REPRESENTATION LAW AND PROCEDURES

I. INTRODUCTION

The National Labor Relations Act ("NLRA" or the "Act") was primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining.)[1] As a prerequisite to collective bargaining, however, Employees must obtain a Union to serve as their authorized bargaining agent. Employees may obtain a Union through (1) a representation-election, (2) voluntary recognition, or (3) a bargaining order [pursuant to adjudication or settlement]. This article focuses primarily on the election process, but includes a brief discussion of voluntary recognition and bargaining orders.

II. THE ELECTION PETITION

The NLRA's election process begins when Employees, the Employer, or a Union files an "election petition" with the National Labor Relations Board ("NLRB" or the "Board") to determine whether the Union is entitled to represent a group of Employees for purposes of collective bargaining. There are six types of petitions.

A. Certification Of Representative ("RC") Petition

Employees or the Union (or two Unions seeking to act as a joint representative) can file an RC Petition with the Board seeking certification as the Employee's representative.[2] Two elements must be established. First, in most representation matters, the Board requires a petitioner to prove there is sufficient Employee interest in a representation election. Generally, at least thirty percent of the Employees must support the petition, the required "showing of interest," and evidence of this support must be filed with the petition or within forty-eight hours thereafter.[3] The "showing of interest" can be proven by the submission of signed and dated Union authorization cards. The Employer may not inspect the authorization cards, and no litigation is permitted in a representation hearing concerning fraud, forgery or coercion in obtaining the cards. Second, the Employer must refuse to recognize the Union, which can occur when the Union demands recognition or at the Representation Hearing because the petition constitutes such a demand.

B. Representation ("RM") Petition

Where a Union demands recognition, the Employer may file an RM Petition without any showing of interest.[4] The Employer must allege and prove that the Union has demanded recognition. A demand for recognition includes (i) a Union's submission of a proposed contract or a request for a contract,[5] (ii) picketing for recognition or organization,[6] and (iii) a request for contract renewal by an incumbent Union.[7] Union campaigning, including a campaign seeking a voluntary recognition agreement, does not constitute a claim for recognition. *Brylane, L.P.*, 338 NLRB 528 (2002); *Rapera, Inc.*, 333 NLRB 1287 (2001); *New Otani Hotel and Garden*, 331 NLRB 1078 (2000).[8] In addition, the Employer may file an RM Petition to test the majority status of an incumbent Union. The Employer, however, must demonstrate "good faith reasonable uncertainty [rather than disbelief] as to the union's continuing majority status." *Levitz Furniture Co.*, 333 NLRB 717 (2001); *Allentown Mack v. NLRB*, 522 U.S. 359 (1998). An employer must have a reasonable basis, predicated on objective evidence, for the belief that

the incumbent Union no longer represents a majority of the Employees. In the majority of cases, the required objective evidence takes the form of an Employer's declaration, based on personal knowledge, setting forth the reasons for the Employer's doubts as to the Union's majority status. This declaration, which is submitted confidentially to the Regional Director, should include all relevant facts supporting the Employer's assertions.

C. Decertification ("RD") Petition

Employees who no longer desire union representation can file an RD Petition upon a thirty percent showing of interest.[9] The Employer cannot instigate or assist these Employees.[10] In response, however, to questions by Employees, the Employer can advise Employees as to the proper procedure for filing an RD Petition.[11] Employees cannot decertify part of a historical unit; thus, a single plant in an established multi-plant unit cannot file an RD Petition for only that single plant.[12]

D. Withdrawal Of Union Shop Authority ("UD") Petition

Employees seeking to rescind the Union's authority to make an existing Union-shop agreement with the Employer can file a UD Petition anytime upon a thirty percent showing of interest.[13] The UD Petition only revokes the Union security provision of the collective bargaining agreement.

E. Unit Clarification ("UC") Petition

The Employer or Union can file a UC Petition to seek clarification or placement of classifications of Employees within an existing bargaining unit, if no question concerning representation is pending.[14] The UC Petition can be filed even for an uncertified bargaining unit.[15]

F. Amendment Of Certification ("AC") Petition

The Employer or Union can file an AC Petition (1) to resolve an ambiguity in the description of a certified unit, (ii) to reflect a change in the duties of certain Employees in the unit, or (iii) to reflect a change in the identity of the bargaining agent.[16]

III. POST-PETITION INVESTIGATION BY REGIONAL OFFICE OF NLRB

The Election Petition is filed with the Regional Office, docketed, and assigned to a Board agent. The Regional Director immediately sends a copy of the petition and various forms to each party and schedules a Representation Hearing (the "Hearing") to occur in approximately 10 to 14 days. The Regional Office then determines, among other things, whether the NLRB has jurisdiction, whether there has been a showing of interest, and whether the petition is timely. The NLRB will dismiss a petition if one of these elements is lacking.[17]

A. Jurisdiction Of NLRB - Commerce Requirement

The NLRB has jurisdiction over all labor disputes "affecting" interstate commerce, including representation proceedings. However, rather than exercising jurisdiction over every

conceivable commercial operation, the NLRB set up minimum standards for the exercise of jurisdiction. These minimum standards are by industry based on the yearly dollar amounts of outflowing and inflowing goods and services of a direct and indirect nature.[18] In addition, the Board has established separate, individual standards to address certain industries and types of enterprises. R&R 11700 – HO's Manual(?) If an Employer fails to meet the minimum standards, the Board will refuse to exercise its jurisdiction.

B. Showing Of Interest

The Employer may, if requested, submit to the Regional Director a list that identifies the Employees and job classifications in the petitioned for unit as of the close of the payroll period immediately preceding the date the petition was filed. The Regional Director's responsibility is to cross-check the Union authorization cards with the list to determine whether the cards are current and sufficient in number.

C. Timeliness Of The Election Petition

1. One-Year Rule Statutory Bar

An election cannot be held in any bargaining unit in which a final and valid election was concluded within the preceding twelve-month period.[19] This twelve-month period begins to run on the actual date of the prior election, not from the date the Union was certified. The rule does not preclude an election in a broader unit and does not apply to a rerun or runoff election.[20] If a prior election results in a vote for no Union, the one-year period runs from the date of that election.[21]

2. One-Year Certification Rule

Absent unusual circumstances, a Union's certification will bar another petition during the subsequent twelve-month period.[22] This period, unlike the period for the One-Year Rule Statutory Bar, begins to run from the date of certification, not the date of the election. "Unusual circumstances" include (i) conflict as to the identity of the bargaining agent, (ii) defunctness of a certified Union, and (iii) radical fluctuation in the size of the bargaining unit within a short period of time. It does not include the repudiation of the Union by Employees. The one-year period can be extended by the Board if it determines the Employer has refused to bargain in good faith with the certified Union.[23]

3. Pendency Of An Unfair Labor Practice ("ULP") Charge

If a ULP charge is pending, the NLRB rally will not process an election petition absent a request to proceed by the charging party.[24] This rule is known as the "blocking charge" rule and is discretionary, not statutory.[25] Its purpose is to avoid the holding of an election where a "charge alleges conduct that, if proven, would interfere with employee free choice." There are significant exceptions, including: The rule will not be applied if (i) the charge lacks merit or was filed immediately before the selection, (ii) a similar charge has been dismissed, (iii) an existing economic strike is approaching its twelfth month, or (iv) it is determined that a fair election can be conducted.

4. Fluctuating Work Force

The Regional Director will dismiss a petition without prejudice if the existing work force is not substantial and representative of the work force to be employed in the near future. If the Employer's operation is seasonal in nature, the election usually is held at or near the seasonal peak.

5. Contract Bar Rule

An existing and valid contract generally will bar an election petition for the actual duration of the contract or up to three years, whichever is shorter. The contract must be in writing, signed, and contain all material terms, including a specific duration.[26] This practice is discretionary and not statutorily mandated.

a. **Exceptions** – The contract bar rule generally does not apply in the following situations:

i. Where the contract contains illegal per se clauses;[27]

ii. Where the contract is extended during its term;[28]

iii. Where the contract is executed before any Employees are hired, e.g., a pre-hire agreement in the construction industry;

iv. Where the Union either becomes defunct or develops a schism such that its identity is destroyed, or;

v. Where the nature of the operation substantially changes between the execution of the contract and the filing of the election petition. Such changes include (i) a merger or consolidation of two or more operations creating a new operation with major personnel changes and (ii) a resumption of operations, after an indefinite period of closing, with new Employees. A change in the number of Employees due to a relocation does not affect the contract bar rule.[29]

b. **"Hot Cargo"** – A contract with an illegal "hot-cargo", clause will not bar an election.[30]

c. **Accretion** – An existing contract may bar an election at a newly acquired or constructed facility if the contract is extended to cover the employees in the new operation. The appropriateness of extending the contract depends upon a variety of factors, including: (i) the degree of Employee interchange; (ii) centralization of labor relations; (iii) distance between facilities; (iv) integration of product lines, machinery, and operations; (v) similarity of skills and working conditions; (vi) the ratio of the number of Employees at the existing facility to the new facility; (vii) Employee interchange and (viii) common day-to-day supervision.[31] A review of these

factors will determine whether the new facility is sufficiently integrated into the current operation to justify the application of the contract as a bar.

d. **Time Limits** – An election petition can be filed between ninety and sixty days prior to a contract's expiration.[32] A petition will be considered untimely if it is filed more than ninety days before the contract's expiration or during the sixty-day period immediately preceding the termination date. A petition filed on the sixtieth day prior to the contract's expiration is untimely.

i. After the contract expires, a petition will be timely if it is filed (i) before the execution of a new contract, or (ii) between the new contract's execution date and effective date.[33] If the new contract is effective immediately or retroactively, a petition filed on the day the contract is executed will be timely if the Employer was previously informed of that petition.[34]

ii. In the health care industry, the petition must be filed between 120 and ninety days prior to the contract's expiration.[35] In seasonal industries, the ninety-day limit generally applied to petitions may also be extended.[36]

IV. VOLUNTARY ELECTION AGREEMENTS

If the Board determines that the requirements for a valid petition and election have been satisfied, the Board generally will attempt to obtain agreement from the parties on issues such as jurisdiction, appropriate bargaining unit, voter eligibility and time and place of the election. Securing consent on these issues eliminates the need for a formal Representation Hearing. If a Voluntary Election Agreement is not obtained, the NLRB will hold a Representation Hearing.

