/rulesregsfull.pdf.
Board, in respect of the investigation of charges and issuance of complaints” alleging unfair labor practices. 29 U.S.C. §153(d). The General Counsel’s powers with respect to unfair labor practices are delegated in substantial part to the Regional Directors, including the authority to issue and prosecute complaints against parties alleged to have violated the Act, obtain settlements of unfair labor practice charges, and obtain compliance with rulings of administrative law judges, the Board, and the courts. NLRB Rules & Regulations §203.1.

The Regional Directors receive guidance not only from the NLRA and the Board’s body of decisions interpreting the Act, but also from a variety of internal casehandling manuals and other guidelines. For example, the Office of the General Counsel has issued Casehandling Manuals for representation and unfair labor practice cases, and a variety of memoranda addressing particular substantive and procedural casehandling issues, such as issues raised by significant new decisions of the Board. The Division of Operations-Management in the General Counsel’s office also issues various memoranda addressing case processing issues. The Casehandling Manuals and most General Counsel and Operations-Management memoranda are available to the public on the NLRB’s website, www.nlrb.gov.

**Representation Cases**

Parties seeking to determine, by a secret ballot election, whether a particular labor organization has majority support in a workplace must first submit a petition for an election to the local regional office. The Regional Directors are authorized to decide whether a valid question of representation exists, and if so, to conduct elections and certify the results. See NLRB Rules & Regulations §203.1.

After an election petition is filed, a field examiner in the regional office conducts a preliminary investigation to determine whether an election may be warranted under the Act. See NLRB Statements of Procedure §101.18(a). If the investigation reveals that there is no probable cause to believe a question of representation exists, the Regional Director may dismiss the petition without holding a hearing. Representation Casehandling Manual ¶11011. A decision to dismiss a petition is appealable directly to the Board. However, the Board grants review of such decisions only in certain limited circumstances, such as where the Regional Director’s decision departs from Board precedent, documentary evidence raises “serious doubt” about the Regional Director’s decision, or the Regional Director’s decision is “on its face, arbitrary or capricious.” See NLRB Rules & Regulations §102.71.

If it appears an election may be warranted, regional staff encourage the parties to stipulate to an election without a formal hearing. See Representation Casehandling Manual ¶11084.2. If these efforts fail, the regional office must hold a pre-election hearing to gather the facts necessary for the Regional Director to determine whether an election should be held, and if so, which employees should be included in the bargaining unit that will vote. NLRB Rules & Regulations §102.63. Based on the hearing officer’s report, the Regional Director may direct an election and dictate its procedures, or dismiss the petition. NLRB Rules & Regulations §102.67. The Regional Director’s post-hearing decision – including any decision on election procedures – is final unless a petition for review is filed with the Board.
Again, the Board’s review of the Regional Director’s decision after hearing to direct an election or dismiss a petition is discretionary, and the Board will only grant review under limited circumstances. See NLRB Rules & Regulations §102.67(c). Review is granted only when “a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent,” “the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record” resulting in prejudicial error, “the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error,” or “there are compelling reasons for reconsideration of an important Board rule or policy.” Id. From 2002 to 2009, the Board granted review of a Regional Director’s pre-election decision in approximately 15% of the cases in which review was sought. 76 FR 36826 n.55 (June 22, 2011) (citing NLRB Annual Reports FY 2001-09; NLRB Office of the General Counsel, Summaries of Operations (FY 2002-09)).

After regional staff conducts an election, the parties sometimes object to the results and/or challenge the eligibility of certain voters. The Regional Director may rule on these post-election objections and ballot challenges with or without a formal hearing. However, in practice, where the parties have demonstrated through proffers that there are material facts in dispute, the Regional Director usually holds a hearing, and a decision not to do so may be reversed by the Board. See, e.g., Transcare of New York, 355 NLRB No. 56 (2010) (reversing Regional Director’s decision to overrule post-election objections without a hearing where Union proffered testimony that a Board majority considered sufficient, if credited, to warrant overturning election results).

The post-election hearing is conducted by a hearing officer, who is usually an employee of the regional office. In a stipulated election, the hearing officer submits his or her report and recommendations to the Board. In an election directed by the Regional Director, the hearing officer submits his or her report and recommendations to either the Board or the Regional Director, in the Regional Director’s discretion. Representation Casehandling Manual, ¶11366.2. When a hearing officer submits a report to the Regional Director, the parties may take exceptions to the hearing officer’s report, on which the Regional Director then rules. A party may seek Board review of a Regional Director’s report or decision on post-election objections and challenged ballots. NLRB Rules & Regulations, §102.69.

