TRYING AN NLRB REPRESENTATION CASE  
PRE-TRIAL PROCESS, PROCEDURE AND INSIGHTS

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OVERVIEW

This session focuses on the pre-hearing steps involved in trying an NLRB Representation (R) case that arises in connection with a union organizing attempt. Topics include the investigative process before the Board's Regional Office, pre-hearing practice, witness preparation, subpoenas, document production, and hearing strategy.

INTRODUCTION

Instructional information on NLRB representation (R) case hearings can be found in the Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings. Proper preparation for an R-Case hearing includes understanding the procedural guidelines the NLRB uses in conducting these hearings. The Guide is a good starting place. It contains procedural and substantive information and covers key elements such as prehearing motions, intervention, jurisdiction, labor organization, question concerning representation, history of collective bargaining, bars to the conduct of an election and the appropriate unit. It also contains a script of a hearing. The hearing officer conducting the hearing is normally a Board agent from the Region in which the hearing is held. The hearing officer's role in both pre and post election hearings is to guide, direct and control presentation of evidence at the hearing. He/she ensures that a full and complete record is obtained, upon which the Regional Director can make a decision regarding the issues. The Regions' representation investigative process and pre and post election hearings are also guided by the NLRB’s Casehandling Manual, Part Two, Representation Proceedings (CHM) and the NLRB’s An Outline of Law and Procedure in Representation Cases. These manuals and the Guide are available on the NLRB website at www.nlrb.gov under publications/manuals. Another useful source is the book How to Take a Case Before the NLRB.
I. INVESTIGATIVE PROCESS

UNION ATTORNEY’S PERSPECTIVE: The goal of the union’s attorney is to move the process as quickly as possible to an election while applying the client's approach.

1. Therefore, if possible prior to the filing of the petition, the attorney assigned to handle the organizing drive should gather facts to understand the following: how the Company is generally organized; its locations; the work of the employees being organized; the integration of the employees’ work sought to be organized with the work of others; the supervisory structure; the Human Resources structure; and the Union's flexibility in the shape and scope of the unit seeking to organize.

2. During investigative process, the bargaining over the unit scope and exclusions is more often successful if the Union attorney can speak directly with the Company attorney.

3. If cannot resolve disputes but able to get election with the disputes settled post-election, that is most often a better result. For example, if dispute over one or just a few persons’ inclusion or exclusion in a bargaining unit, then propose that the person(s) vote under challenge.

MANAGEMENT ATTORNEY’S PERSPECTIVE: The goal of the employer’s attorney is to receive notice of the Petition as quickly as possible, enter a Notice of Appearance or submit a letter of representation, and rapidly assess the workforce to evaluate potential unit issues or other issues which may result in the need for an R-case hearing.

1. It is important to note that R-case hearings are scheduled for a date very soon after the Petition is filed. If the employer or its attorney has a conflict with the scheduled hearing date, the attorney should immediately request a change of the hearing date from the Region in the event a hearing proves necessary.

2. The employer’s attorney should quickly gather information about the employer’s business and the workforce. Information such as state of incorporation, nature of the business, jurisdictional data, payroll period cutoffs, any foreign language communication needs of the workforce, etc. will be asked of the employer’s attorney.

3. The assigned Board Agent also will generally inquire about possible voting dates and times, potential unit issues, and the possibility of a mail ballot election where appropriate. Whether the employer concludes that an election agreement can be negotiated or a hearing is required, these details will have to be rapidly assessed.
NLRB PERSPECTIVE: This is the most important phase of the process as the NLRB’s primary goal is to assist the parties in reaching an election agreement which obviates the need for a pre-election hearing and helps ensure a prompt election.

1. Election agreements are obtained in about 92 percent of our representation cases. From the earliest stage of a case, the Board agent works with the parties via telephone and email contacts to obtain relevant information about the employer’s operations, the bargaining unit, eligibility issues and election mechanics (best dates and times, foreign languages, etc.). The Board agent strives to eliminate the possibility of surprises either at hearing or after the approval of an election agreement.