A. Three Forms Of Voluntary Election Agreements

1. Agreement For Consent Election ("Consent")

With the Regional Director's approval, the parties can execute a "Consent," agreeing to an election and to waive their right to a Hearing at the pre-election stage of the proceedings. The "Consent" gives the Regional Director the authority to make the final decision on all election issues, including the validity of challenged ballots and objections and voter eligibility.[37] The determinations made by the Regional Director on all issues are final and not subject to review by the Board, unless they are determined to be arbitrary or capricious.[38]

2. Full Consent Election Agreement ("Full Consent")

In a full consent election agreement, the parties enter into a voluntary agreement to have the Regional Director conduct a hearing and then resolve with finality all pre-election factual and legal disputes. The parties waive their right to file a request for view with the Board. As with the traditional "consent" agreement, all post election disputes – challenges and objections –

would be decided by the Regional Director with no right of appeal to the Board. Section 102.62 (c).

3. Stipulation For Certification Upon Consent Election ("Stip")

In a "Stip," the parties agree to an election and waive their right to a pre-election Hearing. However, the parties do not waive their right to a Hearing after an election. Additionally, the Board, not the Regional Director, renders the final decision on all election issues, including voter eligibility, challenged votes d objections to the conduct of the election.[39]

B. Terms of Voluntary Election Agreement

If a Voluntary Election Agreement is possible, the Regional Office will determine by telephone, e-mail, or informal conference the following:

1. Election Date – Target date is 42 days from the filing of the petition.

2. Place – Generally held at the Employer's premises. *See* **Casehandling Manual** 11301.1 and 11302.2.

3. Time – Based on work schedules. Polls are generally open at and around the beginning and end of each work shift. One hundred Employees can vote per hour.

4. Appropriate Bargaining Unit – Parties can agree on unit composition as long as it does not conflict with the NLRA or well-established NLRB doctrine or policy.

5. Voter Eligibility – Specific payroll period for determining voter eligibility. Parties can agree upon final list of eligible voters as long as it does not conflict with NLRA, or NLRA doctrine or policy.

V. REPRESENTATION HEARING

If the parties do not enter into a Voluntary Election Agreement, the NLRB will hold a Representation Hearing to ensure that the record contains as full a statement of the pertinent facts as may be necessary for the Regional Director or the Board to rule upon representation issues.[40]

A. Structure Of The Representation Hearing

The Representation Hearing, which is non-adversarial and investigative in nature, is held before a hearing officer who is normally an attorney or field examiner associated with the Regional Office.[41] The parties may appear and be represented by counsel. The hearing officer and the parties may call, examine and cross-examine witnesses and introduce into the record any other evidence. The hearing officer and the parties may compel witness testimony and the production of documents through NLRB-issued subpoenas. Although witnesses testify under oath, the formal rules of evidence are not controlling.[42] Oral argument is permissible but parties generally waive it and are permitted to file written briefs within seven days after the Hearing.

B. Stipulations Entered Into At The Representation Hearing

At the beginning of the Hearing, the hearing officer generally will seek stipulations (i) to correct the names of parties and amend the petition if necessary, (ii) as to facts regarding NLRB jurisdiction, (iii) as to the status of the petitioner and intervenor as a labor organization, and (iv) as to uncontested job classifications or the status of particular Employees.

C. Intervention By A Union

A Union can intervene in a Representation Hearing based on an RC, RM or RD petition if it makes the required showing of interest.

1. Showing Of Interest

The showing of interest required by intervenors is subject to different rules than those for petitioners. A Union seeking to participate fully in all related proceedings must prove it has at least a ten percent showing of interest among the Employees.[43] A showing of less than ten percent will allow the intervening Union to participate in any representation proceeding and be placed on the ballot; however, the Union will not be entitled to object to or block a consent election.[44]

A Union can also satisfy the required showing of interest if it is: (i) the certified or currently recognized bargaining agent of the Employees involved, or (ii) party to a currently effective or recently expired collective bargaining agreement covering those Employees.[45]

2. Timeliness Of Intervention

The required showing of interest must be made within forty-eight hours of the request to intervene.

a. If the showing of interest is late, the intervenor can still participate at the Hearing to the extent of its showing of interest if (i) it is made before a Consent Election Agreement is approved or before the Hearing is terminated; or (ii) the Union had no pre-consent or pre-hearing notice and the Union's showing of interest predated the approval of the consent agreement.[46]

b. If the forty-eight hour notice has been given to the intervenor and the showing of interest is made after a Consent Election Agreement has been approved or after the Hearing has been terminated, the intervenor cannot participate in further proceedings, but can be added to the ballot in a consent election if the parties thereto approve.

D. Determining An Appropriate Bargaining Unit

Section 9(a) of the NLRA provides that a representative selected by "a majority of the Employees in a unit appropriate for purposes of collective bargaining shall be the exclusive representative of all the Unit".[47] The Board need not determine "the only appropriate unit, or the ultimate unit, or the most appropriate unit: the Act requires only that the unit be 'appropriate.'"[48] Consequently, if a petitioning Union seeks a unit that the Board finds appropriate, the Employer's alternative proposals will not be considered.[49]

1. Factors Considered

The NLRB will assemble an "appropriate" bargaining unit based on the "community-of-interests" test, which assesses whether Employees enjoy a "substantial mutuality of interest in wages, hours and working conditions…".[50] The Board considers a number of factors in determining whether there exists an appropriate unit, including: (i) similarity of duties, skills, wages, fringe benefits, hours, 'interest and working conditions; (ii) amount of interchange among Employees; (iii) the Employer's organizational structure; (iv) integration of the work flow and interrelationship of the production process; (v) bargaining history in the particular unit and industry; (vi) extent of organization; and (vii) desires of petitioner.[51]

2. Job Classifications Excluded From The Bargaining Unit

a. **Supervisors** - The definition of a "supervisor" has three elements: a supervisor must have the authority (1) "in the interest of the employer," (2) to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action," and (3) the exercise of such authority must not be "of a merely routine or clerical nature, but [must] require[] the use of independent judgment." 29 U.S.C. Section 152(12).

A tension exists between the exclusion of supervisors from the Act's protections and the inclusion of professional employees because the statutory definition of *included* professionals requires that the professional be engaged in work "involving the consistent exercise of discretion and judgment in its performance" [29 U.S.C. Section 152 (12)] and *excluded* supervisors are also required to exercise a seemingly similar form of "independent judgment." 29 U.S.C. Section 152(11). Since 1994, the Supreme Court has twice rejected the Board's efforts to resolve this tension. *NLRB v. Health Care & Retirement Corp. (HCR)*, 511 U.S. 671 (1994); *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). These cases only address a narrow issue relating to independent judgment in the context of the statute's "responsibly to direct" and "assign" criteria, while leaving several important aspects of the existing jurisprudence on supervisory status unaffected. The NLRB General Counsel has issued guidance on this issue following *Kentucky River* [G.C. Memo OM 04-09 (Oct. 31, 2003)] and a triad of cases identified as "lead" cases on this issue by the Board, are pending.

b. **Managerial Employees** - includes Employees (i) who formulate and effectuate management policies by expressing and making operative the decisions of their Employer, and (ii) who have discretion in the performance of their jobs independent of their Employer's established policies.[52]

c. **Agricultural Laborers** - includes Employees who work primarily in connection with the agricultural operation, not the commercial operation, of agricultural products.[53]

d. **Confidential Employees** - are defined as employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations, or regularly substitute for employees having such duties. An Outline of Law and Procedure in Representation Cases, 19-100.

e. **Independent Contractors** - includes those entities and individuals who exercise considerable control over their method and mode of job performance. In determining independent contractor status, the Board applies the common-law agency test and considers all the incidents of the individual's relationship to the employing entity; no one factor is given controlling weigh.[54] *St. Joseph News-Press*, 345 NLRB No. 31 (August 27, 2005).

f. **Certain Family Members** – The statutory definition of an Employee in Section 2(3) of the Act specifically excludes "any individual employed by his parent or spouse." Thus, the Board excludes from bargaining units children and spouses of individuals who are sole shareholders,[55] majority shareholders,[56] or have substantial stock interests in closely held corporations.[57] Relatives of owners of less than 50 percent of a non-closely held corporation are excluded if they enjoy "special status."[58] The special status test is also applied to determine whether relatives of nonowner managers should be excluded from a bargaining unit.[59]

g. **Domestic Servants**

h. **Employees Of Excluded Employers** - includes the Employees of (i) the United States or any wholly owned government corporation, (ii) states or their political subdivisions, (iii) Federal Reserve Banks, (iv) persons subject to the Railway Labor Act,[60] (v) Employers who are not subject to the jurisdiction of the NLRB, and (vi) Employers over whom the NLRB refuses to assert jurisdiction.