The finality of the Regional Director’s decision on objections to the conduct of an election depends on whether the parties agreed to the election, or whether the Regional Director directed an election to be held. In the common stipulated election procedure, the parties accept the Regional Director’s decision to certify election results absent post-election objections or potentially outcome-determinative ballot challenges, but preserve their right to appeal to the Board any rulings by the Regional Director on objections and challenges. See Representation

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3 In some instances, an ALJ, rather than a hearing officer, may take evidence in a post-election hearing. In all such cases, exceptions to the ALJ’s decision are taken directly to the NLRB, not to the Regional Director.
In the less common full consent election procedure, the parties agree to accept the Regional Director’s pre-election and post-election rulings as final, and waive their rights to appeal to the Board. See id.; NLRB Rules & Regulations §102.62. Finally, in all cases where the Regional Director directs an election after hearing, the parties retain their rights to appeal post-election rulings to the Board. NLRB Rules & Regulations §102.67(b).

The Board generally grants broad deference to Regional Directors’ decisions about the best way to administer an election, based on the fact that Regional Directors are on the ground and likely know best how to conduct a particular election to most effectively secure employees’ rights to a free and uncoerced choice. See, e.g., Austal USA, LLC, 357 NLRB No. 40 (2011) (collecting Board decisions regarding the Regional Directors’ broad authority to determine election logistics). Guidance for the Regional Directors in determining election logistics, including such matters as where and when to hold an election and whether to use mail ballots, is set forth in the Representation Casehandling Manual, ¶¶11301-11302.3, 11335. Although the Regional Director’s decisions with regard to such matters generally are not reviewable, the Board in a recent case granted special permission to appeal where it was asserted that a Regional Director had abused her discretion in determining the logistics for a rerun election. See Austal, 357 NLRB No. 40. The Board there instructed the Regional Director to exercise her discretion in a written order explaining her decision regarding the election logistics, and to address relevant considerations that had been raised by the parties and were addressed in the Casehandling Manual.

On June 21, 2011, the Board issued a Notice of Proposed Rulemaking proposing to amend the procedures regional offices follow in representation cases. 76 FR 36812 (June 22, 2011), available at www.gpoaccess.gov. Under the proposed regulations, parties would no longer be able to request Board review of Regional Directors’ pre-election rulings, but those rulings would remain subject to review after an election unless rendered moot by the election results. All Board review of the Regional Directors’ pre- and post-election rulings would instead be consolidated after an election is held. Moreover, the Board would no longer be required to hear all post-election appeals from stipulated and directed elections (as it currently must). Instead, such review would be discretionary in all cases, much as it is now discretionary with respect to Regional Directors’ pre-election decisions. See 76 FR 36827 (June 22, 2011). In its Notice of Proposed Rulemaking, the Board majority explained that this proposed change, “permitting [the Board] to deny review of regional directors’ resolution of post-election disputes – when a party’s request rases no compelling grounds for granting such review – would eliminate the most significant source of administrative delay in the finality of election results.” See 76 FR 36827 n.56 (June 22, 2011). The public comment period on the proposed regulations closed on August 22, 2011.

Unfair Labor Practice Cases

All enforcement actions under the NLRA begin with a unfair labor practice charge filed by a private party – usually a labor organization, an employer, or an individual worker – with one of the NLRB’s regional offices. After an investigation, the regional staff, under the direction of the Regional Director, decides whether or not to issue a complaint and prosecute the case
before an Administrative Law Judge on behalf of the charging party. In practice, the Regional Director has broad authority to decide whether to prosecute an unfair labor practice charge, settle the charge, or dismiss it.

A Regional Director’s decision to dismiss a charge may be appealed only to the General Counsel, and the General Counsel’s decision is not subject to judicial review. See NLRB v. Food & Commercial Workers Local 23, 484 U.S. 112 (1987). The General Counsel’s Office of Appeals reviews appeals from Regional Director decisions to dismiss unfair labor practice charges, and overrules those decisions from time to time.

A Regional Director’s decision whether to prosecute an unfair labor practice charge is subject to important constraints. The regional staff, under the Regional Director’s supervision, decide whether an unfair labor practice charge has merit based on the NLRB’s body of case law and guidance memos issued by the General Counsel’s office. Charges involving certain alleged violations of the NLRA must be submitted to the General Counsel’s Division of Advice before issuing a complaint. See, e.g., GC Memo 11-11 (April 12, 2011) (issued by Acting General Counsel Lafe Solomon). These include cases concerning novel, difficult, or rapidly evolving legal issues, and cases which the General Counsel has identified as presenting issues of importance. See GC Memo 11-11. For example, all cases involving “employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media” must be submitted to Advice. Id. Regional Directors may also voluntarily submit any charge to Advice when the need arises. Id.

After receiving a charge, the regional staff investigate the charge by conducting interviews, taking witness affidavits, and seeking evidence from the parties and witnesses. See generally NLRB Casehandling Manual ¶10054. Regional staff rely for the most part on voluntary cooperation by the parties and witnesses in their investigations. In cases where the parties or witnesses are uncooperative, however, the Regional Director is authorized to issue an investigative subpoena for document production or to compel testimony. The decision to do so is within the “full discretion” of the Regional Director, when the evidence sought would “materially aid in the determination [to issue the complaint] . . . and [the] evidence cannot be obtained by reasonable voluntary means.” ULP Casehandling Manual ¶11770.2. Regional Directors must obtain authorization from the Division of Advice regarding investigative subpoenas only in limited circumstances, such as when making certain subpoena decisions not covered by previously delegated authority, where a privilege may be implicated, or where the Regional Director is considering denying private party’s request to enforce subpoena. See GC Memo 11-11 at 5; ULP Casehandling Manual ¶11770.4.

