

## **11300-11350 ELECTIONS**

### **11300-11301 PRELIMINARY CONSIDERATIONS**

#### **11300 Generally**

As described in Sec. 11000, the prompt resolution of questions concerning representation is a primary objective of the Act. If an election is to be held, the Regional Director should exercise discretion in achieving the objective of conducting the election as soon as practical after a petition is filed.

Elections may be conducted pursuant to a Consent Election Agreement Form NLRB-651 or a Stipulated Election Agreement Form NLRB-652 (Sec. 11084), a Regional Director or Board Decision and Direction of Election (Secs. 11273.2 and 11280.3) or an expedited election under Section 8(b)(7)(C).

The arrangements and voting procedure in all elections are the same, whether they be by agreement or by direction. In the former case, they are made by the parties working with the assigned Board agent (Secs. 11084-11098); in the latter, for the Regional Director by the assigned Board agent, in consultation with the parties (Secs. 11273.2 and 11280.3). The Election Order Sheet Form NLRB-700 may be used as a checklist of election arrangements.

#### **11300.1 Suit to Enjoin Election**

See Sec. 11000.1 in the event of a suit to enjoin an election.

### **11301 Arrangements for Conducting Election**

#### **11301.1 Generally**

Election arrangements may involve conducting the election

(a) manually, either at the employer's premises or at some other appropriate location away from the employer's premises (Sec. 11302.2); or

(b) by mail (Sec. 11336).

Under certain circumstances, a mixed manual-mail election may also be conducted. Sec. 11335.

#### **11301.2 Manual or Mail Ballot Election: Determination**

The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually. The Board has also recognized, however, that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done. In these instances, the Regional Director may reasonably conclude that

conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to vote. The Regional Director should use his/her discretion in deciding which type of election to conduct, taking into consideration at least the following situations that normally suggest the propriety of using mail ballots:

(a) where eligible voters are “scattered” because of their job duties over a wide geographic area

(b) 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

(c) where there is a strike, a lockout or picketing in progress.

Employees may be deemed to be “scattered” where they work in different geographic areas, work in the same areas but travel on the road, work different shifts, or work combinations of full-time and part-time schedules. If any of the foregoing situations exist, the Regional Director should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots and the availability of addresses for employees. As a final factor, the Regional Director should also consider the efficient use of the Agency’s financial resources, because their efficient and economic use is reasonably a concern. However, mail ballot elections should not be directed based solely on budgetary concerns. Under extraordinary circumstances, other relevant factors may also be considered by the Regional Director. *San Diego Gas & Electric*, 325 NLRB No. 218 (1998).

### **11301.3 Time of Determination**

The above factors should be given consideration as early as possible in the processing of the petition, although they should not otherwise delay such processing. Secs. 11080–11082. In most cases in which an election is to be conducted, a determination as to the type of election may be made early on; it is also recognized, however, that in other cases, a determination may not be possible until, for example, after a decision and direction of election has issued.

### **11301.4 Manner of Determination**

In the event a hearing is held during the course of processing the petition (because, for example, a party refuses to enter into an election agreement for a reason related to the election arrangements or for another reason), there is no requirement that parties be permitted to litigate the election arrangements in the hearing. Cf. *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954). If an election is to be conducted, the arrangements as to the type of election may be resolved administratively and the parties so notified by letter separate from the decision and direction of election. Sec. 11301.5.

### **11301.5 Informing Parties**

If after considering the above factors, the Regional Director concludes that an election should be of a type different from the wishes of a party, the parties should be so advised. As promptly as practical thereafter, the Regional Director should issue a letter

formally notifying the parties of the manner in which the Regional Director intends to conduct that election, if an election is directed or otherwise agreed upon. The Regional Director should specify the rationale relied upon in making that determination. *Odebrecht Contractors of Florida*, 326 NLRB No. 8 (1998); *San Diego Gas & Electric*, 325 NLRB No. 218 (1998).

## **11302–11335 MANUAL ELECTION**

These Sections deal only with procedures for conducting a manual election. Sec. 11336 discusses procedures for conducting a mail ballot election.