3. Special Job Classifications Included In The Bargaining Unit

a. Driver-Salesman - are generally included in the salesman unit, not the driver unit.[61]

b. Hospital Interns and residents - interns, residents and fellows fall within the broad definition of "employee" under Section 2(3) of the Act, notwithstanding that a purpose of their being at a hospital may also be, in part, educational.[62]

c. Graduate Assistants – Graduate students who perform teaching and other related services are not protected employees, but rather, excluded students. *Brown University*, 342 NLRB No. 42 (July 13, 2004), overruling *New York University*, 332 NLRB 1205 (2000).

d. Part-Time Employees - Part-time Employees, who work on a regular basis for a sufficient period of time, are generally included in the bargaining unit if they have a substantial and ongoing interest in the wages, hours and working conditions of the full-time unit Employees. Employees working "on call" or for short periods of time and at different wage levels may be included in the bargaining unit, if they have a substantial work history as well as the likelihood of continued regular employment.[63]

e. Technical Employees - Highly skilled Employees who do not meet the statutory test for professional Employees sometimes are placed in a

separate bargaining unit.[64] In the health care industry, a separate technical unit generally will be created if requested by the petitioner.[65]

f. **Employees on Lay-Off** - are generally included in the bargaining unit if they have a reasonable expectation of being recalled.

g. **Probationary Employees** - are generally included in the bargaining unit if they expect to become full-time Employees and share other interests with the full-time Employees.

4. Special Rules Applicable To Certain Bargaining Units

a. **Professional Units** - The Board may not decide that a unit containing professionals and non-professionals is an appropriate bargaining unit unless a majority of the professionals vote for inclusion.[66] In the absence of any determination by the Board, an Employer and a Union may agree to an appropriate unit, containing both professionals and non-professionals. A professional is defined as one whose work (i) is predominantly intellectual and varied in nature, (ii) involves consistent exercise of discretion and judgment, (iii) does not involve output that is standardized in relation to time, and (iv) requires knowledge of an advanced type in a field of science requiring extensive study.[67]

b. **Guard Units** - Guards may not be included in the same unit with other Employees (non-guards). A guard is defined as one who enforces rules to protect (i) the property of the Employer and/or (ii) the safety of persons on the Employer's premises.[68]

c. **Craft Units** - Craft units may seek severance from a larger bargaining unit.[69] The decision to sever is made on a case-by-case basis with a consideration of the following factors: (i) the existence of distinct and homogeneous groups of skilled craftsmen or a department of Employees working in trades or occupations having a tradition of separate representation; (ii) the bargaining history in the industry and at the plant and other plants of the Employer; (iii) the extent to which Employees seeking severance have maintained a separate identity within the broader unit; (iv) the degree of integration of the manufacturing process and the extent it is dependent upon the Employees sought; and (v) the experience of the petitioning Union in the representative crafts.[70]

d. **Department Units** - Department units may be formed, depending on whether (1) the department is functionally distinct and separate (based on factors for assembling bargaining units), and (ii) the petitioning Union has traditionally represented the Employees in question.

e. **Multi-Plant Unit** – The general rules is that a petitioned-for, single-plant unit is presumptively appropriate, unless the employees at the plant have been merged into a more comprehensive unit by bargaining history, or the

plant has been so integrated with the employees in another plant as to cause the single plant to lose its separate identity.[71] An employer-wide unit also is presumptively appropriate.[72] When a union seeks a presumptively appropriate unit, it is the Employer's burden to rebut the presumption.[73] The single-facility and employer-wide unit presumptions are inapplicable when a union seeks a different unit.[74]

In considering whether the single-facility presumption has been rebutted, the Board examines a number of factors, including: centralized control over labor relations; local autonomy; employee interchange; similarity of employees' skills; conditions of employment; supervision; geographic separation; plant and product integration; and bargaining history.[75]

When a union seeks to represent employees at more than one, but not all, of the Employer's facilities, there is no presumption of unit appropriateness. Rather, the Board evaluates employees' skills and duties; terms and conditions of employment; employee interchange; functional integration; geographic proximity; centralized control of management and supervision; and bargaining history.[76]

f. **Multi-Employer Bargaining Units** - A group of Employers can agree to be bound in future collective bargaining by the group rather than by their individual actions. The consent must be objective, not based on custom or past practice. The Union's consent is also required. A Union or individual Employer can unilaterally withdraw from the Multi-Employer unit by unequivocal written notice to all parties prior to commencement of negotiations. Once negotiations have commenced, the Union or an Employer can withdraw from the unit only with the express consent of all parties.[77]

g. **Contingent/Temporary Agency Employees** - Temporary agency workers cannot be included with a unit of regularly employed [user] workers, even if they share a community of interest, absent the consent of both the temporary agency employer and the user employer. *H.S. Care L.L.C. d/b/a Oakwood Care Center*, 343 NLRB No. 76 (2004), overruling *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000).

5. Rulemaking and Units in the Healthcare Industry

Historically, the Board struggled with unit determinations in hospitals. The Board's application of the community-of-interests test often produced numerous bargaining units, and Congress had specifically instructed the Board "to avoid undue proliferation of units in the health care industry."[78] As a result of its struggle and the conflict with the courts of appeals created thereby, the Board, for the first time, decided to engage in rulemaking to resolve unit issues. In 1989, the Board promulgated a rule that defines bargaining units for acute care facilities, defined as those in which the average patient stay is less than thirty days (excluding, therefore, most psychiatric hospitals and nursing homes).[79] Absent extraordinary circumstances, eight units are

appropriate under the rule: registered nurses, physicians, other professionals, technical Employees, skilled maintenance Employees, business office clericals, service and other non-professional Employees, and guards. A petitioning union may seek a combination of these units. The Supreme Court upheld the Board's use of administrative rulemaking, rather than adjudication, to resolve unit issues, and affirmed the substance of the Board's eight-unit rule.[80]

E. Decision Of Regional Director And Appeal

1. Following the representation hearing, the hearing officer submits a report to the Regional Director summarizing the issues and evidence. If the Regional Director determines that the Board has jurisdiction over the employer, the union is a labor organization within the meaning of the Act, the unit is appropriate and a question concerning representation exists, and there is no bar to the conducting of an election, a Decision and Direction of Election will be issued and an election will be scheduled between twenty-five and thirty days later; otherwise, the Regional Director will issue a Decision and Order dismissing the petition.

2. A party may appeal the Regional Director's decision by filing a Request For Review ("Request") within fourteen days after service of the decision.[81] The Request will be granted only where compelling reasons exist, which include situations in which (1) a substantial question of law or policy is raised because of the absence of or departure from officially reported NLRB precedent, (ii) the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and prejudicial, (iii) the conduct of the Hearing resulted in prejudicial error, or (iv) compelling reasons exist for reconsideration of an important NLRB policy or rule.[82]

3. Within seven days after the last day on which the request for review must be filed, any party may file with the Board a statement opposing the Request.[83] If the Request for Review is granted, the parties may file additional briefs within fourteen days of the Order granting review.[84] The granting of a request does not stay the election unless ordered by the Board. Accordingly, the Regional Director will conduct an election directed by the Decision even though a Request has been granted. If the Request is still pending on the day of the election, the ballots whose validity might be affected by the final Board decision shall be segregated and all ballots shall be impounded and remain unopened pending Board disposition of the Request.[85] Denial of the Request for Review amounts to Board approval of the Regional Director's Decision.[86]

VI. PROVIDING THE ELIGIBLE VOTER LIST

A. Requirements

Within seven days after the Direction of Election or approval of the Consent Election Agreement, the Employer must file with the Regional Director the full first and last names and addresses of each Employee in the appropriate bargaining unit and on the payroll as of the payroll period immediately preceding the date of the Direction of Election or the approval of the Consent Election Agreement (the "Excelsior List").[87] The Regional Director then makes the Excelsior List available to all parties. The general rule regarding eligibility to vote is that Employees must be both employed and working on the established eligibility date.[88]

B. Failure To Comply

If the Employer fails to furnish the Excelsior List or furnishes an incomplete or inaccurate list, the election can be set aside upon proper objection. The NLRB, however, generally will not set aside elections where there has been "substantial compliance" in preparing the Excelsior List.[89] *Washington Fruit & Produce Co.*, 343 NLRB No. 126 (2004); *Special Citizens Futures Unlimited, Inc.*, 331 NLRB 160 (2000).

