AMERICAN BAR ASSOCIATION
SECTION OF LABOR & EMPLOYMENT LAW ANNUAL CLE CONFERENCE

THE TRADITIONAL LABOR LAW TRACK:
CLASSIC LAW OF LABOR-MANAGEMENT RELATIONS
NLRA BASICS: A SHORT PRIMER

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OVERVIEW OF THE NLRA AND THE NLRB

I. HISTORY


In 1934 and 1935, Senator Wagner of New York introduced bills in the United States Senate to give federal support to employee organizations and collective bargaining. The National Labor Relations Act ("NLRA") was passed by Congress, signed into law by President Roosevelt, and became effective on July 5, 1935. The NLRA is frequently referred to as the "Wagner Act" in recognition of the efforts, energy and legislative expertise of Senator Wagner in bringing to fruition the origin of modern American labor law.

The cornerstone of the NLRA was Section 7, which originally provided:

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Unlike the earlier provisions of the National Industrial Relations Act ("NIRA"), 48 Stat. 198 (1933), the NLRA made the rights set forth in Section 7 legally enforceable. The NLRA also required employers to bargain collectively with employees through representatives [labor organizations] chosen by the employees.

In addition to the rights established in Section 7 – the right to organize, the right to bargain collectively, and the right to engage in strikes, picketing and concerted activities – the Wagner Act established the National Labor Relations Board. The initial National Labor Relations Board (frequently referred to as the "Board" or the "NLRB") consisted of three (3) members appointed by the President by and with the advice and consent of the Senate. The Wagner Act defined certain acts and practices of employers as unfair labor practices in Section 8; and provided that the Board would decide in each case the appropriate unit for the
purpose of collective bargaining, hold hearings, conduct secret elections, and resolve questions of representation.

Section 10 of the Wagner Act empowered the Board to prevent any person from engaging in any unfair labor practice (listed in Section 8), including the issuance of complaints and the holding of hearings, and the authority to issue an order requiring persons to cease and desist from unfair labor practices and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of the Act.


The Labor Management Relations Act of 1947 (“LMRA”; “Taft-Hartley Act”, or “NLRA, is amended”) was enacted on June 23, 1947, and the amendments became effective 60 days thereafter, except that the authority of the President to appoint certain officers as set forth in Section 3 became effective immediately. The Taft-Hartley Act increased the membership of the Board from 3 to 5 Members, and authorized the Board to delegate to any group of three or more Members any or all of the powers it may itself exercise.

The Taft-Hartley Act established the position of General Counsel of the Board who, like the Board Members, is appointed by the President by and with the advice and consent of the Senate. The General Counsel of the Board exercises general supervision over all attorneys employed by the Board (other than Trial Examiners and legal assistants to Board Members) and over the officers and employees in the Regional Offices. The General Counsel has final authority, on behalf of the Board, with respect to the investigation of charges and issuance of complaints under Section 10, and with respect to the prosecution of such complaints before the Board. The separation of the judiciary and prosecutorial functions in the LMRA was in response to criticism under the Wagner Act that the NLRB appeared to function as “judge, jury, and prosecutor”.

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Section 7 (Rights Of Employees) was amended by the Taft-Hartley Act as follows:

“Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring members in a labor organization as a condition of employment as authorized in Section 8(a)(3).” (LMRA amendments in bold letters)

Section 8(b) was added and stated, among other provisions, that it was an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in Section 7; to refuse to bargain collectively with an employer; and to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a refusal in the course of their employment, for certain prohibited objectives.

The LMRA added Section 8(c) which provided:

“The expression of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”

The Taft-Hartley Act stated in Section 8(d) that “to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party...”

The Taft-Hartley Act made some changes in Section 9 including the filing of a decertification petition, and providing that the Board would conduct only one (1) election in a 12-month period. Section 10(b) was amended to provide than no complaint shall issue based
upon any unfair labor practice occurring more than six (6) months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. The Taft-Hartley Act added Sections 14(a) and (b), which provided as follows:

“(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”

The Taft-Hartley Act established the Federal Mediation and Conciliation Service (“FMCS” or “Service”), and set forth the functions of the Service. LMRA also included a provision where, in the opinion of the President, a threatened or actual strike or lockout affecting an entire industry or substantial part thereof will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe.


The Labor-Management Reporting and Disclosure Act of 1959 (“LMRDA” or “Landrum-Griffin Act”) was signed into law on September 15, 1959 by President Eisenhower. The Landrum-Griffin Act consisted of two major parts: Titles I through VI pertain to a bill of rights for union members, reporting requirements, trusteeships, elections, and miscellaneous provisions; and, Title VII, amendments to the Taft-Hartley Act. Some of the major amendments to the Taft- Hartley Act included the closing of alleged “loopholes” in the secondary boycott provisions; the addition of a publicity proviso to Section 8(b)(4)(D); the addition of Section 8(b)(7); prohibited so-called “hot cargo” agreements in Section 8(e), with the exception
of the construction and garment industries; and added Section 8(f) which permitted prehire agreements in the construction industry and agreements in the construction industry which required membership in a labor organization after the 7th day following the beginning of employment.

D. Other Amendments To The National Labor Relations Act.

In addition to the 1947 and 1959 amendments to the National Labor Relations Act, there have been other Federal Statutes or laws which have amended certain provisions of the NLRA. Public Law 93-360, enacted July 26, 1974, added Section 8(g) which requires notification of intention to strike or picket at any health care institution; and Section 19 concerning employees with religious convictions. There have also been a number of changes over the years to Section 302, Restrictions On Payments To Employee Representatives.

II. GENERAL OVERVIEW OF THE NLRB\(^1\) AND THE NLRA, AS AMENDED.

A. Structure of the National Labor Relations Board.

1. The Board

   a. **Function** – The chief quasi-judicial body under the NLRA, as amended.

   b. **Size** – The Board consists of five (5) Members appointed by the President for five (5) years, with the advice and consent of the Senate. The terms of the Board are staggered. Usually the Board Members sit on panels of three (3) Members.

   c. **Executive Secretary** – The Chief administrative officer responsible for assigning and monitoring cases, receiving and docketing documents, and other administrative duties.
d. **Information Division** – Responsible for press announcements, public announcements, and the publication of a weekly summary of Board Decisions.

e. **Solicitor** – Chief legal advisor to the Board.

f. **Division of Judges** – The Administrative Law Judges (“ALJ”) function as the trier of fact in unfair labor practice proceedings; and render Decisions containing findings of fact, conclusions of law, and a recommendation(s) as to the disposition of the case. The case, after hearing and the issuance of the Decision, is then transferred to the Board.

2. **The General Counsel Of The NLRB**

   a. **Function** – The General Counsel exercises general supervision over all attorneys employed by the Board (except ALJs and legal assistants to Board Members), and over the officers and employees in the Regional Offices; has final authority on behalf of Board to investigate charges, issue and prosecute complaints, handle appeals, seek 10(j) injunctions, the overall supervision of the investigation and processing of representation petitions; and other duties prescribed by the Board or provided by law.

   b. **Term** – The General Counsel is appointed by the President for four (4) years, with the advice and consent of the Senate.

   c. **Division of Advice** – Responsible for giving advice to Regional Offices concerning complex or new legal issues.
d. **Division of Enforcement Litigation** – Responsible for litigation to enforce or defend orders of the NLRB.

e. **Division of Operations Management** – Responsible for supervising the field operations.

f. **Regional Offices** – The Regional Director supervises a staff consisting of a Regional Attorney, field attorneys, field examiners, and other personnel. Some of the Regional Offices have separate Resident Offices header by a Resident Officer.

**B. Coverage Under The NLRA, As Amended.**

1. **Person** – Section 2(1) defines the term “person” to include one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11 of the United States Code, or receivers.

2. **Employer** – Section 2(2) defines the term “employer” to include any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

3. **Employee** – Section 2(3) defines the term “employee” to include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, or by any other person who is not an employer as herein defined.

4. **Representative** – Section 2(4) defines the term “representative” to include any individual or labor organization.
5. **Labor Organization** – Section 2(5) defines the term “labor organization” to mean any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

6. **Commerce** – Section 2(6) defines “Commerce” to mean trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

7. **Affective Commerce** – Section 2(7) defines the term “Affecting Commerce” to mean in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

8. **Supervisor** – Section 2(11) defines the term “supervisor” to mean any individual having authority, in the interest of the employer, 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, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

### C. Current Jurisdictional Standards Of The NLRB2.

1. **Nonretail Enterprises** – gross outflow or inflow of revenue of at least $50,000, whether such outflow or inflow is regarded as direct or indirect.

2. **Retail Establishments** – gross business volume of at least $500,000 per year and substantial purchases from or sales to other states on a direct or indirect basis. When an employer’s operations are both retail and nonretail, the nonretail jurisdictional standards are applied unless the nonretail portion is de minimis.

3. **Office Buildings and Shopping Centers** – gross revenue of at least $100,000 per year, of which at least $25,000 is derived from organizations whose operations meet any of the Board’s jurisdictional standards other than indirect inflow or outflow standards.

4. **Public Utilities** – gross business volume of at least $250,000 per year or an interstate outflow or inflow of goods, materials, or services of $50,000 or more per year, whether directly or indirectly.
5. **Newspapers** – gross business volume of at least $200,000 per year.

6. **Radio and Television Stations; Telephone and Telegraph Systems** – gross business volume of at least $100,000 per year.

7. **Hotels, Motels, Apartments, and Condominiums** – gross revenues of $500,000 or more per year.

8. **National Defense Enterprise** – substantial impact on the national defense, irrespective of whether the operations satisfy any other jurisdictional standard.