Secs. 11301.2 and 11335.2 discuss the Regional Director's determination as to whether to conduct a manual, mail or mixed manual-mail election.

### **11302-11310 ELECTION DETAILS**

#### **11302 Date, Place, and Hours**

The date, place, and hours are ordinarily based upon the parties' voluntary meeting of the minds (with the Regional Director's approval), as reflected in an election agreement. Secs. 11084–11098. But where the parties to an election agreement leave these matters to determination by the Regional Director or where, in a directed election, the parties cannot agree on these details or their agreement would cause undue delay or otherwise be unacceptable, the following are suggested as guidelines.

##### **11302.1 Selection of Date**

An election should be held as early as is practical.

In Board directed elections, the full 30 days after the Board's Direction of Election should not normally be taken. However, there may also be situations where additional time beyond 30 days is necessary. Sec. 11284.

When the Regional Director directs an election, the election normally should not be scheduled prior to the 25th day thereafter, unless the right to file a request for review has been waived, nor later than the 30th day thereafter. Sec. 101.21(d), Statements of Procedure. If the 25th day is not a workday suitable for an election, then the election should be set for a later, not an earlier, day. If a request for review is filed, the Office of Representation Appeals should be notified immediately by electronic mail of the date of the election as soon as it has been set. Sec. 11274. The Office of Representation Appeals should also be advised immediately of any development, such as the filing of blocking charges or a request to withdraw the petition, that might affect the Board's processing of the petition.

The date selected should be one that balances the desires of the parties and operational considerations, along with the desirability of facilitating employee participation and the prompt and timely conduct of the election. The petitioner, as the moving party in representation cases, whether union, employer, or employee, must be prepared to

proceed to an election promptly. Refusal of a petitioner to agree to an early date in an election agreement (to which all other parties are willing to agree) is grounds for dismissal of the petition, in the absence of valid reasons for the position taken.

Where there is a choice, the Regional Director should avoid scheduling the election on dates on which all or part of the plant will be closed, on which past experience indicates that the rate of absenteeism will be high or on which many persons will be away from the plant on company business or on vacation. Days immediately preceding or following holidays should also be avoided if the rate of absenteeism is likely to be high.

The election may stretch over several days, where necessary, e.g., where an entire shift of workers is off for 24 hours on any given day of the week. In all cases, the hours should be limited to those actually necessary.

An election may not be held sooner than 10 days after the list of names and addresses of the eligible voters (Sec. 11312.1) is due to be received by the Regional Director.

**EXCEPTION:** Where economic strikers are involved, and processing of the petition is being expedited in order to conduct the election within 12 months after commencement of the strike pursuant to Section 9(c)(3), the 10-day period may be shortened or eliminated. *Kingsport Press, Inc.*, 146 NLRB 1111 (1964).

Where the parties jointly wish a prompt election, presumably the employer will make the list available in less than the required 7 days. If a party wants to have use of the list for a full 10 days, it may make arrangements to pick up the list at the Regional Office. Sec. 11312.2 gives guidance on service of the list.

To avoid a situation where the list is promised early to secure a prompt election, but submission is delayed, the notice of election should not be mailed until the list is in hand. However, an election may be held on the 9th day provided that day is the day before a holiday, a weekend, or a shutdown and further provided that all parties agree. In the event of a bona fide strike or picketing situation in which all parties desire a prompt election and the employer has furnished the list promptly, an exception may be made to the 10-day period.

### **11302.1(a) Impounding of Ballots**

If the Board does not rule on a request for review before the election, the Regional Director should proceed to conduct the election and segregate and impound the ballots, unless the Board specifically directs otherwise. When the Board has not ruled on a pending request for review, the election should be conducted in such a manner as to preserve all contested issues for Board determination, using such methods as separate ballot boxes or the challenged ballot procedure. Secs. 11274, 11280.3, 11338.1, and 11338.8; Sec. 102.67(b), Rules & Regulations. For procedures involving individuals whom the Board or Regional Director has directed must vote subject to challenge, see Sec. 11338.2(b).