C. Special Categories Of Employees

1. **Economic Strikers** - Employees engaged in an economic strike who are not entitled to reinstatement will be eligible to vote under Board regulations as long as the election is conducted within twelve months after the start of the strike.[90] Replacements employed on a permanent basis can also vote.

2. **Unfair Labor Practice Strikers** - are eligible to vote regardless of when the election is held. Their replacements, however, cannot vote.[91]

3. **Employees on Lay-Off** - are eligible to vote if they have a reasonable expectation of re-employment with the Employer in the foreseeable future.[92] The Board considers the following objective factors to determine whether a reasonable expectation of recall exists: the Employer's prior experience, the Employer's future plans, the circumstances of the layoff, and what, if anything, the Employee has been told about the recall.[93]

4. **Employees Who Previously Quit Or Were Discharged For Cause** – generally are ineligible to vote. Employees terminated in violation of the Act are eligible to vote.

5. **Probationary Employees** - are eligible to vote if their duties and working conditions are substantially similar to those of regular employees and they have a reasonable expectation of continued employment.[94]

6. **Employees On Leave** - Employees on sick leave or other leaves of absence are eligible to vote if they are to be restored to their duties following the sick leave or other leave of absence.[95]

7. **Temporary Employees** - are eligible to vote only if they are employed on the eligibility date and their tenure of employment is uncertain. An Employee's tenure is considered uncertain so long as the prospect of termination was not sufficiently finite on the eligibility date.[96]

8. **Paid Union Organizers** - Full-time, paid union organizers are "employees" entitled to the Act's protections, and Employers cannot lawfully refuse to hire qualified individuals for the reason that they are paid union organizers.[97]

VII. RULES GOVERNING PREELECTION CONDUCT BY EMPLOYERS

As a general rule, the period during which the Board will consider conduct as objectionable is the period between the filing of the petition and the date of the election.

Objections to the election, alleging that such misconduct took place, must be filed with the Regional Director within 7 days after the tally of ballots has been prepared.. Objections must be timely filed in order to set aside an election. Certain objectionable conduct may also constitute an unfair labor practice and both objections and unfair labor practice charges may be filed; only objections, and not unfair labor practice charges, can result in a rerun election.

A. Employer Speech

1. Promise Of Benefits Or Threats Of Reprisal

The Employer may speak freely with the Employees concerning its position on unionization, but it cannot promise benefits nor threaten reprisals for Union activity.[98] According to the Supreme Court, an employer is allowed to make "predictions" regarding the possible consequences of unionization so long as the "prediction" is carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control."[99] Applying this standard, the Board has invalidated elections where, not based on objective facts, the Employer has threatened that unionization would cause a loss of business and plant closure, that unionization would lead to a loss of jobs, and that strikes or shutdowns would inevitably result.

2. Misrepresentations In Campaign Propaganda

The NLRB believes that Employees generally are capable of fairly evaluating campaign propaganda. Therefore, the NLRB will not set aside an election solely because of misleading campaign statements or misrepresentations of fact unless the Misrepresentation was deceptively made such that Employees could not fairly evaluate it.[100] For example, the use of a forged NLRB document (e.g. a ballot) will be scrutinized by the Board to determine whether it has a tendency to mislead voters.

3. Employees

a. **General Rule** – Employees have the right to distribute union literature in nonworking areas on company property during nonworking time as long as the restriction is not limited to union-related distributions. Solicitation, defined as oral communications and the dissemination of authorization cards, can only be prohibited during working time and then only if the employer prohibits other worktime solicitations. *Washington Fruit & Produce Co.*, 343 NLRB No. 125 (2004). Non-working areas include restrooms, cafeterias, parking lots, and time clocks. CITE??

b. **Exceptions** - Employers operating health care facilities may prohibit Employee solicitation and distribution in "immediate patient care areas." Employers operating retail department stores may prohibit solicitation on the selling floor during working and non-working hours.

c. **Off-Duty** - Off-duty, onsite Employees are entitled to access to exterior parking lots, gates, and other outside non-working areas of an Employer's property unless a contrary rule is justified by business reasons and

uniformly enforced.[101] Offsite Employees (in contrast to non-employee union organizers) also have an access right, for organizational purposes, to their Employer's facilities absent an overriding business justification, uniformly applied..[102] *Hillhaven*, 336 NLRB No. 646 (2001), enforced sub nom. *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2005); *ITT Industries*, 341 NLRB No. 118 (May 13, 2004), enforced, 413 F.3d 74 (DC Cir. 2005).

4. Non-Employees

The Employer generally may prohibit distribution of Union literature on its premises by Non-Employee Union organizers, except in rare circumstances. The threshold test, stated the Supreme Court, is whether "the location of a plant and the living quarters of the Employees place the Employees beyond the reach of reasonable union efforts to communicate with them."[103] The Court in *Lechmere* emphasized that this exception to the Employer's right to deny access to Non-Employees is narrow. The Court identified (1) Isolated Logging Camps, (2) Mining Camps, and (3) Mountain Resorts as "classic examples" of situations where the Employer may have to allow Non-Employee organizers onto its property.[104]

B. Interrogation

1. General Rule

Employer interrogation of an Employee as to Union affiliation or activity is prohibited if "coercive." Whether interrogation is coercive depends on the totality of the circumstances. *Shamrock Foods Co.*, 337 NLRB 915, enforcement granted, 346 F.2d 1130 (DC Cir. 2003); *V&S ProGalv, Inc. v. NLRB*, 168 F.3d 270 (6th Cir. 1999), enforcing 323 NLRB 801 (1997).

2. Systematic Polling

Under current Board law, before Employees may be polled about their union sympathies, the Employer must have objective evidence supporting a good-faith reasonable doubt (uncertainty) of a Union's majority status sufficient to justify withdrawal. Until recently, the Board also applied this standard to evaluate the lawfulness of two other Employer actions: unilateral withdrawals of recognition and the filing of RM petitions. However, in *Levitz*,[105] the Board developed a new standard for employer withdrawals of recognition. An Employer who withdraws recognition from an incumbent union must now prove that the union had, in fact, lost majority status at the time of the withdrawal. The Board retained the good-faith doubt standard for employer RM petitions. However, it left to a later case the decision of whether the current good-faith doubt standard for polling should be changed. When an Employer does poll its employees, it must employ the following safeguards: (i) the Employees are informed of the purpose of the poll; (ii) the Employees are polled by secret ballot; and (iii) the Employer has not committed other unfair labor practices or created a coercive atmosphere; and (iv) assurances against reprisal are given.[106]

C. Surveillance

The Employer may not conduct surveillance of Employees engaging in Union activities regardless of whether (i) the Employees know of the surveillance or (ii) the surveillance is conducted by supervisors either encouraged by the Employer or acting on their own. The Employer is also prohibited from creating the impression among Employees that it is engaged in surveillance. Surveillance includes unjustified recording, photographing, or videotaping of protected activity.

D. Promises And Grants Of Benefits

A grant of employment benefits during an organization campaign, although not per se unlawful, will be presumed objectionable by the Board unless the Employer establishes that the timing of the action was governed by factors other than the pendency of the election.[107] An Employer's offer of money which is accompanied with an urging to the Employee to vote a certain way is clearly unlawful, as is a bribe offered to Employees to work against the Union.[108]

E. Discipline Or Discharge

The Employer may not discriminate against any person in regard to hiring, tenure of employment, or any condition of employment to encourage or discourage membership in a labor organization.[109] Thus, it is unlawful to discipline or discharge an Employee because of his or her membership in or activities on behalf of a labor organization.

F. Captive Audience Speeches

Generally, it is not an unfair labor practice for an Employer to a make a pre-election speech to Employees on company time and premises and to deny the Union's request for an Opportunity to respond.[110] However, neither the Employer nor the Union may conduct mandatory employee meetings, *i.e.*, "captive audience meetings" pertaining to election issues within the twenty four-hour period immediately preceding an election.[111] Violation of this twenty four-hour rule is not an unfair labor practice but is grounds for setting aside the election. The NLRB has not extended this rule to include (1) statements made by management representatives to individual Employees at their respective work stations or (ii) the distribution of campaign literature.

G. Misuse Of The Board's (NLRB's) Election Process

The term "misuse of the Board's election process" refers to prohibited campaign techniques that create the impression that the NLRB or the government favors a particular outcome in the election. The most common misuse is the distribution of a facsimile of a NLRB document, such as a sample ballot, that is altered to suggest that the NLRB endorses a particular outcome. The Board will set aside an election only where such a tactic used by a party would mislead a reasonable voter to believe the Board supported the outcome.