9. **Employer Associations** – any member meets any jurisdictional standard, or the combined operations of all members meet any such standard.

10. **Secondary Employers** – in cases involving union conduct with respect to secondary employers, if the primary employer meets any of the jurisdictional standards or if the combined operations of the primary employer and the business of any secondary employers at the location affected by the conduct meet such standards.

11. **Single Employer Engaged In Multiple Enterprises** – the employer’s overall operations meet any jurisdictional standard.

12. **Instrumentalities, Links, and Channels of Interstate Commerce** – gross revenue of at least $50,000 per year derived from furnishing interstate transportation services or functioning as essential links in such transportation of passengers or commodities.

13. **Other Transit Systems** – gross volume of at least $250,000 per year.

14. **Restaurants and Country Clubs** – gross annual volume of at least $500,000.

15. **Hospitals** – at least $250,000 gross annual revenue.

16. **Nursing Homes, Visiting Nursing Associations, and Related Facilities** – at least $100,000 gross annual revenue.

17. **Gambling Casinos** – where gross annual revenues exceed $500,000.

18. **Symphony Orchestras** – gross annual revenue from all sources of at least $1,000,000.

19. **Law Firms and Legal Assistance Programs** – jurisdiction is asserted where gross annual revenues are $250,000 per year.
The NLRB has other jurisdictional standards besides the above list of jurisdictional standards covering such entities or organizations as professional sports, horse and dog racing, non-profit, private educational, and religious institutions, architects, museums, accounting firms, real estate firms and associations, etc.

1 For more information on procedure before the NLRB, see How to Take a Case Before the NLRB, Sixth Edition, and 1998 Supplement, published by the Bureau of National Affairs.

OUTLINE OF REPRESENTATION PROCEDURES UNDER SECTION 9(c)

1. File with Regional Office.
2. Investigation and/or dismissal.
3. Appeal may be entertained by regional director.
4. Case may be referred to Board for decision.

CONCEPT PROCEDURES

1. Petition for Certification. Petition must be initiated within the time period specified in the Act.
2. Certification granted by Board or Regional Director. Board or Regional Director certifies the selection of a representative.
3. Election conducted by Regional Director.
4. Election challenged. Regional Director may conduct an investigation or refer to Board.
5. Regional Director issues challenge resolution to Regional Director.
6. Regional Director informs parties of challenge resolution.

FINAL PROCEDURES

1. Election results are conclusive and for no action required.
2. Election results are non-conclusive. Regional Director may conduct an investigation or refer to Board.
3. Election challenged. Regional Director may conduct an investigation or refer to Board.
4. Election results are non-conclusive. Regional Director may conduct an investigation or refer to Board.
5. Election results are non-conclusive. Regional Director may conduct an investigation or refer to Board.
6. Election results are non-conclusive. Regional Director may conduct an investigation or refer to Board.
7. Election results are non-conclusive. Regional Director may conduct an investigation or refer to Board.
8. Election results are non-conclusive. Regional Director may conduct an investigation or refer to Board.
9. Election results are non-conclusive. Regional Director may conduct an investigation or refer to Board.
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. Although this article focuses on the election process, it closes with a brief discussion of voluntary recognition and bargaining orders.

II. THE ELECTION PETITION

The 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 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.

**B. Representation (“RM”) Petition**

Where a Union demands recognition, the Employer may file an RM Petition without any showing of interest. 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, (ii) picketing for recognition or organization, and (iii) a request for contract renewal by an incumbent Union. Union campaigning does not constitute a claim for recognition. In addition, the Employer may file an RM Petition to test the majority status of an incumbent Union. The Employer, however, must have a “good faith uncertainty” that a majority of the unit employees continue to support the union. The required evidence must be specific and detailed, e.g., the names of the employees must be listed. The evidence must be objective and reliably indicate that a majority of employees oppose the incumbent union, rather than mere speculation. Such evidence would include, but is not limited to, anti-union petitions signed by unit employees, firsthand employee statements including a desire to no longer be represented by the incumbent union, employees’ unverified statements regarding other employees’ anti-union sentiments, and employees’ statements expressing dissatisfaction with the union’s performance as bargaining representative. As in a showing of interest, the names are confidential and the specific extent of dissatisfaction is not divulged to the union.

**C. Decertification (“RD”) Petition**

Employees who wish to rid themselves of a Union can file an RD Petition upon a thirty percent showing of interest. The Employer cannot instigate or assist these Employees. In response, however, to questions by Employees, the Employer can advise Employees as to the
proper procedure for filing an RD Petition. Employees cannot decertify part of a unit, thus, a single plant in a multi-plant unit cannot file an RD Petition for only that single plant.

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. 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. The UC Petition can be filed even for an uncertified bargaining unit.

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.

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 may schedule a Representation Hearing (the “Hearing”) to occur ten to fifteen days thereafter. 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.
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. If an Employer fails to meet the minimum standards, the Board will refuse to exercise its jurisdiction. Generally, this does not present a problem for Employers because the minimum jurisdictional dollar amounts are quite low.

B. Showing Of Interest

The Employer must, 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. Furthermore, if any party raises allegation of fraud (other than forgery), misconduct or supervisory taint in connection with the showing of interest, the party will be directed to present its supporting evidence to the Regional Director within 7 days after raising them. If the Regional Director is presented with supporting evidence that gives reasonable cause to believe that the showing of interest may have been invalidated, the Regional Director should conduct a further administrative investigation. In the event a party attempts to present such evidence more than 7 days after raising the allegations, the Regional Director may regard the evidence as untimely filed and is not required to consider it, absent unusual circumstances.
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. 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. If a prior election results in a vote for no Union, the one-year period runs from the date of that election.

2. One-Year Certification Rule

Absent unusual circumstances, a Union’s certification will bar another petition during the subsequent twelve-month period. 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.

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

If a ULP charge is filed or pending, the NLRB generally will not process an election petition absent a request to proceed by the charging party. This rule is known as the “blocking charge” rule and is discretionary, not statutory. The rule will not be applied if (i) employees could, under the circumstances, exercise their free choice in an election notwithstanding the charge; (ii) the petition and charge raise significant common issues (iii) or where a R case
hearing or an election has been scheduled and time does not permit the determination on the possible merits of a recently filed charge.

4. **Fluctuating Work Force**

The Regional Director will dismiss a petition without prejudice if the representative work force is not present or if substantial corporate changes are occurring. If the work force is seasonal, the election is held at 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. 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;

ii. Where the contract is extended during its term;

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.28

b. **“Hot Cargo”** – A contract with an illegal “hot-cargo” clause will not bar an election.29

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. Whether the contract is extended 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; and (vi) the ratio of the number of Employees at the existing facility to the new facility.30 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. The Board has stated that Employee interchange and common day-to-day supervision are especially important in a finding of accretion.

d. **Time Limits** – An election petition can be filed between ninety and sixty days prior to a contract’s expiration.31 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.\textsuperscript{32} 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.\textsuperscript{33}

ii. In the health care industry, the petition must be filed between 120 and ninety days prior to the contract’s expiration.\textsuperscript{34} In seasonal industries, the ninety-day limit generally applied to petitions may also be extended.\textsuperscript{35}

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 waive their right to a Hearing at any 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. 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.

2. Full Consent Election Agreement

On January 25, 2005, the Board published in the Federal Register final revisions of Parts 101 and 102 of its Rules and Regulations. These revisions include a new Section 102.62 (c) which provides a third election agreement option for the parties to a representation case. As with the traditional “consent” agreement under Section 102.62 (a), all post election disputes—challenges and objections—would be decided by the Regional Director with no right of appeal to the Board. The Regional Director would investigate those matters either administratively or through a hearing and issue a report setting for the his/her findings, which would be final and binding.

3. Stipulation For Certification Upon Consent Election (“Stip”)

In a “Stip,” the parties also waive their right to a pre-election Hearing and all disputes initially are decided by the Regional Director. However, the parties retain 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 and objections to the conduct of the election.
B. Terms Of Voluntary Election Agreement

If a Voluntary Election Agreement is possible, the Regional Office will hold an informal conference to determine the following:

1. Date – Generally four weeks after the conference; payday may be most appropriate because absenteeism usually is at a minimum.

2. Place – Generally held at the Employer’s premises.

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.

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.

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. Although witnesses testify under oath, the 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 Employees in that 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** – includes Employees that can affect the terms of another Employee’s employment by having authority, in the interest of the Employer, 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, where the exercise of such authority requires use of independent Judgment. The fact that a person is called a supervisor, even if by himself, is not enough to meet the statutory standards of Section 2(11).

A tension exists between the exclusion of supervisors from the Act’s protections and the inclusion of professional Employees. Because most professional Employees assign and direct other Employees’ work, a literal reading of Section 2(11) would likely substantially reduce the number of professionals covered by the Act. To accommodate this tension in cases involving nurses and certain other professional Employees, the Board adopted a narrow reading of the phrase “in the interest of the Employer.” In its *Health Care & Retirement Corp.* decision, the Supreme Court reversed the Board’s holding that nurses who direct Employees in the care of patients do not have “authority in the interest of the employer” and are therefore not supervisors. The Court found that directions given in the interest of quality treatment for the patients are actions taken on behalf of the Employer. The Court
stated that three questions must be answered in the affirmative if an Employee is to be deemed a supervisor: (1) does the Employee have the authority to engage in one of the activities listed in Section 2(11) of the Act; (2) does the exercise of that authority require the use of independent judgment?; and (3) does the Employee hold the authority in the interest of the Employer?55

In Kentucky River Community Care, Inc.,56 the Board held that registered nurses were not supervisors, despite their independent direction of other employees engaged in patient care, because the exercise of “ordinary professional or technical judgment in directing less-skilled employees to deliver services” could not constitute “independent judgment” in responsibly directing employees under Section 2(11). The Supreme Court rejected this interpretation of the statute, and found that, although it is within the Board’s purview to determine the degree of discretion required for a finding of supervisory status, the Board could not interpret the statute to eliminate a particular kind of judgment, no matter how significant and loosely constrained by the employer, from the term “independent judgment.” The Court noted that almost any supervisory judgment worth exercising would rest on “professional or technical skill or experience,” and that if the Board applied its test to the other 11 supervisory functions (which would be required to avoid an asymmetrical interpretation of the
statute since the term “independent judgment” applied to all 12), there might be no “supervisors” outside the protection of the Act. However, the Court endorsed the NLRB’s rule that the burden of proof on the issue of supervisory authority rests with the party asserting that position.