2. As the parties and the agent identify potential issues, the Board agent solicits the positions of the parties and shares information between the parties. While not advising the parties, the Board agent provides the parties with relevant case law on potential issues.

3. The Board agent will encourage direct contact between counsels for the parties. We actively encourage the parties to provide documentation that supports your position well before a possible hearing to avoid the expense of a hearing.

4. The Board agent will likely schedule initial and follow-up conference calls with the parties. These calls are often fruitful in narrowing and resolving issues as well as ironing out election details and finalizing election agreements.

II. PRE-HEARING PRACTICE

UNION ATTORNEY’S PERSPECTIVE: Meet with the lead organizer to find witnesses on the issues raised. Meet with the witnesses to gather documents and facts in possession of the Union and employees seeking to organize. This is also critical to understand what information the Union and employees do not possess in order to prepare subpoena request.

MANAGEMENT ATTORNEY’S PERSPECTIVE: A face-to-face meeting with the employer is generally the best method for quickly gathering information to respond to the election Petition. Documents that may be relevant to the investigation include job descriptions, documents evidencing supervisory status of disputed individuals, and organizational charts. The attorney will need to prepare witnesses to support the employer’s position if there is no agreement between the parties.

NLRB PERSPECTIVE: If it appears that substantial differences exist and a hearing will occur, the Board agent wants to ensure that the parties are properly prepared for the hearing. He or she may check to see if subpoenas have been requested and discuss the types of witness/evidence needed, given the current case law, to resolve those issues. The agent will also continue trying to obtain an election agreement given the
expense of a hearing and its effect on delaying an election. If the outstanding issues are limited, the Board agent will suggest the parties use the challenge procedure.

The Board agent will prepare and present the parties with a written stipulation of the areas not in dispute.

III. WITNESS PREPARATION

UNION ATTORNEY’S PERSPECTIVE: Very simply, don't call an employee witness that you have not prepared prior to the hearing.

1. Many employees are concerned that by appearing at the hearing they will jeopardize their jobs. Explain to the employees the protections under the Act and issue them witness subpoenas.
2. Preparation is often preparing the witness for the unknown -- responding to facts that the Employer will make to support its position in the dispute. For preparation, meeting with more than one employee that performs the classification at issue is helpful.

MANAGEMENT ATTORNEY’S PERSPECTIVE: All employer witnesses should be prepared by the attorney in advance of the hearing.

1. Where helpful, both employee and supervisory witnesses should be called by the employer to testify about disputed issues.
2. The employer’s attorney should review Johnnie’s Poultry assurances with any employees before questioning them in preparation for a hearing.

NLRB PERSPECTIVE: The hearing officer is responsible for making a full and complete record; if the parties don’t ask the critical question, hopefully the hearing officer will.

1. Credibility is not at issue in a pre-election hearing as the Regional Director, not the Board agent issues the decision.
2. While an overview of the operations by someone such as the human resource director or other upper-level manager is helpful, testimony of those directly involved/connected to the disputed position are essential.
IV. SUBPOENAS

UNION ATTORNEY’S PERSPECTIVE: Document subpoenas are critical to the Union in preparing its arguments on the disputes with the petitioned-for unit. Without discovery, the Employer possesses most of the documents and facts related to the dispute. Work with the organizers and witnesses to tailor the subpoena request to the disputes over the petitioned-for unit. A sample subpoena attachment is attached, which can be used when uncertain of exactly what the issues will be.

1. Subpoenas must be requested in writing from the Regional Director. See NLRB Rules and Regulations and Statements of Procedure, Section 102.31.
2. Subpoenas can be served personally, by certified mail or registered mail, or by leaving a copy at the principal office or place of business of the person being served. NLRB Rules and Regulations and Statements of Procedure, Section 102.113.
3. To be enforceable, the subpoena must be accompanied by a check for the witness fee and mileage. 29 U.S.C. § 161(4); 5 U.S.C. § 5704.
4. A party has five days after being served with a subpoena to petition the Board to revoke it. 29 U.S.C. § 161(1). Thus, subpoenas should be served at least five business days before the return date. 2 Casehandling Manual 11778.