VIII. THE ELECTION

A. Supervision

A representation election is conducted and supervised by a NLRB agent and is normally held on the Employer's premises. The Board personnel conducting the election are required to follow the Board's established procedures and to maintain a neutral stance at all times.

B. Observers

Each party is permitted an equal number of observers at the polling place. Observers assist NLRB agents in conducting the election, identifying voters, challenging voters and ballots, and verifying the tally. Unless the parties agree otherwise, all observers must be non-supervisory Employees who are not closely identified with the Employer.

C. Challenges

Before a voter casts a ballot, the NLRB agent or any party (acting through the authorized observers) may challenge for good cause the eligibility of that particular voter. The challenge procedure permits the questioning of a voter's eligibility and the impoundment of the challenged voter's marked ballot pending a determination of the eligibility question. The Board agent conducting the election must challenge (1) any voter whose name is not on the eligibility list, (2) any voter who has been permitted by the Board to vote subject to challenge, and (3) any voter, not challenged by one of the parties's observers, who the agent has reason to believe is ineligible. Examples where a voter's eligibility may be challenged by an observer include challenges based upon the voter's supervisory status, or challenges because the voter, although appearing on the eligibility list, has been discharged, laid off (with no expectation of recall) or has quit subsequent to the preparation of the eligibility list. Challenges should be made before the voter is handed a ballot, however, a challenge voiced anytime before the voter's ballot is deposited in the ballot box will usually be honored.[112] Once a ballot is cast, it is final and cannot be challenged. The ballots of contested voters are segregated from the other ballots at the time of the count and confidentiality is maintained. Only if the number of challenged ballots is sufficient to affect the outcome of the election will the eligibility of challenged voters be determined through post-election procedures.

D. Conduct At The Polling Place

In the final minutes before an Employee votes, he/she should be free from interference. Accordingly, the following activities generally are prohibited: (i) campaigning activity conducted too close to the polls; (ii) prolonged conversations between parties or observers and voters waiting to vote; and (iii) observation of the voting by Employer officials such as supervisory personnel.

E. Counting The Ballots

Immediately after the polls are closed, NLRB agents count and tabulate the ballots in the presence of the observers.

F. Mail Balloting

Mail balloting is allowed at the Regional Director's discretion. The Board has stated: "When deciding whether to conduct a mail ballot election or a mixed manual-mail ballot election, the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are 'scattered' because of their job duties over a wide geographic area; (2) where eligible voters are 'scattered' in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lock-out or picketing in progress. If any of the foregoing situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for Employees, and finally, what constitutes the efficient use of Board resources, because efficient and economic use of Board agents is reasonably a concern."[113]

IX. VOLUNTARY RECOGNITION

An Employer may voluntarily recognize a Union that represents a majority of its Employees. If more than one Union seeks recognition, however, the Employer may only recognize a Union that produces evidence of majority support - generally through presentation of signed Union authorization cards - until such time as the rival Union files a valid election petition. An Employer that voluntarily recognizes a Union and subsequently enters into a bargaining agreement cannot withdraw recognition of the Union following expiration of the bargaining agreement even though the Union was not certified by the NLRB, unless the Employer proffers evidence that the union had, in fact, lost majority status at the time of the withdrawal.[114]

In the construction industry, however, the same rules do not apply. Section 8(f) of the NLRA Permits construction contractors and labor unions to enter into a form of collective bargaining agreement "without regard to the union's majority status." Employers in the construction industry, in recognition of the relatively short-term duration of projects and mobility of work forces, are permitted by Section 8(f) of the Act to execute bargaining agreements with Unions prior to the actual employment of Employees, without running afoul of prohibitions against Employers giving unlawful support and assistance to minority Unions. Such bargaining agreements may not be repudiated during the life of the Agreement; yet, upon expiration of the pre-hire agreement, the signatory Union does not enjoy a presumption of majority status, and either parry may repudiate the bargaining relationship at that time.[115] Of course, the contractor must comply with the notice provisions specified in the contract and with the withdrawal provisions of any Multi-Employer agreement to which it is a party. In election cases involving a single contract signed to an 8(f) agreement, the contractual unit will usually be found appropriate. *John DeKlewa Sons*, 282 NLRB 1375 (1987); *P.J. Dick Contracting, Inc.*, 290 NLRB (1988); *but see A.C. Pavement Striping Co.*, 296 NLRB 206 (1989); *R.C. Aluminum Industries, Inc.*, 326 F.3d 235 (DC Cir. 2003).

X. BARGAINING ORDERS

The NLRB may order an Employer to recognize and bargain with a Union where the Employer, among other things, has committed unfair labor practices ("ULPs") that have made a fair election unlikely or has undermined the Unions majority and caused an election to be set aside.[116] In *Gissel Packing Company*, the Supreme Court identified three separate categories of ULPs that it would consider in deciding whether a bargaining order would be an appropriate remedy. The first category of cases, known as Gissel-I cases, involves situations in which the Employer has committed outrageous or pervasive ULPs that would make it impossible to hold a fair election. The court determined that in these exceptional cases a bargaining order is the appropriate remedy "without need of inquiry into majority status."[117] The Supreme Court did not, however, specifically endorse the idea of non-majority bargaining orders. The second category of cases, known as Gissel-II cases, involves "less extraordinary cases marked by less pervasive practices which nonetheless have the tendency to undermine majority strength and impede the election processes."[118] The Supreme Court approved this use of bargaining orders but held that a bargaining order is justified only where there is also a showing that at some point the Union had the support of the majority of Employees in the appropriate unit. The Court counseled the Board to "take into consideration the extensiveness of an Employer's unfair practices" in terms of their past effect upon election conditions and the likelihood of their recurrence "in the future" in determining whether a bargaining order is an appropriate remedy.[119] Finally, the Supreme Court identified a third category of cases, Gissel-III cases, involving minor or less extensive ULPs that have only a minimal impact on the election machinery and do not support the issuance of a bargaining order.

Despite Gissel's dictum regarding the issuance of bargaining orders without proof that the Union ever obtained majority status (Gissel-I cases), the Board did not issue any bargaining orders under these circumstances until 1981. In *United Dairy Farmers Cooperative Association*[120] and *Connair Corp.*[121] a divided Board issued bargaining orders even though the Unions had never demonstrated majority support. In 1984, however, the Board reexamined the issue of Gissel-I bargain orders in *Gourmet Foods, Inc.*[122] The Board concluded that a remedial bargaining order is completely unwarranted if the Union lacks majority support. Specifically, the Board found that the issuance of a bargaining order without any evidence that the Union ever had the support of a majority of the affected Employees contravened the principles embodied in the Act. Although the decision has been questioned in recent years, the Board continues to follow *Gourmet Foods*.

XI. CERTIFICATION OF THE ELECTION OUTCOME

In the typical "RC" or "RD" election involving one labor organization, the Board issues one of two kinds of Certification formalizing the outcome of the Board's procedures: a "Certification of Representative," signifying that a majority of valid ballots were marked "YES" for representation by a labor organization; or a "Certification of Results of Election," issued when the labor organization fails to receive a majority of valid votes cast.

Similar forms of certification are issued by the Board following other kinds of elections. The Board, for example, issues a Certification of Results in a "UD" election, where the ballot

gives Employees a "YES/NO" choice on whether to take away their representative's authority to negotiate a union-security clause.

The Regional Director, acting on behalf of the Board, must issue the appropriate certification "forthwith" if no objections have been filed and challenged ballots, if any, are insufficient in number to affect the result of the election.[123] If timely objections are filed or if challenged ballots would affect the election results, the Regional Director withholds certification until those disputes have been resolved.

Where a ballot contains three or more choices (because two or more labor organizations are competing for representation) and no single choice receives a majority of valid votes cast, the Regional director ordinarily must conduct a runoff election, limited to the "top two" choices, before issuing certification.[124]

XII. CHALLENGED BALLOTS

As indicated above, challenges are timely only if made (by a party or the Board Agent) before the voter deposits the ballot in the ballot box. The Board will not entertain untimely challenges alleged through the vehicle of post-election objections.[125] For example, a party cannot file objections alleging an individual's supervisory status if that individual was permitted to vote unchallenged.

After the polls close and before tallying ballots, the Board Agent may seek to resolve some or all challenges by obtaining agreement of the parties. If the remaining unresolved challenges are sufficient in number to affect the election results, the Tally of Ballots will be marked accordingly and the Regional Director will open a non-adversarial administrative investigation.[126]

As in other administrative investigations conducted by NLRB Regional Offices, the parties may submit written position statements and other relevant documents and identify and present witnesses for interviewing. The investigating Board Agent may also take written affidavits.[127] Matters as to which no material factual dispute exists are appropriately decided without a hearing.

The Regional Director has the authority to convene a fact-finding hearing at any time during the investigation, and the Regional Director must do so if she concludes that the case raises "substantial and material factual issues."[128] Such hearings are conducted by an appointed Hearing Officer, following procedures similar to those governing pre-election representation hearings. Unlike pre-election hearings, however, in post-election proceedings the Regional Director can direct the Hearing Officer to include not only findings of fact but also "recommendations as to the disposition of the issues."[129] In cases where unresolved objections are also pending, the Regional Director may order a consolidated hearing on challenges and objections.