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.

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

d. **Confidential Employees** – includes Employees (i) who are closely related to management or supervisory Employees and (ii) whose work involves labor relations. Secretaries for the plant manager or personnel department have been held to be confidential, but clericals in accounting, production control or payroll were not.

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.61

f. **Certain Family Members** – includes Employees who work for a parent or spouse,62 or those the Board determines whose interests are aligned with the management in some other way.63

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,64 (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.65

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.66

c. **Graduate Assistants** – Emblematic of the sometimes shifting sands of the substantive law under the National Labor Relations Act is the issue of whether teaching assistants, graduate assistants and research assistants at institutions of higher learning are
employees within the meaning of the NLRA. In *New York University*, the Board reversed prior precedent and reasoned that while graduate students are students, because they are paid to perform services under the direction and control of the employer, they fall within the coverage of Section 2(3) of the Act. However, in *Brown University*, the Board overturned *New York University* and returned to 25 years of pre-existing precedent in holding that the relationship between graduate assistants and their universities are primarily academic, rather than economic, in nature.

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 will not be included in the bargaining unit, unless the on-call Employee has a substantial work history as well as the likelihood of continued regular employment.

e. **Technical Employees** – Highly skilled Employees who do not meet the statutory test for professional Employees generally are placed in a separate bargaining unit. In the health care industry, a separate technical unit generally will be created if requested by the petitioner.
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. 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.

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.

c. **Craft Units** – Craft units may seek severance from a larger bargaining unit. 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.\textsuperscript{76}

d. \textbf{Department Units} – Department units may be formed, depending
on whether (i) 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. \textbf{Multi-Plant Unit} – There is a presumption in favor of a single-
plant unit. Even where the Employer transfers a number of
unionized Employees to a new facility, the Board will presume that
the unit at the new facility constitutes a separate appropriate unit.\textsuperscript{77}

To determine whether the presumption has been rebutted, the
NLRB looks to such factors as (i) central control of daily
operations and labor relations, (ii) interchange of Employees, (iii)
similarity of skills and job classifications, (iv) commonality of
working conditions, fringe benefits, and supervision, (v)
geographical separation, (vi) plant and product integration, and (vii) bargaining history.78

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.79 Bargaining units that include Employees who are solely employed by a user Employer and Employees who are jointly employed by the user Employer and a supplier Employer are permissible under the statute without the consent of the employers.80 The Board will apply traditional community-of-interest factors to decide if such units are appropriate. Where jointly employed new hires are placed in positions that are within the plain meaning of the contractual unit description, then the broad and unequivocal contract language compels their inclusion in the unit.81

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.” 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). 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. 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.

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 there exists a question concerning representation, a Decision and Direction of Election will be issued and an election will be scheduled twenty to 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. The Request will be granted only where compelling reasons exist, which include situations in which (i) 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.
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.\textsuperscript{87} If the Request for Review is granted, the parties may file additional briefs within fourteen days of the Order granting review.\textsuperscript{88} 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.\textsuperscript{89} Denial of the Request for Review amounts to Board approval of the Regional Director’s Decision.\textsuperscript{90}

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”).\textsuperscript{91} 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.\textsuperscript{92}

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.\textsuperscript{93}
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. 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.

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. 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.

4. Employees Who Previously Quit Or Were Discharged For Cause – generally are ineligible 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.

6. Employees On Leave – Employees on sick leave or other leaves of absence are eligible to vote if they are to be automatically restored to their duties following the sick leave or other leave of absence.

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.

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. However, paid union organizers, like other Employees, may be excluded from voting if they are temporary, or if their interests sufficiently differ from those of their coworkers.
VII. RULES GOVERNING PREELECTION CONDUCT BY EMPLOYERS

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 he cannot promise benefits nor threaten reprisal for Union activity. The Supreme Court has summarized the permissible scope of an Employer’s campaign statements regarding the possible consequences of unionization: “The prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control.” Applying these standards, the Board has invalidated elections where, not based on objective facts, the Employer has made statements predicting 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. Directions Versus Opinions

The Employer may not issue “directions” to Employees not to engage in Union activity (i.e., “don’t sign authorization cards”), but it may express “opinions” advising against Union activity (i.e., “refuse to sign any Union authorization cards and avoid a lot of turmoil”).

3. 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. 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.
B. No Solicitation And No Distribution Rules

The Employer, with some limitations, may refuse to allow solicitation and distribution of Union literature by Employees. The Employer generally can prohibit solicitation and distribution by Non-Employees. Solicitation includes oral communications and dissemination of authorization cards.

1. Employees

a. General Rule – The Employer may prohibit Employee solicitation in “working areas” during “working time.” The policy, however, must be carefully drafted and refer to “working time,” not “working hours.” Non-working areas include restrooms, cafeteria, parking lot, and time clocks.

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. Offsite Employees (in contrast to non-employee union organizers) also have an access right, for organizational purposes, to their Employer’s facilities. However, an Employer may have heightened property concerns regarding offsite employees. If the Employer can demonstrate that
an influx of offsite Employees raises security problems, traffic control problems, or other difficulties, access may be restricted.109

2. Non-Employees

The Employer generally may prohibit distribution of Union literature 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.”110 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.111

C. 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, including (i) the time and place of the interrogation, (ii) the personnel involved, (iii) the information sought, and (iv) the Employer’s known preferences.112

2. Systematic Polling

Under current Board law, before Employees may be polled, 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,113 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.114

D. 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. The NLRB, however, has held in recent decisions that passive observation of
Employee union activity by an Employer or supervisor is permissible so long as the conduct does
not disrupt or interfere with the Union’s organizing activities.115

E. 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.116 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.117

F. 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
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.

G. Captive Audience Speeches

Generally, it is not an unfair labor practice for an Employer to make a pre-election speech to Employees on company time and premises and to deny the Union’s request for an Opportunity to respond. However, neither the Employer nor the Union may deliver captive-audience speeches to massed groups of Employees pertaining to election issues within the twenty-four-hour period immediately preceding an election. Violation of this twenty-four-hour rule is not an unfair labor practice but is grounds for setting aside the election. The NLRB has refused to extend this rule to include (i) statements made by management representatives to individual Employees at their respective work stations or (ii) the distribution of campaign literature.

H. 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 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 his 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’ 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. 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. Only if the number of challenged ballots is sufficient to affect the outcome of the election will the eligibility of challenged voters be determined.
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 and with the assistance of the observers.

F. **Mail Balloting**

The NLRB has a new policy concerning mail balloting. Under its prior policy, the Regional Director could not order a mail ballot election unless “unusual circumstances” showed that a manual election was “impossible to perform.” The Board has changed its policy to allow mail balloting at the Regional Director’s discretion. The Board 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
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.

In an important and very recent opinion, the Board entertained the issue of the validity of a voluntary recognition pursuant to a neutrality/card check agreement. In entertaining an employee attempt to file a decertification petition to challenge a voluntary recognition pursuant to a card check/neutrality agreement with the union, the Board held that employees have 45 days after receiving notice that their employer has recognized a union based upon a card check majority to file a petition for decertification election or to support an election petition filed by a rival union. These rules apply even if the parties execute a collective bargaining agreement following voluntary recognition. Additionally, the Board imposed a new requirement that the employer and/or the union must promptly notify the proper Regional Office of the NLRB in writing of the grant of voluntary recognition and must post an official NLRB Notice in conspicuous places in the workplace, alerting employees to the recognition. Once the 45 day
notice period has passed, a “recognition bar” to any representation petitions at the Board arises.\(^{126}\)

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 that is not permitted in the rest of American industry. 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. Section 8(f) or “pre-hire agreements” permit the establishment of bargaining relationships and bargaining units before Employees are hired and before Union have shown that they represent, for collective bargaining purposes, a majority of a contractor’s work force. 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 party may repudiate the bargaining relationship at that time.\(^{127}\) 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.

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 Union’s majority and caused an election to be set aside.\(^{128}\) 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.” 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.” 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 the 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.

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 and Connair Corp. 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. 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.135 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.136
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. 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.

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. 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 he/she concludes that the case raises “substantial and material factual issues.” 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.” 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 elections” – 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. 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). 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). Objections to elections will also be accepted by the Agency if transmitted to the facsimile machine of the appropriate office.
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. At this stage, 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.

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. 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: Parties Obtain Final Decision by Regional Director

As noted in Part IV, when the parties enter into an Agreement for Consent Election (“Consent”) they agree that the Regional Director shall make the final decision on pre- and post-election disputes. 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.\textsuperscript{150}

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” form of election agreement, parties to a “Stip” agree to the Board’s final resolution of challenges and election objections.\textsuperscript{151} 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.\textsuperscript{152} 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.\textsuperscript{153} Parties have the right to file exceptions to the Regional Director’s Report and recommendations; whether or not exceptions are filed, the Board makes the final decision.\textsuperscript{154}

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) she 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) she may issue a Supplemental Decision, in which case the Board considers the case only if a timely Request for Review is filed.\textsuperscript{155}

4. **Consolidation of Objections/Challenges with ULP Proceedings**

An Employer’s or labor organization’s allegedly objectionable pre-election conduct may also amount to 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 should 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.\textsuperscript{156} 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.