At the conclusion of the investigation, the investigating Board agent meets with his or her supervisors to review the evidence obtained through the investigation and make a

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4 The practice of identifying certain priority cases that must be submitted to the Division of Advice has been followed by previous NLRB General Counsels as well. See, e.g., GC Memo 07-11 (issued by then-General Counsel Ronald Meisburg).
recommendation as to the disposition of the charge. Based on the internal review, the Regional Director may either dismiss the charge or authorize a complaint to be issued absent settlement. In cases where a dispute may be resolved through collectively bargained grievance arbitration procedures, the Regional Director may decide to defer a charge to arbitration, resuming the processing of the charge only if the results of the arbitration are repugnant to the NLRA. See generally Collyer Insulated Wire, 192 NLRB 837 (1971); Spielberg Mfg. Co., 112 NLRB 1080 (1955).

If a charge appears to be meritorious based on the regional staff’s investigation, the Regional Director will encourage the charged party to settle the charge. ULP Casehandling Manual ¶10126.2. The Regional Director may delay issuing a complaint while settlement negotiations are underway. Id. ¶10126.61. The Casehandling Manual provides guidelines for the content of informal settlements, including remedies that should be sought in the settlement of particular kinds of cases. Id. ¶¶10130-10132.

The Regional Director has broad authority to approve informal settlements, which account for the majority of “Board” settlements.5 The Regional Director may approve an informal settlement with the charged party even over the charging party’s objections. ULP Casehandling Manual ¶10150.2. The charging party may appeal the Regional Director’s decision to the General Counsel, but the General Counsel’s decision is considered prosecutorial and thus not subject to judicial review. NLRB v. Food & Commercial Workers Local 23, 484 U.S. 112 (1987).

By contrast, the Regional Director’s authority to approve formal settlements, which require Board entry of a cease and desist order enforceable in court, is subject to Board approval. NLRB Statements of Procedure §101.9(d)(1); ULP Casehandling Manual ¶10164.7(b)(1). Moreover, Regional Directors may not submit formal, unilateral settlements to the Board without clearance from the Division of Advice. ULP Casehandling Manual ¶10164.7(a)(3).

Injunction cases

The NLRB is authorized to seek injunctions in federal district court while processing unfair labor practice charges in cases involving serious violations of the Act. Responsibility for seeking injunctions falls on the Regional Director, under supervision of the General Counsel. Section 10(l) injunctions are mandatory, while §10(j) injunctions are discretionary.

Under §10(l) of the Act, 29 U.S.C. §160(l), the Regional Directors are required to seek an injunction in cases where there is probable cause to believe the NLRA’s prohibitions on secondary boycotting, hot cargo agreements, or certain types of picketing have been violated. The district court has the authority to grant a temporary restraining order or preliminary

5 The parties to an unfair labor practice charge may also settle their dispute outside the NLRB’s procedures, although the withdrawal of a charge pursuant to such a “non-Board” settlement requires the Regional Director’s approval.
injunction if it determines that such relief is “just and proper.” 29 U.S.C. §160(l).

Under §10(j), 29 U.S.C. §160(j), the Regional Directors are permitted to seek an injunction upon issuance of a complaint alleging that an unfair labor practice has been committed. The district court has the authority to grant preliminary relief if it determines that such relief is “just and proper.” 29 U.S.C. §160(j).

Because seeking §10(j) relief is discretionary, a Regional Director must obtain approval from the General Counsel’s Division of Advice before filing a petition with the district court. See GC Memo 11-11 at 4. Additionally, the General Counsel’s office requires Regional Directors to consider §10(j) relief in certain types of cases. For example, Regional Directors must consider seeking an injunction in cases where a party is alleged to have engaged in unfair labor practices after a union has been certified as the bargaining representative of a group of employees, and while the parties are engaged in bargaining for an initial contract. See First Contract Bargaining Cases, GC Memo 06-05 (Apr. 19, 2006). Regional Directors are also required to consider seeking §10(j) relief in so-called “nip in the bud” cases involving unlawful discharges during an organizing campaign. See Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns, GC Memo 10-07 (Sept. 30, 2010). Further discussion of kinds of cases in which §10(j) relief may be appropriate is included in the Section 10(j) Manual, which is available to the public on the NLRB’s website.

A charging party may ask the Regional Director to consider seeking §10(j) relief in any appropriate case. In some instances, the regional staff, under the Regional Director’s supervision, may consider whether to seek §10(j) relief sua sponte. Where a Regional Director is considering whether to seek §10(j) relief, it is the practice to request position statements regarding the propriety of such relief from the charging party and the respondent.