Even absent consolidation, the processing of challenges generally takes the same course as post-election objections, as described below.

XIII. OBJECTIONS TO THE ELECTION

A. Kinds of Objections

The Board's Rules and Regulations cite two categories of election objections: (1) objections to "the conduct of the election"-including actions or omissions by the Board Agent in running the election, or alleged misconduct in the polling area; and (2) objections to "conduct affecting the results of the election"-typically, alleged misconduct or events attributable to a party or its agents occurring after the filing of the Petition.[130] The same Agency procedures govern both kinds of objections. The substantive law, however, differs in certain respects described below.

B. Procedures and Time for Filing Objections

Only parties in the election--that is, the Petitioner (whether individual or organization), the Employer, and any labor organization appearing on the ballot--may file objections to a representation election. To be deemed timely, such objections must be filed by the close of business on the seventh calendar day after the Agency prepares the Tally of Ballots and makes it available to the parties (the official Tally is typically prepared and distributed at the conclusion of the election).[131] Timely filing, for purposes of filing by mail, means postmarked no later than the day before the due date (and where the due date falls on a Saturday, Sunday or legal holiday the mail filing deadline is extended to the close of business on the next Agency business day).[132] Objections to elections will also be accepted by the Agency if transmitted to the facsimile machine of the appropriate office.[133]

Although the Board prescribes no rigid format for election objections, at a minimum the objecting party must include (or file at the same time) a brief statement of reasons underlying the objections. Within seven days of filing objections, the objecting party must submit supporting evidence--including names of witnesses and a short description of their testimony.[134] At this stage, the objector has the burden of presenting a prima facie case. The Regional Director may overrule objections without further investigation if the objector fails to meet that burden, or if, even crediting all the supporting evidence, the objections would not justify setting aside the election.[135]

C. Investigation and Disposition of Objections (and Challenges)

As indicated above, objections and challenges are resolved through administrative investigation that may or may not involve a fact-finding hearing. Although the issues raised by timely-filed objections typically define the scope of the investigation at the outset, the Regional Director may also consider evidence of other post-petition conduct that is disclosed in the investigation.[136] The course taken in investigating and resolving post-election objections and challenges depends in part on the parties' preelection choices-that is, whether the election was conducted under one of the Agency's voluntary agreements, or pursuant to a Decision and Direction.

1. Agreement for Consent Election and "Full" Consent Election: Parties Obtain Final Decision by Regional Director

As noted in Part IV, when the parties enter into an Agreement for Consent Election ("Consent") or "Full" Consent Agreement ("Full Consent"), they agree that the Regional Director shall make the final decision on pre- and post-election disputes.[137] Although the parties also waive their right to demand a hearing on pre- and post-election matters, the Regional Director retains discretion to use the standard investigatory tools for resolving challenges and objections, including conducting a hearing if deemed necessary (for example, where witness affidavits present "credibility" issues regarding material facts).

If no hearing is held, the Regional Director's written Report constitutes the final decision. No formal avenue of review is provided, and the Board is unlikely to consider a motion challenging the final ruling in the absence of fraud, misconduct, bad faith on the part of the Regional Director, or similar extraordinary circumstances.[138]

If the Regional Director convenes a hearing, the Hearing Officer makes a report and recommendations to the Regional Director; exceptions, if any, are filed with the Regional Director. The Regional Director then issues a Report including determinations on the disputed issues, with "final" effect as described above.

2. Stipulation for Certification: Parties Obtain Final Decision by Board

In contrast to the "Consent" forms of election agreements, parties to a "Stip" agree on all pre-election issues and also agree to the Board's final resolution of challenges and election objections. Accordingly, if the Regional Director resolves issues without a hearing, the Regional Director's Report will include recommendations, and the Regional Director will formally transfer the case to the Board.[139] If the Regional Director deems a hearing necessary, the issuance of a notice of hearing has the effect of transferring the case to the Board for a final decision.[140] Parties have the right to file exceptions to the Regional Director's Report and recommendations; whether or not exceptions are fled, the Board makes the final decision.[141]

3. Decision and Direction of Election: Board Has Ultimate Authority to Decide

Where the election was directed by either the Regional Director or the Board, the Regional Director has two alternatives for resolving challenges and objections after administrative investigation (with or without a hearing): (1) the Director may issue a Report and recommendations, transferring the case to the Board, and the Board will issue a final decision (whether or not exceptions are filed); or (2) the Director may issue a Supplemental Decision, in which case the Board considers the case only if a timely Request for Review is filed.[142]

4. Consolidation of Objections/Challenges with ULP Proceedings

An Employer's or labor organization's allegedly objectionable pre-election conduct may also constitute a ULP charge, as discussed further below. Indeed, the filing of ULP charges is common in contested representation elections. While the subject of ULP proceedings will be taken up in another presentation, we note here that pending ULP charges may affect the course of post-election representation proceedings.

Filing ULP charges prior to the election can, in some cases, lead to "blocking" or temporary postponement of the election if the alleged serious violations would interfere with Employees' free choice in the election. A charging party, however, may usually avoid the impact of a "blocking charge" by filing a Request to Proceed that waives reliance on pre-petition conduct as a basis for subsequently objecting to the election.[143] In the alternative, the charging party may choose to wait until after the election to file ULP charges as well as post-election objections, if any. Even if a charging party does file a Request to Proceed, a Regional Director has discretion, in certain circumstances, to block an election.

Thus, the pendency of ULP charges at the same time as challenges and/or objections is typical in the aftermath of a contested election. In those circumstances the RD has discretion to direct a consolidated hearing covering both ULP and representation issues.[144] Such hearings are conducted before an Administrative Law Judge.

The ULP portion of the consolidated hearing (including trial of "overlapping" allegations that constitute both Unfair Labor Practices and election objections) follows standard procedures governing ULP trials, with Counsel for the NLRB General Counsel taking the lead in presenting the affirmative case. Portions of the case raising exclusively representational issues--for example, ballot challenges or objectionable conduct not rising to the level of a ULP--proceed as in the typical representation case; the objecting party carries the burden of making its case and the Regional Office representative participates merely in a supplementary capacity to develop a full record. The ALJ follows the applicable standards of law in adjudicating ULP and non-ULP issues (except in the case of "consent" agreements, which require that the representation issues be severed at the close of the hearing and returned to the Regional Director for decision).

D. Standards for Reviewing Election Objections

Section VII of this presentation describes common forms of misconduct that have been deemed objectionable in representation elections. As indicated above, the scope of the Board's inquiry and the standards enforced by the Board differ depending on whether an objection goes to conduct "affecting" the election outcome or to the Board Agent's conduct of the election itself.

1. Conduct Affecting Election Outcome

Much of the objectionable pre-election conduct noted in Section VII -- threats, promises or grants of benefits, interrogation, surveillance, discriminatory discipline, reprisals, improper restrictions on Employee solicitation-can be charged as violations of Section 8(a)(1) and, in some cases, 8(a)(3).[145] In its 1962 *Dal-Tex Optical* decision, the Board announced a seemingly categorical rule: "Conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election."[146] Over the years, however, the Board has qualified the Dal-Tex doctrine, recognizing a de minimis exception for 8(a)(1) violations that are unlikely to have affected the results of the election.[147]

Other kinds of pre-election conduct, while not rising to the level of an 8(a) or 8(b) violation, can also constitute objectionable interference with a free and fair election. The Board's so-called "laboratory conditions" doctrine, articulated over forty years ago in *General*

Shoe, remains, in theory, the standard for evaluating such conduct by employers, unions and their agents. In the Board's words:

Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice.... [T]he criteria applied...in a representation proceeding...need [not] be identical to those employed in testing whether an unfair labor practice was committed.... In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.[148]

2. Conduct of the Election Itself

The Board has enforced stricter standards for evaluating the actions or omissions of Agency personnel involved in running elections: "The conduct of Board agents must be beyond reproach and must not tend to destroy confidence in the election process."[149] Under this standard, for example, the Board has set aside elections where an Agent left ballots or a ballot box unattended, and where an Agent was observed drinking beer with a party's representative between voting sessions.[150]

Similar deficiencies in election mechanics, including those arising from a party's failure to fulfill an election-related obligation, may also warrant invalidating an election. Examples include an Employer's failure to post timely the election notice;[151] an Employer's failure to submit an accurate Excelsior list within the prescribed deadline; improper opening or closing of polls; failure to permit the appropriate number of observers; jeopardizing secrecy of the ballot; electioneering by a party in the polling place; and maintaining a private list of voters (other than the Board Agent's official voting list and the observers' permitted lists of challenged voters).[152]

XIV. RUNOFF AND RERUN ELECTIONS

Resolution of dispositive challenges, if any, does not necessarily result in issuance of a Certification. As noted above, in elections involving more than one labor organization, a runoff election is usually required if no choice on the ballot receives a majority of valid votes cast in an election. The Regional Director conducts the runoff between the choice receiving the highest number of votes, and the choice receiving the next highest vote number. In certain exceptional cases--for example, where all choices receive the same number of votes--no runoff is held, the "inconclusive" election is declared a nullity, and the election is simply rerun.[153]