MANAGEMENT ATTORNEY’S PERSPECTIVE: The employer often possesses more relevant documents than the union or another person/entity with regard to the issues in dispute in an R-case hearing. However, there are times when the employer may want to issue subpoenas duces tecum.

1. If the attorney believes there is any chance of a hearing, it should proceed with requesting both duces tecum and ad testificandum subpoenas from the Region early in the process.
2. The employer’s attorney should advise the employer to notify him/her immediately upon service of a subpoena on the employer. Oftentimes, the blanket subpoena requests are overly broad or otherwise defective and a timely Petition to Revoke should be filed. The employer should immediately begin compiling and reviewing documents that it anticipates having to turn over to the union.
3. If proprietary or other confidential business documents are required to be produced, the employer may want to consider seeking a protective order before producing such documents.

NLRB PERSPECTIVE: Properly serve your subpoenas. Petitions to revoke are generally referred to the hearing officer. While the hearing officer may be called upon to rule on a subpoena, the general practice is to resolve most subpoena issues informally.
V. DOCUMENT PRODUCTION

UNION ATTORNEY’S PERSPECTIVE: Remember that the first time you will be able to review the documents is at the hearing itself. Accordingly, requesting documents beyond what you need could hinder your ability to carefully review the documents before the hearing begins.

If an employer refuses to produce records in response to an enforceable subpoena and does not prevail on a petition to revoke, the employer should be precluded from relying on those documents in presenting its case.

Documents can be critical in establishing supervisory status (for example, signatures on reprimands or disciplinary records), and can provide helpful insight into community of interest factors (similar pay and benefits, terms and conditions of employment).

MANAGEMENT ATTORNEY’S PERSPECTIVE: If documents are produced to the union, they should be carefully reviewed in advance for all relevant issues. Employer witnesses also should be familiar with any documents produced, so as not to be caught off guard by any questions relating to the documents. Moreover, the employer’s attorney should keep in mind that the union may use information it learns from subpoenaed documents later in its organizing campaign.

NLRB PERSPECTIVE: It is beneficial for the parties’ counsels to work with each other for early review of documents to facilitate an efficient hearing process.

Make sure that the appropriate witness for authentication is present in the hearing room at the appropriate time.

If testimony indicates that certain relevant documents exist, the hearing officer may seek their production.

VI. HEARING STRATEGY

UNION ATTORNEY’S PERSPECTIVE: Since the overall goal of the union is to move the process as quickly as possible to an election, consistent with union’s organizing approach, the union attorney will seek to minimize the number of issues in dispute. The simpler the record, the easier it will be to obtain a relatively quick DDE (Decision and Direction of Election) from the Regional Director, followed by a quick election. This may necessitate compromising on a number of issues, or narrowing the areas in dispute.
MANAGEMENT ATTORNEY’S PERSPECTIVE: The employer’s goal is to ensure that an appropriate unit and other appropriate election arrangements are arrived at as a result of a fair hearing. The employer’s attorney will need to quickly learn and understand the employer’s business and its workforce to be able to effectively represent the employer and ensure that no employees are unfairly disenfranchised with only a couple of weeks or less time from the time a Petition is filed. A case handling strategy must be determined swiftly and put into action so that days are not lost in this highly accelerated process.

NLRB PERSPECTIVE: The hearing officer wants to ensure a clear and complete record without causing undue delay in the election process. Early in the proceeding, the hearing officer will seek the positions of the parties on the identified issues and will explain the parties’ burdens. Throughout the hearing in an effort to narrow the issues, the hearing officer will identify areas of agreement and seek fact-based stipulations.

Generally, the hearing officer will ask the employer to proceed first by calling a witness who can provide a general overview of the employer’s operations and staffing.

By the conclusion, the hearing officer will inform the parties of the briefing schedule and the probable need to obtain expedited transcripts.