**11302.1(b) Postponed or Canceled Election**

In the event a scheduled election is postponed or canceled, the parties should be immediately advised. Thereafter, written notification should be provided in an expeditious manner, such as by facsimile transmission. In the event the notice of election has been distributed, see Sec.11314.8.

The Regional Director may unilaterally set the date of a rescheduled or canceled election. *Superior of Missouri, Inc.*, 327 NLRB No. 53 (1998); Secs. 11084.3 and 11314.8.

**11302.2 Selection of Place**

The best place to hold an election, from the standpoint of accessibility to voters, is somewhere on the employer's premises. In the absence of good cause to the contrary, the election should be held there.

One circumstance indicating the possibility of an offsite election at a neutral location is when striking employees are involved. *San Diego Gas & Electric*, 325 NLRB No. 218 fn. 9 (1998).

It may also be necessary to conduct an election off the employer's premises where there are egregious or pervasive employer unfair labor practices. Thus, where a request to proceed has been filed, the Regional Director may direct that the election be conducted away from the employer's premises in situations where an election held on the employer's premises would compromise the prospect that employees will be able to exercise free choice. Examples of such conduct might include discharges or other discrimination directed at a significant portion of the voting unit, threats of plant closure, or other serious consequences if the union were to prevail and threats of violence to union adherents. In exercising discretion, the Regional Director should consider factors such as size of the unit, whether the conduct is ongoing, the extent to which the unfair labor practices are known to the voters, and the potential impact upon voter participation of having the election off premises.

If an election is held away from the employer's premises, it should be held as close by as is appropriate and necessary in a public building, social hall (other than one used as headquarters by a union), or a hotel, motel, school, church, or garage. A place normally used as a municipal voting place is particularly desirable. A van or truck may also be used if other accommodations are not found.

The availability of places away from the employer's premises should be taken into consideration when one of the parties urges that the election be held off company property. The initial burden of suggesting such available places should be placed on the party seeking that the election be held off company property, but final arrangements should be made by the Board agent. Permission to use such property should be in writing.

Rental expense, if any, should be borne by the Agency. (See Administrative Manual for procedures to be followed in making payment.) An offer of the parties to assume the expense should be rejected since the Agency cannot accept funds from private

parties, as this would be a prohibited augmentation of its appropriations. *North American Plastics Corp.*, 326 NLRB No. 70 fn. 3 (1998).

Whether the election is held on or off the employer's premises, the actual polling place, if feasible, should be spacially and visually separated from the scene of any other activity during the voting period. There should be adequate space for all equipment and all personnel. Secs. 11308–11310. An office, a production department, or a shipping room or shipping platform are examples of appropriate places. Because of the vagaries of the weather, elections should not be scheduled to be held in unprotected outdoor locations.

The polling place should be accessible to all voters. Special assistance should be provided, where requested and necessary, to accommodate handicapped individuals.

Arrangements should also be made so that the polling place is accessible to voters who may be off duty at the time they wish to vote.

### **11302.2(a) Multiple Polling Places**

If the circumstances demand, voting at more than one place should be provided. Sec. 11334. If more than one polling place will be open simultaneously, see Sec. 11334.1. If the election is also large or complex, see Sec. 11312.4 regarding the utilization of identifying information for voters.

**NOTE:** Simultaneously open polling places require that the employer provide separate lists for each such polling place. Sec. 11312.1(g).

### **11302.3 Selection of Hours**

The hours of an election depend on the circumstances of each case. The voting period(s) should be adequate to permit all voters, at their option, to cast votes either on employer time or on their own time, without making a special trip to vote. (Example of possible exception: where a limited number of employees in a large unit will not be scheduled to work during the voting hours.) It is better to err on the side of allowing too much time than too little.

However, when estimating the time necessary for an election, the Regional Director should take into account the effective utilization of the Board's personnel resources, as well as the goal of not disrupting production or occupying the time of Board agents and observers any more than is necessary. In a well-arranged election, voters can easily be handled at the rate of 250 per hour per checking table.