If the Regional Director or Board, as appropriate, invalidates an election based on meritorious objections, the usual remedy is a rerun election.[154] The Board, however, has authority to grant a so-called *Gissell* or remedial bargaining order, in lieu of an election or rerun election, where the union had obtained majority support prior to the scheduled election and the Employer's ULPs are found sufficiently serious to impede a fair election.[155] The Regional Director has discretion as to the timing and other details of the rerun election. The voting eligibility test is usually revised, using a more recent payroll period as the benchmark (for example, the last full payroll period preceding the date of the decision ordering a rerun, or

preceding the date of the rerun election notice). Other election procedures remain substantially the same.[156]

XV. TESTING CERTIFICATION

The issuance of a Certification formally terminates the Board's representation proceedings. A final Certification of Results in an "RC" case formally determines that the election was valid and that a majority of Employees has not elected a collective bargaining representative. The statute then bars the Board from holding another election within twelve months of that valid election.[157] The unsuccessful Petitioner has no direct avenue for judicial review of such a Certification--the non-adversarial representation process does not culminate in an appealable "final order" of the Board, and the Certification itself is not directly enforceable against a party.[158]

A representation case may also end with a Certification of Representative, signifying that the Employees have chosen a collective bargaining agent. That Certification, again, is not directly enforceable, and the Employer similarly lacks a direct right of appeal. Employers, however, can "test" certification in court by refusing to bargain with the newly certified union and litigating the resulting Section 8(a)(5) Unfair Labor Practice case. Such a case, referred to as a test of certification case, is typically brought to the Board by means of a summary judgment motion where the only disputed issues involve the validity of the union's Certification, and the factual record comprises only the underlying representation proceedings. The Board's final order is then subject to direct appeal/enforcement before a U.S. Court of Appeals.[159]

In theory, labor organizations have available a ULP counterpart to the Employer's technical 8(a)(5). Section 8(b)(7)(B) of the Act prohibits picketing for representational or organizational purposes within twelve months of a valid election; thus, a union could trigger a Section 8(b)(7) charge and defend by attacking the validity of the election. In most cases, however, the twelve-month election bar would expire in any event before the union obtained even an appealable final Board order, much less a favorable court ruling. Thus, a Certification of Results is final for all practical purposes.

XVI. CONCLUSION

The goal of the panelists has been to provide a very basic orientation to the administrative system, to introduce some of the terminology and concepts a practitioner regularly encounters when participating in Representation proceedings before the Board, and to direct your attention to some of the relevant legal resources and "required reading."

Today's seminar materials merely touch on an extensive, complex and ever changing area of labor law. They cannot and must not substitute for direct recourse to and thorough review of the statute, the Board's Rules and Regulations, the Board's official NLRB Casehandling Manual and Outline of Law and Procedure in Representation Cases, and such established reference texts as The Developing Labor Law and How to Take a Case Before the NLRB. Indeed, since some of the ground rules are changing even as this course outline is being prepared and presented, recourse to "advance sheets" and Federal Register notices has become imperative.

References in this area that may be consulted are: The Developing Labor Law, 4th Ed. (including the 2001 Cumulative Supplement) (Bureau of National Affairs), a significant reference manual published by the ABA's Section of Labor and Employment Law (cited herein as "DLL"); the Statute; the NLRB's Rules and Regulations ("R&R"); the NLRB Casehandling Manual (three volumes); the NLRB's Outline of Law and Procedure in Representation Cases (1999 Ed.); and How to Take a Case Before the NLRB (7th Ed.), and the NLRB's website, www.nlrb.gov.

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[1] 29 U.S.C. A7 151; *See Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964).
[2] 29 U.S.C. A7 159(c)(1)(A).
[3] Section 101.19 of the Board's **Rules and Regulations**, 29 C.F.R. A7 101 – 19 (citations to the **Rules and Regulations** appear hereafter in abbreviated format as R&R 10_.__).
[4] 29 U.S.C. A7 159(c)(1)(B).
[5] *See Johnsonson Bros. Furniture Co.*, 97 NLRB 246, 247 (1956).
[6] *See Coca-Cola Bottling Co.*, 80 NLRB 1063 (1948).
[7] Caveat: Because a Union's request for a Section 8(f) agreement does not assert a claim for majority status, it does not satisfy the statutory requisite of a demand to be recognized "as the representative" of the Employees. *Albuquerque Insulation Contractor*, 256 N.L.R.B. 61 (198 1). Similarly, upon the expiration of the pre-hire agreement, the signatory union does not enjoy a presumption of majority status, and either party may repudiate the bargaining relationship at that time. *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enforced*, 843 F.2d 770 (3rd Cir. 1987), *cert. denied*, 488 U.S. 889 (1988).
[8] *See Electro Metallurgical Co.*, 72 NLRB 1396, 1399 (1947).
[9] 29 U.S.C. 159(c)(1)(A); R&R 102.60(a).
[10] *See Clinton Food 4 Less*, 288 NLRB 597 (1988); see also *Eastern States Optical Co.*, 275 NLRB 371 (1985).
[11] *Eastern States Optical*, 275 NLRB 371.
[12] *See Mo's West*, 283 NLRB 130 (1989); compare *West Lawrence Care Center*, 305 NLRB 212 (1991).
[13] **Casehandling Manual B6** 11002.1(b)4d).
[14] **R&R** 102.60(b).
[15] *See Locomotive Firemen & Enginemen*, 145 NLRB 1521, 1523 n.5 (1964).
[16] **R&R** 102.60(b).
[17] **R&R** 101.18.
[18] *See Siemons Mailing Serv.*, 122 NLRB 81, 83 (1958), *supplemented*, 124 NLRB 594 (1959).
[19] *See* 29 U.S.C. A7 159(c)(3).
[20] *See Robertson Bros. Dep't Store, Inc.*, 95 NLRB 271, 273 (1951); *see also Cohn-Rall-Marx Co.*, 86 NLRB 10 1 n. 1 (1949).
[21] *See Bendix Corp.*, 179 NLRB 140 (1969).
[22] *See Brooks v. NLRB*, 348 U.S. 96, 98 (1954).
[23] *See Mar-Jac Poultry Co.*, 136 NLRB 785, 787 (1962).
[24] *See, generally*, **Casehandling Manual** 11730 *et seq.*
[25] *See American Metal Prods. Corp.*, 139 NLRB 601, 604 (1962).
[26] *See General Cable Corp.*, 139 NLRB 1123, 1125 (1962).
[27] *See Paragon Prods. Corp.*, 134 NLRB 662, 666-67 (1961).
[28] *New England Telephone Co.*, 179 NLRB 53 (1969).
[29] *See General Extrusion Co.*, 121 NLRB 1165 (1958).
[30] *See Food Haulers Co.*, 136 NLRB 394, 397 (1962) (*overruling Calorator Mfg. Corp.*, 129 NLRB 704 (1960)).
[31] *See eg., Staten Island Univ. Hosp.*, 308 NLRB 58 (1992).
[32] *See Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962).

[33] *See Deluxe Metal Furniture Co.*, 121 NLRB 995, 999-1000 (1958).
[34] *See Portland Associated Morticians Inc.*, 163 NLRB 614, 615 (1967).
[35] *See Trinity Lutheran Hosp.*, 218 NLRB 199 (1975).
[36] *See Cooperative Azucarera Los Canos*, 122 NLRB 817 n.2 (1958).
[37] **R&R** 101.19(a)(5).
[38] **R&R** 102.62(a).
[39] **R&R** 101.19(b) and 102.62(b).
[40] **R&R** 101.20(c).
[41] **R&R** 101.20(c).
[42] **R&R** 102.66(a).
[43] **Casehandling Manual** B611022.3(c).
[44] **Casehandling Manual** B611022.3(d).
[45] *Peabody Coal Co.*, 197 NLRB 1231 (1972); *Stockton Roofing Co.*, 304 NLRB 699 (1991).
[46] **Casehandling Manual** B611026.2.
[47] 29 U.S.C. A7 159(a).
[48] *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), *enf'd*, 190 F.2d 576 (7th Cir. 1951) (emphasis in original).
[49] *P.J. Dick Contracting*, 290 NLRB 150 (1988).
[50] NLRB Annual Report Vol. 14, 32-33 (1949).
[51] *See Capital Bakers, Inc.*, 168 NLRB 904 (1967).
[52] *AERB v. Yeshiva Univ.*, 444 U.S. 672 (1980); *see also NLRB v. Bell Aerospace Co.*, 416 U.S. 167, 288 (1974).
[53] *See DiGiorgio Fruit Corp.*, 80 NLRB 853, 855 (1948).
[54] *See Roadway Package System, Inc.*, 326 NLRB 72 (1998); *see also Dial-A-Mattress Operating Corp.*, 326 NLRB 75 (1998).
[55] *Bridgeton Transit*, 123 NLRB 1196 (1959).
[56] *Cerni Motor Sales*, 201 NLRB 918 (1973).
[57] *NLRB v. Action Automotive*, 469 U.S. 490 (1985); *Scandia*, 167 NLRB 623 (1967).
[58] *NLRB v. Action Automotive*, 469 U.S. 490 (1985). *See also Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991).
[59] *Allen Services Co.*, 314 NLRB 1060 (1994); *Cumberland Farms*, 272 NLRB 336 (1984).
[60] *See* 29 U.S.C. A7 152(2).
[61] *See Plaza Provision Co.*, 134 NLRB 910, 911-12 (1961).
[62] *Boston Medical Center Corp.*, 330 NLRB No. 30 (November 1999) (overruling its prior decision in *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), that hospital interns and residents were students rather than employees within the meaning of Section 2(3) of the Act). N.B. cases challenging the *Boston Medical Center* holding are pending before the Board.
[63] *See Columbus Plaza Motor Hotel*, 148 NLRB 1053 (1964).
[64] *See Sheffield Corp.*, 134 NLRB 1101, 1103-04 (1961).
[65] *See Barnert Memorial Hosp. Ass'n*, 217 NLRB 775, 777 (1975).
[66] *See* 29 U.S.C. A7 159(b)(1).
[67] *See* 29 U.S.C. A7 152(12).
[68] *See* 29 U.S.C. A7 159(b)(3).
[69] *See* 29 U.S.C. 159(b)(2).
[70] *See Mallinckrodt Chem. Works*, 162 NLRB 387 (1966).