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.\textsuperscript{157} 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 a “consent” agreement, which requires 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). 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 untrammelled choice in an election.” 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.

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.161

Taken out of context, the Board’s scientific metaphor and “laboratory” reference might erroneously imply a per se rule. A contrary conclusion is suggested by the Board’s equally significant statement that “an atmosphere” making voters’ free choice “improbable” will “sometimes” justify a rerun election. Nearly five decades of litigation over what does and does not destroy “laboratory conditions” has done little to clarify the confusion inherent in that oracular ruling.

The Board’s approach to campaign propaganda and misrepresentations, in particular, has fluctuated significantly over the years. Prior to 1962, the Board preferred to leave evaluation of campaign statements and misstatements to the electorate and to refrain from censoring and regulating the contents of election propaganda. In its 1962 Hollywood Ceramics decision, the Board articulated a “balancing” approach guaranteed to foster litigation:

[A]n election should be set aside only where there has been misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.162

The Hollywood Ceramics doctrine was overruled in 1977 when the Board in Shopping Kart substituted a policy of nonintervention. Under the new doctrine, only fraudulent or deceptive campaign practices such as misuse of Board processes or forgery of documents would
warrant setting aside an election.\textsuperscript{163} Within the next five years the Board reversed itself on two more occasions, in \textit{General Knit} (1978)\textsuperscript{164} and then \textit{Midland National Life Insurance Co} (1982).\textsuperscript{165} The Board has continued to follow the “hands off” approach of Midland National Life, declining to set aside elections on the basis of alleged campaign misrepresentations by Employers or unions that do not involve misuse of the Board process or forged documents.

The law governing a related category of pre-election speech has remained more stable. The Board still holds to its longstanding \textit{Peerless Plywood} rule prohibiting “captive audience” campaign speeches to massed groups of Employees on company premises, by Employers or unions, within the twenty-four–hour period immediately preceding an election.\textsuperscript{166} The effect of that rule, however, has been weakened by subsequent decisions – for example, exempting “captive audience” speeches delivered by supervisors or management to Employees individually or in small groups.\textsuperscript{167}

Another area of fluctuation involved a union’s offer of a “conditional” waiver or reduction in union fees, limited to Employees who pledge their support prior to the election (for example, joining the union, or signing an authorization card, or promising to vote for the union). The Board’s position shifted until settling into its present form as upheld by the Supreme Court in \textit{Savair}: if limited to pre-election supporters, such offers are deemed objectionable.\textsuperscript{168} As a general matter, pre-election grants or promises of benefits by the Employer will invite election objections (as well as ULP charges). Although unions typically lack the same capacity to bestow employment-related benefits, the grant of direct and valuable consideration to prospective voters may risk similar accusations of vote-buying.

2. \textbf{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.” 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.

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; 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).

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.

If the Regional Director or Board, as appropriate, invalidates an election based on meritorious objections, the usual remedy is a rerun election. 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. 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.175

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.176 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.177

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 “technical” 8(a)(5), 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.178
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 (6th Ed., Norris, Ed. 1992)
Section 101.19 of the Board’s Rules and Regulations, 29 C.R.R. § 101-19 (citations to the Rules and Regulations appear hereafter in abbreviated format as R&R 10...).

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 (1981). 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).

See Electro Metallurgical Co., 72 NLRB 1396, 1399 (1947).

See Levitz Furniture Company of the Pacific, 333 NLRB 717 (2001); See generally, NLRB Casehandling Manual, Part II, Representation Proceedings ¶11042, 11003.1(b) and 11250(citations to the NLRB Casehandling Manual, Part II, Representation Proceedings appear hereafter in abbreviated format as Casehandling Manual ¶__.)

See Casehandling Manual Section 11028 et. Seq.
30 See e.g., Staten Island Univ. Hosp., 308 NLRB 58 (1992).
35 See Cooperative Azucarera Los Canos, 122 NLRB 817 n.2 (1958).
36 R&R 101.19(a)(5).
37 R&R 102.62(a).
38 See OM 05-40 (Revised) and Casehandling Manual Sections 11084-11098.
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 11022.3(c).
44 Casehandling Manual ¶ 11022.3(d).
45 Peabody Coal Co., 197 NLRB 1231 (1972).
46 Casehandling Manual ¶ 111026.2.
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).
52 See 29 U.S.C. § 152(11); see also NLRB v. Health Care & Retirement Corp. of America, 114 S.Ct. 1778 (1994).
55 Id.
56 323 NLRB No. 209 (1997).
59 See Di Giorgio Fruit Corp., 80 NLRB 853, 855 (1948).
63 See International Metal Prods. Co., 107 NLRB 65 (1953) (children of major stockholder could be excluded from unit).
64 See 29 U.S.C. § 152(2).
66 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).

67  See New York University, 332 NLRB No. 111 (October 31, 2000).
68  Brown University, 342 NLRB No. 42 (2004).
69  See Columbus Plaza Motor Hotel, 148 NLRB 1053 (1964).
71  See Barnert Memorial Hosp. Ass’n, 217 NLRB 775, 777 (1975).
75  See 29 U.S.C. 159(b)(2).
77  See Gitano Group, 308 NLRB 1172 (1992).
78  See Mercy Health Services North, 311 NLRB No. 38 (1993).
81  See Gourmet Award Foods, Northeast, 336 NLRB No. 77, slip op. at 3 (October 1, 2001).
85  R&R 102.67(b).
86  R&R 102.67(c)(1)-(4).
87  R&R 102.67(e).
88  R&R 102.67(g).
89  R&R 102.67(b).
90  R&R 102.67(f).
91  See Excelsior Underwear, 156 NLRB 1236 (1966).
94  29U.S.C. 159(c)(3).
95  See Larand Leisurelies, 222 NLRB 838 (1976).
97  See Data Technology Corp., 281 NLRB 1005 (1986).
98  See Vogue Art Ware & China Co., 129 NLRB 1253 (1961).
102  Id. at 1229
103  See 29U.S.C. 158(c).
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 non-derivative access rights to offsite employees, and to adopt a balancing test
that takes proper account of an employer’s “predictably heightened property concerns”).
Id. slip op. at 3, 5.
See St. Luke’s Hosp., 300 NLRB 836 (1990); Tri-County Medical Center, Inc., 222
NLRB 1089 (1976).
Id. at 539.
333 NLRB No. 105 (March 29, 2001).
See Micro Measurements, 233 NLRB 76 (1977)
See Coca-Cola bottling Co., 132NLRB481 (1961); see also Wesselman’s Enters., 248
NLRB 1017 (1980).
See Livingston Shirt Co., 107 NLRB 400 (1953).
Ryder Mem’l Hospital, 351 NLRB No. 26 (2007).
See Peerless Plywood Co., 107 NLRB 427 (1953)
Casehandling Manual ¶ 11301.2; see also ¶ 11336.
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).
Dana Corp., 351 NLRB No. 28 (2007).
See San Diego Gas and Electric 325 NLRB 218 (1998); see also Sitka Sound Seafoods,
325 NLRB 125(1998).
Id. at 613.
Id. at 614.
Id.
242 N.L.R.B. 1026 (1979) aff’d and remanded for reconsideration of bargaining order
261 N.L.R.B. 1189, enforcement denied, 721 F2d 1355 (D.C. Cir. 1983), cert. denied sub
270 NLRB 578 (1984)
R& R 102.69(b).
29 U.S.C. §159(c)(3); R&R 102.70.
R&R 102.69(c)(l).
NLRB Casehandling Manual ¶ 11364.
R&R 102.69(d).
R&R 102.69(e).
R&R 102.69(a).
R&R 102.69(a).
R&R 102.111(b).
R&R 102.114(f).
R&R 102.69(a); Casehandling Manual, ¶ 11392.5.
Casehandling Manual, ¶ 11396.2.
Casehandling Manual ¶ 11394.
R&R 102.62(a).


R&R 102.62(b).
R&R 102.69(c)(2).
R&R 102.69(i)(l).
R&R 102.69(f).
R&R 102.69(c)(3), 102.69(c)(4).
Casehandling Manual ¶ 11730, 11734.
R&R 102.33(a)(2).

29 U.S.C. § 158(a)(1) and (a)(3).
137 NLRB 1782, 50 LRRM 1489 (1962).

77 NLRB 124, 21 LRRM 1137 (1948).
140 NLRB 221, 224, 51 LRRM 1600 (1962).
228 NLRB 1311, 94 LRRM 1705 (1977).
263 NLRB 127, 110 LRRM 1489(1982).
107 NLRB 427, 33 LRRM 1151 (1953).


Outline of Law and Procedure in Representations Cases at 384, citing Athbro Precision Engineering Co., 166 NLRB 966 (1967).

See Outline at 384-386.

See Outline at 384-408.

R&R 102.70; Casehandling Manual ¶ 11350.5.
Casehandling Manual ¶ 11450-11452.


NLRA Section 9(c)(3), 29 U.S.C. § 159(c)(3).
UNFAIR LABOR PRACTICE LAW AND PROCEDURE

I. Statutory Overview

A. Section 7 of the NLRA (the Act) gives employees the right to engage in union or other concerted activities, and the right to refrain from such activities.