It is usually good practice for the polling period to extend into a pre or postshift period for a single-shift facility and to center around the shift change for a multishift facility. (See Sec. 11332 for "split-session" elections.) Additional time extending into the working hours should be provided where voting may take place on employer time.

Also see Secs. 11320 and 11324 which deal with opening and closing polls, respectively.

**11302.4 Absentee Ballots Not Permitted**

The Board does not provide absentee ballots. *NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794 (3d Cir. 1999); *KRCA-TV*, 271 NLRB 1288 (1984); *Wilson & Co.*, 37 NLRB 944 (1941). Specifically, ballots for voting by mail should not be provided to, inter alia, those who are in the Armed Forces, ill at home or in a hospital, on vacation, or on leave of absence due to their own decision or condition.

See, however, Sec. 11335.1 regarding ballots for voting by mail in mixed manual-mail elections.

**11304 Election Equipment****11304.1 Election Kit**

A Board agent should bring to an election a kit (to be augmented as necessary in any given situation) containing the following equipment:

- (a) 1 agent badge
- (b) 6 window badges and inserts for badges
- (c) 2 voting place signs Form NLRB-732
- (d) 2 warning signs Form NLRB-731
- (e) 6 instructions to observers Form NLRB-722
- (f) sufficient challenge envelopes, filled out if warranted
- (g) 2 ballot box labels Form NLRB-730
- (h) 12 blank tally sheets Form NLRB-741
- (i) 3 large envelopes for sealing impounded or determinative challenged ballots Form NLRB-5126
- (j) 6 blank tally of ballots Form NLRB-760
- (k) pencils in different colors
- (l) note paper, masking tape, transparent tape, rubber bands, and felt tip markers.

**11304.2 Equipment Maintained in Regional Office**

The Regional Office should maintain an adequate supply of each of the items listed in Sec. 11304.1 and in addition thereto:

- (a) portable voting booths (metal or cardboard)
- (b) large and small cardboard ballot boxes.
- (c) inner and outer mail ballot envelopes
- (d) mail notices and instructions Form NLRB-4175

**11304.3 Voting Booth**

A voting booth may be either metal or cardboard and will normally be supplied by the Regional Office. Where one voting booth will be adequate for an election, the parties should not be urged to furnish voting booths. Otherwise, the Board agent may suggest that the parties supply facilities for affording privacy to voters in the marking of their ballots.

Usually, municipal or other governmental entities will readily cooperate in the loan of facilities; or booths may be reasonably constructed. What is required is a compartment or cubicle that not only provides privacy but that also demonstrates the appearance of providing privacy, while maintaining a level of dignity appropriate to the election process.

**11304.4 Ballot Bag or Box**

Unless other arrangements are made in advance, the Board agent will furnish the official ballot bag or box, which is a knocked-down cardboard box.

The Agency's label (Form NLRB-730) will be attached to the ballot box used. See Sec. 11318.4 concerning the sealing of the box at the preelection conference.

**11304.5 Equipment for Specific Election**

With respect to any given election, the type of equipment mentioned above will be augmented by certain items applicable to the instant election only:

- (a) case file
- (b) three notices of election
- (c) ballots
- (d) tally of ballots, filled out to the extent possible.

In addition, there should be one or more checking tables, a challenge table, if necessary, and sufficient chairs for all Board agents and observers.

**11306 Ballots****11306.1 Generally**

The ballots, in all cases, are to be furnished by the Agency. Before, during and after an election, no one should be permitted to handle any ballot except a Board agent and the individual who votes that ballot.

**11306.2 Question on Ballot**

The question on the ballot should accord with the election agreement or the direction of election. (With respect to the wording on a "self-determination" ballot involving professional employees, see Sec. 11090.1.) The choices on the ballot, likewise, will be dictated by the basis of the election.

**11306.3 Shortened Name Request**

Should a union request the use of a shortened name, whether or not the matter was raised initially at a hearing, the Regional Director may permit the use of the additional shortened name if, in his/her judgment, by so doing there is no possibility of the voters being confused or misled. Sec. 11086.1. If used, the shortened name should be in parentheses, in addition to the full name. Secs. 11198.1 and 11272 discuss similar requests at hearing and posthearing, respectively.