[71] *Trane*, 339 NLRB 866 (2003); *North Hills Office Services*, 342 NLRB No. 25 (2004).
[72] *Greenhorne & O'Mara, Inc.*, 326 NLRB 514 (1998).
[73] *Id.*
[74] *NLRB v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986).
[75] *See, e.g., Trane*, 339 NLRB 866 (2003); *Budget Rent A Car Systems*, 337 NLRB 884 (2002); *Bowie Hall Trucking*, 290 NLRB 41 (1988).
[76] *Bashas', Inc.*, 337 NLRB 710 (2002); *Alamo Rent A Car*, 330 NLRB 897 (2000).
[77] *See Retail Assocs. Inc.*, 120 NLRB 388 (1958).
[78] *See* S. Rep. No. 93-766, 93d Cong., 2d Sess. 5 (1974); H.R. Rep. No. 93-1051, 93d Con., 2d Sess. 7 (1974).
[79] *See* 54 Fed. Reg. 16336, codified at 29 CFR Part 103.
[80] *American Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991).
[81] **R&R** 102.67(b).
[82] **R&R** 102.67(c)(1)-(4).
[83] **R&R** 102.67(e).
[84] **R&R** 102.67(g).
[85] **R&R** 102.67(b).
[86] **R&R** 102.67(f).
[87] *See Excelsior Underwear*, 156 NLRB 1236 (1966).
[88] *See Ra-Rich Mfg. Corp.*, 120 NLRB 1444, 1447 (1958).
[89] *See Pole-Litus, Ltd.*, 229 NLRB 196 (1977).
[90] 29 U.S.C. 159(c)(3).
[91] *See Larand Leisurelies*, 222 NLRB 838 (1976).
[92] *See Red Arrow Freight Lines*, 278 NLRB 965 (1986).
[93] *See Data Technology Corp.*, 281 NLRB 1005 (1986).
[94] *See Vogue Art Ware & China Co.*, 129 NLRB 1253 (1961).
[95] *See Red Arrow Freight Lines*, 278 NLRB 965 (1986).
[96] *See Caribbean Communications Corp.*, 309 NLRB 712 (1992).
[97] *See Sunland Construction Co.*, 309 NLRB 1224 (1992).
[98] *See* 29 U.S.C. 158(c).
[99] *NLRB v. Gissell Packing Co.*, 395 U.S. 575 (1969).
[100] *See Midland Nat'l Life Ins. Co.*, 263 NLRB No. 24 (1982).
[101] *See St. Luke's Hosp.*, 300 NLRB 836 (1990); *Tri-County Medical Center, Inc.*, 222 NLRB 1089 (1976).
[102] *See First Healthcare Corporation*, 336 NLRB No. 62, slip op. at 3 (September 30, 2001). *See also ITT Industries, v. NLRB*, 251 F.3d 995, 1005 (D.C. Cir. 2001), vacating and remanding 331 NLRB No. 7 (2000) (remanded for Board to consider whether Section 7 extends nonderivative access rights to offsite employees, and to adopt a balancing test that takes proper account of an employer's "predictably heightened property concerns").
[103] *See St. Luke's Hosp.*, 300 NLRB 836 (1990); *Tri-County Medical Center, Inc.*; 222 NLRB 1089 (1976).
[104] *Lechmere, Inc. v. NLRB*, 502 US 527 (1992).
[105] 333 NLRB No. 105 (March 29, 2001).
[106] *See Struksnes Constr. Co.*, 165 NLRB 1062 (1967).
[107] *See Caterpillar Inc.*, 322 NLRB 674 (1996).

[108] *See Micro Measurements*, 233 NLRB 76 (1977).
[109] *See Coca-Cola Bottling Co.*, 132 NLRB 481 (1961); *see also Wesselman's Enters.*, 248 NLRB 1017 (1980).
[110] *See* 29 U.S.C. 158(a)(3).
[111] *See Livingston Shirt Co.*, 107 NLRB 400 (1953).
[112] *See Peerless Plywood Co.*, 107 NLRB 427 (1953).
[113] Casehandling Manual B611338.
[114] *See Levitz*, 333 NLRB No. 105 (an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees).
[115] *See San Diego Gas and Electric*, 325 NLRB 218 (1998); *see also Sitka Sound Seafoods*, 325 NLRB 125 (1998).
[116] *See John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enforced*, 843 F.2d 770 (3d Cir. 1987), *cert. denied*, 488 U.S. 889 (1988).
[117] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).
[118] *Id*. at 613.
[119] *Id*. at 614.
[120] *Id*.
[121] 242 N.L.R.B. 1026 (1979) *aff'd and remanded for reconsideration of bargaining order issue*, 633 F.2d 1054 (3d Cir. 1980), *on remand*, 257 N.L.R.B. 772 (1981).
[122] 261 N.L.R.B. 1189, *enforcement denied*, 721 F.2d 135 (D.C. Cir. 1983), *cert. denied sub nom, Local 222, ILGWU v. N.L.R.B.*, 467 U.S. 1241 (1984).
[123] 270 NLRB 578 (1984).
[124] **R&R** 102.69(b).
[125] 29 U.S.C. A7159(c)(3); **R&R** 102.70.
[126] **R&R** 102.69(a), *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 19 LRRM 2128 (1946).
[127] **R&R** 102.69(c)(1).
[128] **NLRB Casehandling Manual** B6 11364.
[129] **R&R** 102.69(d).
[130] **R&R** 102.69(e).
[131] **R&R** 102.69(a).
[132] **R&R** 102.69(a).
[133] **R&R** 102.111(b).
[134] **R&R** 102.114(f).
[135] **R&R** 102.69(a); **Casehandling Manual**, B6 11392.5.
[136] **Casehandling Manual**, B6 11396.2.
[137] **Casehandling Manual** B6 11394.
[138] **R&R** 102.62(a).
[139] *McMullen Leavens Co.*, 83 NLRB 948, 24 LRRM 1175 (1949); accord, *Lowell Corrugated Container Corp.*, 177 NLRB 169, 72 LRRM 1419 (1969).
[140] **R&R** 102.62(b).
[141] **R&R** 102.69(c)(2).
[142] **R&R** 102.69(i)(1).
[143] **R&R** 102.69(f).
[144] **R&R** 102.69(c)(3), 102.69(c)(4).

[145] **Casehandling Manual** B2 11730, 11734.
[146] **R&R** 102.33(a)(2).
[147] 29 U.S.C. A7 158(a)(1) and (a)(3).
[148] 137 NLRB 1782, 50 LRRM 1489 (1962).
[149] *See, e.g., NVF Co., Hartwell Div.*, 210 NLRB 663, 86 LRRM 1200 (1974); *Associated Milk Producers*, 237 NLRB 879, 99 LRRM 1212 (1978).
[150] *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 84 LRRM 2929 (1973).
[151] **R&R** 103.30.
[152] **Outline of Law and Procedure in Representations Cases** at 384, citing *Athbro Precision Engineering Co.*, 166 NLRB 966 (1967).
[153] *See* **Outline** at 384-386.
[154] *See* **Outline** at 384-408.
[155] **R&R** 102.70; **Casehandling Manual** B6 11350.5.
[156] **Casehandling Manual** B6 11450-11452.
[157] *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 71 LRRM 2481 (1969); *Gourmet Foods, Inc.*, 270 NLRB 578, 116 LRRM 1105 (1984).
[158] *See* **Casehandling Manual** B6 11452-11456.
[159] NLRA Section 9(c)(3), 29 U.S.C. A7 159(c)(3).