1. Meaning of “concerted.” By definition, action by a single employee in his own interest cannot be “concerted”. However, the activities of a single employee are protected when undertaken “with or on the authority of” their fellow workers and not solely on their own behalf in order to engage in concerted activity. Meyers Industries, 281 NLRB 882 (1986).

Protected concerted activities need not be union-related. Any employee activity involving terms and conditions of employment fall within the statutory protections. For example, where four insurance agents had reported allegedly fraudulent handling of claims by their manager to both the insurer’s claims department and state governmental authorities, their subsequent discharges were deemed to be unfair labor practices because they had engaged in protected concerted activity. Georgia Farm Bureau Mutual Ins. Cos., 333 NLRB No. 100 (2001).

However, otherwise protected activity may lose the protections of the NLRA, if it is accompanied by unreasonable or disloyal conduct. E.g., Nynex Corp., 338 NLRB No. 78 (2002).

In order for the collective bargaining process to function properly, adequate information about the topics at issue in both contract bargaining or contract administration must be provided. As such, an employer’s refusal to provide relevant information to its bargaining partner constitutes an unfair labor practice. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). Although the information demanded must be relevant to the bargaining relationship, the Board applies a broad “discovery-type standard” in evaluating the request and the response. NLRB v. Acme Industrial Co., 385 U.S. 432 (1967).

2. Balancing Section 7 rights and property rights. NLRB v. Babcock & Wilcox, 351 U.S. 105; Lechmere, Inc v. NLRB, 502 U.S. 527, 139 LRRM 2225 (1992); Republic Aviation v. NLRB, 324 U.S. 793. Quote from Lechmere: “In Babcock, as explained above, we held that the Act drew a distinction ‘of substance’, 351 U.S., at 113, between the union activities of employees and nonemployees. In cases involving employee activities, we
noted with approval, the Board ‘balanced the conflicting interests of employees to receive information on self-organization on the company’s property from fellow employees during non-working time, with the employer’s right to control the use of his property.’  Id., at 109-110. In cases involving nonemployee activities (like those at issue in Babcock itself), however, the Board was not permitted to engage in that same balancing (and we reversed the Board for having done so). By reversing the Board’s interpretation of the statute for failing to distinguish between the organizing activities of employees and nonemployees, we were saying, in Chevron terms, that §7 speaks to the issue of nonemployee access to an employer’s property. Babcock’s teaching is straightforward: §7 simply does not protect non-employee union organizers except in the rare case where ‘the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.’ 351 U.S., at 112.”

Loehmann’s Plaza, 316 NLRB 109 (1995). Nonemployee union organizers were not entitled to access where General Counsel failed to prove that Respondent’s customers, the intended audience of the union’s handbilling and picketing, were accessible only through trespassory mean. Leslie Homes, Inc., 316 NLRB 123 (1995), rev. den. 68 F.3d 71 (3rd Cir. 1995). Respondent did not violate Act by refusing to permit nonemployee representatives of union to distribute leaflets to potential home buyers on Respondent’s premises where reasonable alternative means were available to union for communicating its area standards message to potential customers.

Four B. Corp., 325 NLRB 186, 1997) Jenfd. 163 F3d. 1177 (10th Cir. 1998). Respondent violated Section 8(a)(1) by prohibiting union from soliciting off-duty employees while allowing nonunion groups to solicit customers.

3. No-solicitation and no-distribution rules. Our Way, 268 NLRB 394 (1983). In Our Way, the Board reaffirmed the view that rules prohibiting solicitation during working time are lawful because such rules implying that solicitation is permitted during nonworking time. However, bans on solicitation during “company time” remain presumptively invalid.

B. Section 8(a) of the Act – Employer ULPs.

1. Section 8(a)(1) prohibits employer from interfering, restraining or coercing employees with respect to their Section 7 rights.

   (a) Examples of 8(a)(1) conduct:

      The Board test is: “...whether under all of the circumstances
the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.”

(2) Threats of reprisal. NLRB v. Gissel Packing, 395 U.S. 575, 618-619 (1969). “[a] prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control.... If there is an implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on representation and coercion, and as such without the protection of the First Amendment.”

(3) Promise and grant of benefits. NLRB v. Exchange Parts, 375 U.S. 405 (1964). “The danger inherent in well-timed increases in benefits is the suggestion of a fist inside a velvet glove. The employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.”

(4) Investigatory interview. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). Employee insistence upon union representation at an employer’s investigatory interview, which the employee reasonably believes might result in disciplinary action, is protected concerted activity. Discipline or discharge of an employee for refusal to cooperate in such an interview violates Section 8(a)(1). Employees who are not represented by a union do not have a right to representation in an investigatory interview. IBM Corp., 341 NLRB No. 148 (June 9, 2004)(overruling Epilepsy Foundation, 331 NLRB No. 92 (2000)).

2. Section 8(a)(2) prohibits employer interference with and domination of a labor organization.

(a) Examples of 8(a)(2) conduct:


(2) Interference or domination of a labor organization. NLRB v. Cabot Carbon, 360 U.S. 203 (1959); Electromation, Inc., 309 NLRB No. 163. Definition of labor organization: “The
term ‘labor organization’ means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” Compare Polaroid Corp., 329 NLRB No. 47 (Sept. 30, 1999) (employer-dominated council was statutory labor organization) with Crown Cork & Seal Co., Inc., 334 NLRB No. 92 (July 20, 2001) (employee committee not a statutory labor organization).

3. Section 8(a)(3) prohibits employer discrimination against an employee because of his/her engaging in union activities or refraining from such activities.

   (a) The “motive” test. Wright Line, 251 NLRB 1083 (1980). “First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.”

   (b) Reinstatement of strikers. Laidlaw Corp., 171 NLRB 1366; Mastro Plastics v. NLRB, 350 U.S. 270 (1956). Economic strikers can be permanently replaced. Unfair labor practice strikers cannot be so replaced.

   (c) Refusal to hire. FES, 331 NLRB NO. 20 (2000). It is unlawful to refuse to hire, or to consider an applicant for employment, due to anti-union animus. Whether the applicant would have been hired but for the discrimination against him must be litigated at the hearing on the merits.

4. Section 8(a)(4) prohibits employer discrimination against an employee because he/she resorted to, or cooperated with, the NLRB.

5. Section 8(a)(5) prohibits the employer from refusing to recognize and bargain in good faith with a union that is the exclusive representative of employees.

   (a) Bad-faith bargaining. Reichhold Chemicals, 288 NLRB 69 (1988). “...we intend to adhere to the general proposition that the content of bargaining proposals will, in certain circumstances, be evidence of an intent to frustrate the collective-bargaining process.”

(c) Withdrawal of recognition. *Brooks v. NLRB*, 348 U.S. 96 (1954); *NLRB v. Curtin Matheson*, 494 U.S. 775 (1990); *Levitz*, 333 NLRB NO. 105 (March 29, 1001); *Allentown Mack Sales and Service, Inc. v. NLRB*, 118 S.Ct. 818 (1998). *Auciello Iron Works, Inc. v. NLRB* 577 U.S. 781 (1996). Employer violated Act by disavowing collective-bargaining agreement because of good-faith doubt of union’s majority status at time contract was made, where doubt arose from facts known to Employer before union accepted contract offer. For example, the same legal standards that apply to an employer’s obligation to provide bargaining information to its union apply to union responses to employer information requests. *Printing & Graphic Communications Local 13 (Oakland Press Co.*), 233 NLRB 994, 996 (1977), *aff’d* 598 F.2d 267 (D.C. Cir. 1979).

C. Section 8(b) of the Act – Union ULPs.

1. Section 8(a)(1)(A) prohibits a union from restraining and coercing employees with respect to their Section 7 rights. Section 8(b)(1)(B) prohibits a union from coercing an employer in the selection of a representative.

(a) Violence and other physical misconduct,


(c) Duty to represent fairly. *Vaca v. Sipes*, 386 U.S. 171 (1967). Incumbent union has not only a duty to bargain with the employer but also a duty to represent fairly the employees,

(d) Union conduct that does not affect the employment relationship. *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB No. 193 (August 2000). Section 8(b)(1)(A)’s proper scope, in union discipline cases, is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board’s processes, pertains to unacceptable methods of union coercion, such as physical violence in
organizational or strike contexts, or otherwise impairs policies imbedded in the Act.

2. Section 8(b)(2) prohibits a union from causing an employer to commit a Section 8(a)(3) violation.


*California Saw & Knife Work*, 320 NLRB 224 (1995), enf'd sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (1998). When or before union seeks to obligate employee to pay fees and dues under union-security clause, union should inform employee that he has right to be or remain nonmember and that nonmembers have right (1) to object to paying for union activities not germane to union's duties as bargaining agent and to obtain reduction in fees for such activities; (2) to be given sufficient information to enable employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections. If employee chooses to object, he must be apprised of percentage of reduction, basis for calculation, and right to challenge these figures.

*CWA Local 9403 (Pacific Bell)*, 322 NLRB 142 (1996), enf'd sub nom. *Finerty v. NLRB*, 113 F.3d 1288, cert. 118 S.Ct. 558 (1997). International union representing about 2,400 different bargaining units nationwide in number of different industries did not violate Act when it charged objection nonmembers uniform fee that did not vary according to objector's bargaining unit, industry, or employer.