**11306.4 Ballots in Multiunion Elections**

Where more than one labor organization appears on the ballot, the places on the ballot should be based on agreement, if there is agreement; on chance, if there is not. In an election involving a number of units, confusion is usually avoided by maintaining the same relative places on the ballot. The choice against representation by any of the participating organizations should be “neither” if there are two unions, “none” if there are more than two. The words “no union” should not be used as a choice.

**11306.5 Color of Ballot**

The color of the ballot must not be disclosed to the parties prior to the opening of the polls. Different colors should be used for the ballots of different groups or units voting at the same time. The color(s) should not normally coincide with that used at the last election held among employees of the same employer. In a mixed manual-mail election (Sec. 11335), the color for the mail ballot should be the same as that used in the manual election.

**11306.6 Instructions on Ballot**

Different instructions to voters must be inserted on ballots in elections involving manual ballots, mail ballots, and mixed manual-mail ballots. Below the choices (boxes) on the ballot, the following language should appear:

(a) Manual ballot:

“DO NOT SIGN THIS BALLOT. Fold and drop in ballot box. If you spoil your ballot, return it to the Board agent for a new one.”

(b) Mail ballot:

“DO NOT SIGN THIS BALLOT. See enclosed Instructions.”

(c) Mixed manual-mail ballot: See Sec. 11335.4.

**11308 Board Personnel**

The number and type of Board agents involved in an election will depend, among other things, on the size, complexity, and duration of the election. Where there is a contemporaneous investigation or trial of an unfair labor practice charge involving the same parties involved in an election, the Board agent conducting the election should be

someone other than a Board agent involved in the unfair labor practice case, wherever feasible, in order to keep the conduct of the election completely separate from the investigation or trial. *Kimco Auto Products*, 184 NLRB 599 (1970); *Amax Aluminum Extrusion Products*, 172 NLRB 1401 (1968).

The Board agent in charge of an election, with his/her supervisor, should anticipate the need for sufficient Board personnel to run the election, along with his/her other planning for the election. In so doing, the Board agent should keep in mind the fact that the administration of Section 9 constitutes one of the most important aspects of the Agency's work; the Board agent should plan, not with respect to the routine aspects of an uneventful election, but with due regard for all potential emergencies.

Generally speaking, one Board agent will be required for each checking table at each polling place. In addition, Board agents may be required for relief and for supervision. Due provision should be made for extended hours.

## **11310 Observers**

### **11310.1 Generally**

Each party may be represented at the polling place by an *equal*, predesignated number of observers. Parties may waive the opportunity to be represented by observers, either expressly or by default (no observers appearing), but care should be taken, in any doubtful case, to accord each party every opportunity for representation.

If the election is being conducted pursuant to an election agreement, a breach of the agreement's provision for an equal number of observers is a material breach which warrants setting aside the election upon the filing of appropriate objections. *Browning-Ferris Industries of California*, 327 NLRB No. 130 (1999); *Breman Steel Co.*, 115 NLRB 247 (1956).

### **11310.2 Designation of Observers**

Parties should be requested to designate their observers in advance of the election. A suggested opportunity to make this request is in the letter accompanying the service of the notice of election on the parties. Copies of the Instructions to Observers Form NLRB-722 may also be included with this correspondence for distribution to the observers prior to the election.

Observers should be employees of the employer, unless a party's use of an observer who is not a current employee of the employer is reasonable under the circumstances. *Embassy Suites Hotel*, 313 NLRB 302 (1993); *Kelley & Hueber*, 309 NLRB 578 (1992). A supervisor should not serve as an observer. *Bosart Co.*, 317 NLRB 245 (1994). An alleged discriminatee is eligible to serve as an observer. A union official may serve as an observer if he/she is also an employee of the employer.