*Rochester Manufacturing Co.*, 323 NLRB No. 36 (Mar. 12, 1997). Employees who were represented by union during years they were deprived notices of *Beck* rights may come forward in compliance stage of Board proceeding and, with reasonable promptness, elect nonmember status. Those who did so may then file objections as to expenditures for each year of Section 10(b) period. Union then must process these objections as it would have if objections had been filed in accounting period in question. Union must then reimburse those objectors for any dues and fees for nonrepresentational expenditures. *Food & Commercial Workers Locals 951, 7, & 1036 Meijer, Inc.*, 329 NLRB 730, 736 (1999), *enf. den.*, 249 E3d 1115, (9th Cir. 2001), *Rehrg. en banc granted* by 265 F.3d 1079 (9th Cir. Sep 14, 2001). Represented employees, whether or not they are members of the union that represents them, under *Beck* may be charged their fair share of the union's organizing expenses.

3. Section 8(b)(3) prohibits a union from refusing to bargain in good faith with the employer.
4. Section 8(b)(4) prohibits, inter alia, secondary boycotts and coercion to resolve a jurisdictional dispute.

   (a) *NLRB v. BCTC (Denver Bldg. Trades)*, 341 U.S. 675 (1951). Union can picket only the employer with whom it has a dispute.

5. Section 8(b)(5) prohibits a union from charging excessive or discriminatory initiation fees.

6. Section 8(b)(6) prohibits a union from causing an employer to pay for services that are not to be performed.

7. Section 8(b)(7) prohibits a union from picketing an employer for recognitional or organizational purposes.

8. Section 8(e) prohibits “hot cargo” agreements between an employer and a union.

II. Procedures Before NLRB

A. Charge.

   1. Can be filed by “any person.”

   2. No “standing to sue” requirement.

   3. Board cannot act on its own.

B. Charge must be filed within 6 months of alleged conduct.

C. Regional Office Investigations.

D. Possible Outcomes.

   1. Charge has no merit.

      (a) Party can withdraw charge.

      (b) Party can decline to withdraw and charges will be dismissed.

      (c) Dismissal can be appealed to General Counsel in Washington.

   2. Charge has merit.

      (a) Respondent can settle. See below as to types of settlements.

      (b) Absent settlement, Region will issue complaint and institute formal proceedings. See below as to these proceedings.
E. Types of Settlements.

1. Private agreement between Charging Party and Respondent.

2. Informal NLRB settlement between Respondent and Regional Directors. Charging Party can join or protest.

3. Formal NLRB settlement. Provides for Board order and court decree. If there is subsequent misconduct, Board seeks adjudication of contempt.

F. Formal Proceedings.

1. Complaint; trial before ALJ; decision by ALJ; appeals to Board; decision by Board; review by circuit court; circuit court decision; seek certiorari review by Supreme Court.

G. Preliminary Injunctions, Pending Decision by NLRB.

1. Section 10(j) – discretionary.
   (a) Standards for grant.

2. Section 10(l) – mandatory.

III. Remedies for ULPs

A. Cease and desist orders.

B. Affirmative relief.

1. Reinstatement.

2. Backpay.

3. Restore the status quo.


C. Extraordinary remedies.

D. Responsibility for conduct of others.

1. Successorship.

2. Single employers.

3. Alter egos.

4. Joint employers.
NATIONAL LABOR RELATIONS BOARD
BASIC PROCEDURES IN CASES INVOLVING
CHARGES OF UNFAIR LABOR PRACTICES

CHARGE
 Filed with Regional Director; alleges unfair labor practice by employer or labor organization.

INJUNCTION
 Regional Director must ask district court for temporary restraining order in unlawful boycott and certain picketing cases.

INJUNCTION
 General Counsel may with Board approval ask district court for temporary restraining order after complaint is issued in certain serious unfair labor practice cases.

INVESTIGATION
 Regional Director determines whether formal action should be taken.

WITHDRAWAL - REFUSAL TO ISSUE COMPLAINT - SETTLEMENT
 Charge may with Agency approval be withdrawn before or after complaint is issued. Regional Director may refuse to issue a complaint; refusal (dismissal of charge) may be appealed to General Counsel. Settlement of case may occur before or after issuance of complaint (informal settlement agreement subject to approval of Regional Director, formal settlement agreement executed simultaneously with or after issuance of complaint, subject to approval of Board). A formal settlement agreement will provide for entry of the Board’s order and may provide for a judgment from the court of appeals enforcing the Board’s order.

COMPLAINT AND ANSWER
 Regional Director issues complaint and notice of hearing. Respondent files answer in 10 days.

HEARING AND DECISION
 Administrative Law Judge presides over a trial and files a decision recommending either (1) order to cease and desist from unfair labor practice and affirmative relief or (2) dismissal of complaint. If no timely exceptions are filed to the Administrative Law Judge’s decision, the findings of the Administrative Law Judge automatically become the decision and order of the Board.

DISMISSAL
 Board finds respondent did not commit unfair labor practice and dismisses complaint.

REMEDIAL ORDER
 Board finds respondent committed unfair labor practice and orders respondent to cease and desist and to remedy such unfair labor practice.

OTHER DISPOSITION
 Board remands case to Regional Director for further action.

COURT ENFORCEMENT AND REVIEW
 Court of appeals can enforce, set aside or remand all or part of the case. U.S. Supreme Court reviews appeals from courts of appeals.
INJUNCTIONS AND JURISDICTIONAL DISPUTES
Sections 10(j), 10(k) and 10(l)

I. Introduction

The National Labor Relations Act (hereafter “Act”) empowers the National Labor Relations Board (hereafter “Board”) to order remedial action to be taken when unfair labor practices are found to have been committed. The Board is also empowered to seek from the district courts of the United States appropriate injunctive relief against charged unfair labor practices pending the final adjudication of the charges by the Board itself. The Board most often invokes Section 10(l) of the Act in seeking such interim injunctive relief. That Section requires the Board to seek, through court intervention, the immediate cessation of certain unlawful conduct, principally work stoppages and picketing having proscribed objectives. Although relied upon less often, Section 10(j) of the Act likewise empowers the Board, at its discretion, to seek interim injunctive relief from the district courts.

In addition, special Board procedures, including the discretionary institution by the Board of interim injunctive proceedings, are involved in the processing of charges that allege violations of Section 8(b)(4)(D) of the Act – a Section which applies to jurisdictional disputes between unions over work assignments.

II. Mandatory Section 10(l) Injunctions

The Board is required to petition for interim injunctive relief under Section 10(l) when investigation of a charge yields reasonable cause to believe that one of the following Sections of the Act has been violated:

1. Section 8(b)(4)(A), which prohibits union coercion to compel an employer either to join a labor organization or to enter into a hot cargo agreement.

2. Section 8(b)(4)(B), which prohibits secondary boycott pressures by unions.

3. Section 8(b)(4)(C), which prohibits union coercion to compel an employer to bargain with one union when another union has been certified by the Board.

4. Section 8(e), which prohibits unions and employers from entering into hot cargo agreements, and

5. Section 8(b)(7), which prohibits organizational or recognition picketing, or threats thereof, by unions.

In one situation, the Act excepts certain alleged violations of Section 8(b)(7) from the mandatory injunction provisions of Section 10(l). An injunction may not be sought in cases arising under that Section when a meritorious charge is filed under Section 8(a)(2) of the Act, which prohibits an employer from dominating, interfering with, or supporting a labor organization.
Regardless of which of the preceding Sections of the Act is alleged to have been violated, the procedure leading to a Board application for 10(1) interim injunctive relief is the same. Charges alleging such violations are accorded statutory “priority”, and the regional office begins an investigation immediately upon the filing of such a charge. If the investigation reveals that the charge has merit and that the charged conduct is continuing or that, despite the fact that the charged conduct has been discontinued, its resumption appears likely, the regional director must immediately petition for injunctive relief. The issuance of an NLRB complaint charging that an unfair labor practice has been committed is not a prerequisite to an application for 10(1) injunctive relief. Moreover, in most cases in which the investigation reveals that a charge has merit, the regional offices are free to proceed without authorization from the General Counsel. Approval from the members of the Board itself is never required.

Section 10(1) also permits temporary restraining orders to be applied for by the Board and to be issued by the district courts. Such an order provides ancillary interim relief prior to a court hearing on the Board’s injunction petition. The issuance of a temporary restraining order is conditioned, however, upon a showing that the charging party will suffer substantial and irreparable injury unless the order is issued. Such an order may be applied for and issued without giving notice of the date and time at which the application will be made. Ordinarily, however, an application will be made without notice only when circumstances render it impossible to communicate without delay with either the charged party or its attorney. When a Section 10(1) temporary restraining order is issued without notice, the statute provides that it can be effective for no longer than five days.

The following circumstances are illustrative of those that would warrant the Board’s application for a temporary restraining order:

1. A threat of substantial financial loss relative to the size of the employer enterprise
2. The interruption of construction work on a military or similar installation that has an impact on the national defense
3. A real threat of bankruptcy, loss of a business relationship, or substantial unemployment should striking or picketing be allowed to continue
4. Picketing that includes violence or massing
5. A cessation of work that presents a public danger, such as the collapse of a partially completed structure
6. The possibility that perishable goods may spoil
7. Disruption of a business that is essential to public safety, health, or welfare, such as a public utility, and
8. A situation in which time is of the essence, such as one in which a scheduled event or a seasonal business may be disrupted.
Except in cases involving novel issues, the regional director may apply for the issuance of a temporary restraining order without prior authorization from the General Counsel.

In order to grant 10(1) injunctive relief, the court must first find that the regional director has reasonable cause “to believe [that the] charge is true and that a complaint should issue” and that, under general equitable principles injunctive relief would be “just and proper.” With a fair degree of uniformity, the courts have held that the “just and proper” requirement is met by a showing that the harm or disruption flowing from the charged conduct can best be avoided or reduced by the granting of an injunction. Because the need for injunctive relief from some sort of damage invariably exists in 10(1) cases involving strikes, picketing, or the threats of such conduct, the primary issue before the district court in such cases will normally be whether the regional director has “reasonable cause” to believe that the Act has been violated.

Although the party bringing charges before the Board has certain rights in the injunction proceedings before the district court, it is not a full party to the proceeding. Therefore, the charging party may not present arguments or theories inconsistent with those advanced by the regional director and may not prosecute any appeal from the district court’s ultimate decision. The charging party does, however, have the right to be represented by counsel at court hearings, to introduce evidence and file briefs, to be kept informed of all actions and to receive copies of all documents filed in the case before the court, and to inform the court of any matters he deems pertinent and relevant.

Although the discovery principles of the Federal Rules of Civil Procedure are generally applicable to Section 10(1) injunction proceedings, the need for prompt relief and expeditious handling tempers their actual application. Hence district courts often shorten, and may even eliminate, discovery procedures in order that the injunctive relief sought is not unreasonably delayed. Further, although oral testimony is generally taken with respect to the factual issues involved, even this may be dispensed with and injunctive relief granted based entirely upon a court’s review of the formal papers, supporting affidavits, and briefs or oral argument. Because the ultimate question is whether there is reasonable cause to believe that the Act has been violated, it is unnecessary for the court to make credibility determinations or resolve factual disputes. Neither the grant nor the denial of an application for interim injunctive relief is res judicata as to any issue in subsequent unfair labor practice proceedings before the Board, and therefore the parties are not foreclosed from relitigating the entire case in the latter forum.

A 10(1) injunction remains operative only during the pendency of the unfair labor practice proceedings leading to an ultimate Board decision and order. Consequently, because Board orders are not self-enforcing, the conduct enjoined by the court may lawfully be resumed after the Board issues a final decision containing a cease-and-desist order that prohibits the continuation of such conduct. As a practical matter, a resumption seldom occurs; if the conduct is resumed, however, the Board, under Sections 10(e) and (f) of the Act, may apply to a United States court of appeals for a further injunction or restraining order against the continuation of the conduct pending review of the Board’s order by the latter court.
III. Discretionary Section 10(j) Injunctions

Section 10(j) of the Act grants the Board the discretion, upon issuance of a complaint charging the commission of any unfair labor practice, to seek appropriate injunctive relief from a district court of the United States prior to the Board’s ultimate adjudication of the merits of the complaint.

The procedures applicable to the Board’s handling of a Section 10(j) case differ in several important respects from those pertaining to 10(l) injunction situations. Initially, as in 10(l) procedures, an unfair labor practice charge must be filed with, and investigated by, a regional office. In contrast to 10(l) procedure, however, the actual issuance of a complaint charging the commission of an unfair labor practice is a statutory prerequisite to an application for 10(j) injunctive relief. Moreover, the Board has not delegated to the General Counsel or to the regional directors its statutory power to decide whether to seek 10(j) relief. Accordingly, the applicable 10(j) practice calls for the regional director to issue an unfair labor practice complaint upon a meritorious charge and to refer the question of 10(j) injunctive relief, together with his recommendation thereon, to the General Counsel in Washington. If the General Counsel determines that injunctive relief would be appropriate, the General Counsel requests the Board to authorize an application for such an injunction. Upon the Board’s authorization, the regional director petitions a district court for the appropriate injunctive relief.

It should be noted that the existing practice gives the General Counsel what is, in effect, a preclusive power of sorts over the Board’s discretionary 10(j) decisional powers. For, in those instances in which the General Counsel believes that injunctive action would be inappropriate, the Board is not presented with the question of whether to authorize a 10(j) injunction.

It should also be noted that in those instances where the General Counsel elects to request from the Board authorization to petition a district court for 10(j) injunctive relief, the Board will not accept a submission either from the charging party showing the need for such relief or from the charged party opposing the relief. Nor will the Board allow either party to make an oral presentation concerning the matter. Thus, only the General Counsel is allowed to make a presentation to the Board justifying a 10(j) application to the district court.

As under Section 10(l), temporary restraining orders under Section 10(j) may be issued upon the Board’s application. Unlike 10(l), however, 10(j) does not affirmatively provide for the issuance of such orders without notice that is, **ex parte**. It nevertheless appears that Rule 65(b) of the Federal Rules of Civil Procedure empowers the district courts to issue such orders **ex parte** upon a showing that “immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.” Because the Board is the applicant for the temporary relief, what this means, in effect, is that there must be a showing of irreparable injury to the purpose and policies of the Act. Further, because Rule 65(b) is controlling, the maximum duration of a temporary restraining order issued without notice is 10, rather than 5, days. In addition, this Rule permits the order to be extended for a 10-day period upon a showing of “good cause.”

Because the Board has the discretion whether to seek 10(j) injunctive relief and because no statutory criteria govern the use of Section 10(j), it is well to note the considerations that have
guided the Board in the past. The major consideration has been whether the continuation of alleged unlawful conduct is likely to frustrate the Board's remedial processes in the absence of an injunction. Stated otherwise, the main consideration is whether the alleged unfair labor practices, if allowed to continue, can be effectively remedied and the status quo restored by a Board order and its subsequent judicial enforcement. Among other factors that have been taken into consideration are the following: the clarity of the alleged violations; the extent of the impact of the unfair labor practices on public interests; the geographical breadth of the violation; a continuing or repetitious pattern of violations; the degree of impairment of employee rights under the Act; and, when the unfair labor practices involve violence, the ability and willingness of local authorities to stop or control it.

The district courts will normally issue 10(j) injunctions when two basic requirements are met: (1) when there is reasonable cause to believe that the alleged unfair labor practices have been committed, and (2) when, equitably, an injunction is necessary, or, in the words of Section 10(j), it is “just and proper”. The courts generally decide whether the first requirement has been met on the basis of the same tests and standards that are applied in 10(l) injunction cases. See § 7.02, supra. With respect to the second requirement, the weight of judicial authority seems to hold that injunctive relief is “just and proper” whenever an injunction is necessary to prevent frustration of the basic remedial purposes of the Act.

The party bringing charges before the Board occupies the same status in a Section 10(j) district court proceeding as in an injunction proceeding under Section 10(l). Issues that pertain to the application of discovery principles, the taking of oral testimony, the making of credibility determinations, and the resolution of factual disputes are treated similarly by the courts in both types of proceedings. In addition, as in 10(l) proceedings, nothing decided in a 10(j) court proceeding is res judicata in the subsequent complaint proceeding before the Board. See § 7.02, supra. As contrasted with 10(l), however, there is no statutory requirement that a 10(j) injunction be dissolved upon the issuance of the Board’s decision. See § 7.02, supra. Accordingly, although the Board takes a contrary position, it is arguable that such an injunction may be continued in effect by the district court pending the outcome of circuit court enforcement proceedings.

IV. Special Procedures For Jurisdictional Disputes

Section 10(k) of the Act mandates a special procedure when a charge is filed alleging a violation of Section 8(b)(4)(D), which prohibits strikes, picketing, boycotts, threats, and coercion in jurisdictional, or work assignment, disputes. Section 10(k) both empowers and directs the Board “to hear and determine the dispute” that is, to decide the merits of the controversy, or who is entitled to do the work in dispute unless, within 10 days after notice that an 8(b)(4)(D) charge has been filed, the parties submit evidence that the dispute has been adjusted or that all parties have agreed upon a method for the voluntary adjustment of the dispute. (One of the more common methods for voluntarily adjusting jurisdictional disputes involves submitting the dispute to the Plan for the Settlement of Jurisdiction Disputes in the Construction Industry, the successor to the Impartial Jurisdictional Disputes Board and the National Joint Board for Settlement of Jurisdictional Disputes.)
As soon as possible after the filing of a charge alleging a violation of Section 8(b)(4)(D), the regional director must serve upon the parties a notice of the filing and a copy of the charge. If, after investigation, the regional director deems injunctive relief to be “appropriate,” it may be sought pursuant to Section 10(l). Rules § 102.89. Unlike other 10(l) proceedings, injunction proceedings pertaining to Section 8(b)(4)(D) are discretionary rather than mandatory. The regional director will normally seek an injunction when picketing or a work stoppage is in progress and work on a construction project is, or is likely to be, halted.

The regional office does not issue an unfair labor practice complaint even if its investigation indicates that the Section 8(b)(4)(D) charge has merit. Instead, when no voluntary method for adjustment exists or when such a method cannot be agreed upon, the regional director issues a notice of hearing under Section 10(k), setting a date for a hearing to be held not less than 10 days after service of the notice that the charge has been filed. The notice of hearing, which is served on all parties to the dispute, including all employers, sets forth the time and place of the hearing and a simple statement of the issues involved. Section 10(k) hearings are conducted by a hearing officer and conform, insofar as possible, to the procedures used in representation matters. Rules § 102.90.

After the close of a 10(k) hearing, the matter is transferred to the Board. The hearing officer may file a report that sets forth the issues and summarizes the evidence, but is prohibited from making any recommendation concerning the dispute. The Board determines the merits of the jurisdictional controversy either immediately upon the record or after oral argument or the submission of briefs. In 10(k) cases that are designated in the notice of hearing as involving the national defense, the parties are limited to oral argument at the close of the hearing and may not file briefs except with specific Board approval. Such approval is sought by means of an application that must be filed “expeditiously” with the Board after the close of the hearing. Rules § 102.90.

The Board’s determination on the merits, reflecting a consideration of “all relevant factors,” consists of a decision as to which of the contending groups of employees is entitled to perform the work in dispute. In actual practice, the Board’s award almost always coincides with the employer’s original work assignment.

If the charged labor organization fails to comply with the Board determination of the dispute or, when a method of adjustment has been agreed upon, with the determination resulting from that method, the regional director issues an unfair labor practice complaint and a notice of hearing based on the original Section 8(b)(4)(D) charge. The case is then processed in the same manner as are other unfair labor practice cases. See § 6.11, supra. If the Board determines in the 10(k) proceeding that the charged labor organization is entitled to the work in dispute, the regional director will dismiss the underlying Section 8(b)(4)(D) charge, and the union deemed to be so entitled may continue to picket or engage in conduct in support of the work award, which would otherwise be unlawful.

I. **Statutory Authority Under The NLRA.**

Section 10(c) of the National Labor Relations Acts, as amended, provides as follows with respect to Board Orders:

“(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state the findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act:...”

If the party or parties against whom a Board order has been issued refuse(s) to obey, the Board has no inherent authority to enforce the order. To secure enforcement of its order, the Board must apply to an appropriate United States Court of Appeals pursuant to Section 10(e) of the Act:

“(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board...”

Until the order is enforced by the Appeals Court, the respondent does not incur any penalty for failing or refusing to comply with the order of the Board.

Section 10(f) provides that any person aggrieved by a final order of the Board has the right to petition the appropriate Court of Appeals for a review of such order:

“(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by
filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.”

II. **NLRB Rulings Subject To Review And Enforcement.**

The only final orders of the Board within the meaning of Sections 10(e) and (f) are those entered by the Board in unfair labor practice cases. Thus, decisions of the General Counsel not to issue an unfair labor practice complaint; jurisdictional dispute awards under Section 10(k); denial by the Board of a request for a subpoena; etc. are not final orders subject to review. The United States Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) declared that “the General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint” and to determine the validity of a post complaint, prehearing, settlement.

A. **Parties Entitled To Enforcement And Review.**

In *Utility Workers v. Consolidated Edison Co. of New York*, 309 U.S. 261 (1940) the Supreme Court held that the Board alone is exclusively vested under Section 10(e) with the power and duty to enforce the Act. The Court held that a labor union could not petition the Court of Appeals for an order adjudging an employer in contempt for failing to comply with certain requirements of the court’s decree enforcing the Board’s order as modified. The Court stated (l.c. 309 U.S. 265):

> “[I]t is apparent that Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or agency, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstacles to interstate commerce.”

While only the Board may take action to enforce its orders, Section 10(f) provides that “any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought” may petition the appropriate Court of Appeals for an order setting aside the Board order. When the Board enters a final order against a respondent; the respondent is a “person aggrieved” and thus entitled to seek immediate review in the Court of Appeals. If the Board determines that the complaint should be dismissed, the charging party is a “person aggrieved”
with the corresponding statutory right to seek judicial review. If the Board dismisses certain portions of the complaint but issues an order on the other portions, the respondent is “aggrieved” as to the portion that results in a remedial order, and the charging party is “aggrieved” with respect to the portion of the decision dismissing the complaint.

B. Intervention.

In Auto Workers Local 283 (Wisconsin Motor Corp.) v. Scofield and Auto Workers Local 133 v. Fafnir Bearing Co., 382 U.S. 205 (1965) the Supreme Court interpreted the NLRA as conferring intervention rights upon both a successful charged party [respondent] and a successful charging party.

C. Procedure.

The Act does not provide any time limits within which the Board must apply for enforcement of its orders; and the Act is also silent as to when petitions for review must be filed. Delay by the Board in seeking enforcement of its orders does not provide a defense to opposing parties; nor does the Board order lose its legal efficacy by reason of the passage of time. In NLRB v. Pool Mfg. Co., 339 U.S. 577 (1950) the Supreme Court enforced the Board’s order even though the Board waited two and one-half years before seeking enforcement of its order in the Court of Appeals. The Court held that the Board’s order should be enforced notwithstanding that the respondent had bargained with the union after the Board’s decision, there had been no effort by the union to bargain for the period of a year prior to the Board’s seeking enforcement of its order, and the respondent questioned whether the union still retained the majority of the employees. The Supreme Court noted that the respondent could have filed a petition for review during the period after the Board’s decision and prior to the Board seeking enforcement of its order.

III. Scope of Review.

A. Questions of Fact.

Section 10(e) of the Act states that “[T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.” Section 10(f) contains the same standard for scope of review, i.e., “if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive”. In Universal Camera v. NLRB, 340 U.S. 474 (1951) the Court laid down the following guidelines for determining whether the Board’s findings of fact were supported by substantial evidence:

- A reviewing court may set aside a Board decision “when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view” (340 U.S. 488).

- A reviewing court cannot set aside a Board decision based on a “choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo” (340 U.S. 488).
The right of a reviewing court to test Board findings of fact on the basis of the whole record does not empower the court to discount the weight to which the Board findings are entitled by reason of the Board’s experience in the specialized field of labor-management relations. (340 U.S. 488).

The reviewing courts are not bound by the Board’s rejection of an ALJ’s findings but may consider the ALJ’s decision. Evidence supporting a conclusion may be less substantial, and the reviewing court must examine the evidence with greater care “when an impartial experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board’s” (340 U.S. 496).

The Universal Camera rule has been interpreted in differing ways by the courts of appeals. Although all the circuits have quoted the same Universal Camera language, they have not reached uniform conclusions as to the meaning of that language. In NLRB v. Walton Mfg. Co., 369 U.S. 404 (1962) the Supreme Court reversed one court of appeals which had adopted a more stringent standard of support in cases in which the Board ordered reinstatement and backpay. The Supreme Court in NLRB v. Walton Mfg. Co., supra, restated and reaffirmed the Universal Camera doctrine. Recently, in Allentown Mack Sales and Services, Inc. v. NLRB, 522 U.S. __, 139 L. Ed. 2d 797, 810 (1998), the Supreme Court cited the Universal Camera and stated: “Put differently, we must decide whether on this record it would have been possible for a reasonable jury to reach the Board’s decision.”

B. Questions of Law.

In NLRB v. Curtin Matheson, 494 U.S. 775 (1990) the Court restated its position on judicial review of Board orders (i.e. 786, 787):

“This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy. See, e.g., Beth Israel Hospital v. NLRB, 437 U.S. 483, 500-501 (1978); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957).

* * *

This Court therefore has accorded Board rules considerable deference. See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. at 42; NLRB v. Iron Workers, 434 U.S. 335, 350 (1978). We will uphold a Board rule as long as it is rational and consistent with the Act, Fall River, supra, at 42, even if we would have formulated a different rule had we sat on the Board, Charles P. Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404, 413, 418 (1982). Furthermore, a Board rule is entitled to deference even if it represents a departure from the Board’s prior policy. See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265-266 (1975). (The use by an administrative agency of the evolitional approach
is particularly fitting. To hold that the Board’s earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision-making’). Accord, Iron Workers, supra, at 351."

IV. **Review Of Representation Or Certification Action.**

In *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940) the Supreme Court held that a Board certification was not a “final order” within the meaning of Section 10(f) and that “the conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from review by the federal appellate courts ... except in the circumstances specified in Section 9(d).” Employers desiring to contest a certification must refuse to bargain and then assert its position by way of defense in an unfair labor practice proceeding and subsequently on judicial review.

In *Leedom v. Kyne*, 358 U.S. 184 (1958) suit was brought by a professional employees’ union in a federal district court, alleging jurisdiction under Section 1337 of the Judicial Code, to set aside a certification on the ground that the Board had exceeded its authority under Section 9(b) (1), by certifying the union as the representative of a unit composed of both professional and non-professional employees, without affording the professionals a separate election to determine whether they desired to be included in the unit. The Supreme Court held that the certification was subject to the equity jurisdiction of the federal district courts and that such courts could entertain suits to set aside certification orders when the Board had plainly exceeded its statutory authority and there was no other adequate remedy (358 U.S. 189).

The Kyne exception was applied in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), where the Board attempted to exercise its jurisdiction over alien employees who were represented by a foreign union on a foreign ship sailing under a foreign flag. However, in *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964) the Court held that a district court was without jurisdiction to enjoin a representation election in an action in which the moving party alleged that the Board had erroneously determined that two separate enterprises were joint employers. The Court stated (l.c. 376 U.S. 481, 482):

> “The Kyne exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the courts of appeals, and then only under the conditions explicitly laid down in Section 9(d) of the Act.”

**Endnote**

The Institute Sponsors acknowledge *The Developing Labor Law*, Third Edition, Volume II, Chapter 33 (Bureau of National Affairs) in the preparation of this paper.
**NLRB ORDER ENFORCEMENT CHART**

**NLRB REMEDIAL ORDER**

**VOLUNTARY COMPLIANCE**
If respondent complies voluntarily, case is usually closed by Regional Office. However, Board may still seek court of appeals judgment enforcing its order.

**APPLICATION FOR COURT ENFORCEMENT**
Board can apply to appropriate court of appeals for a judgment enforcing its order.

**PETITION FOR COURT REVIEW**
Employer, union, employee, or any other person aggrieved by Board’s order may ask a court of appeals to review it. If Board has entered a remedial order against petitioner, Board will usually file a cross-application for enforcement of its order.

**INTERIM INJUNCTION**
Court can grant Board temporary restraining order or other relief, pending outcome of enforcement proceeding.

**COURT OF APPEALS**
Court can enforce, set aside, or remand in whole or in part the Board order. Court judgment may be reviewed by Supreme Court.

**U.S. SUPREME COURT**
Supreme Court can affirm, reverse, or modify court of appeals judgment, or remand case for further action.