If a claim is made that an observer is ineligible to act, the matter should be discussed and the parties made aware that the use of an ineligible observer may result in the election being set aside through the objections process. However, the Board agent

should not attempt to determine the eligibility of an observer. Rather, unresolved issues should be left to the objections process. *Browning-Ferris Industries of California*, supra.

### **11310.3 Role of Observers**

The observers represent their principals, carrying out the important functions of challenging voters and generally monitoring the election process. They also assist the Board agent in the conduct of the election.

Nonparticipating unions should not be permitted to have observers. Individuals contending they are representatives of “no-union” groups should not be permitted to act as or to select observers.

In extraordinarily large elections, three or more observers may be required; in all other elections, observers should usually be limited to one or two per party. In larger elections, there may be one observer per party per checking table and one observer per party at the ballot box, plus observers necessary for relief, ushering and other assistance. Where each party is represented by more than one observer, one of them should be designated as head observer, both for this and for other “housekeeping” purposes, such as a communication channel, task assignment, etc. If observers are to work in shifts, or to relieve each other, all such arrangements are to be made and policed by the head observers.

Observers should normally be given instructions at a conference immediately preceding the election. Sec. 11318.2. In large or complex elections, it may be necessary to explore with the parties in advance of the election the identifying information to be utilized by voters as they approach the observers at the checking table (Secs. 11312.4 and 11322.1) and/or to hold the preelection conference on the day before the election (Sec. 11318).

The names of the proposed observers should be submitted to the Board agent in charge of the election and to the other parties early enough to permit a check of their status. Sec. 11310.2.

### **11310.4 Observer Identification**

The official badge to be worn by observers is the one provided by the Board. It is preferred, although not required, that no other insignia be worn or exhibited by the observers during their service as observers. This, of course, does not apply to regular employer identification badges, the wearing of which is required by the employer. Secs. 11318.1 and 11326.1.

**11312–11313 VOTING ELIGIBILITY LIST****11312 Eligibility List****11312.1 Request for List**

On approval of an election agreement (Secs. 11086.3 and 11094) or on issuance of a Direction of Election (Sec. 11273.1), the employer should be requested to prepare a list of the full names and addresses of eligible voters as of the last payroll period ending before the approval of the agreement or the Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994); *Excelsior Underwear*, 156 NLRB 1236 (1966). The employer must file the eligibility list with the Regional Director within 7 days after approval of the election agreement or 7 days after the Regional Director or the Board has directed an election. As indicated in Sec. 11009.2(c), the employer should be advised of this prospective requirement in the initial correspondence at the time the petition is filed, so that the necessary preparation for the timely completion and submission of this list may be made. The list must be received by the Regional Director at least 10 days before the election. Sec. 11302.1.

The Regional Director shall make the list available to all parties in the case. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *Excelsior Underwear*, supra. The Board will not permit waivers of the *Excelsior* rule with respect to furnishing either names or addresses.

If there is an issue as to an unusual eligibility date, i.e., the use of a date other than the payroll period ending before the approval of the agreement or the Direction of Election, because of a current labor dispute, seasonality of operations, the pending of the petition because of unfair labor practices, etc., the Board agent making the election arrangements (Sec. 11086.3) or conducting the hearing (Sec. 11189(i)) should obtain the information necessary for a resolution of this issue. Also see Secs. 11312.1(i) and 11312.1(j) concerning eligibility dates in rerun and runoff elections, respectively.

**11312.1(a) Election Agreement**

A conformed copy of the approved election agreement should be sent to the parties on the same day it is approved. The covering letter should include the following language:

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the full names and addresses of all the eligible voters, must be filed by the Employer with the undersigned within seven days of the date of my approval of the attached agreement. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently

large type to be clearly legible. I shall, in turn, make this list available to all parties to the election.

In order to be timely filed, the list must be received in this office on or before (date). No extension of time to file this list may be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of \_\_\_\_\_ copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

If you have any questions, please contact (Board agent).

### **11312.1(b) Direction of Election**

When a Direction of Election is issued by the Regional Director, it should carry a footnote (inserted in the Direction of Election before the final sentence beginning “Those eligible . . .”) to read:

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region \_\_\_\_ within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office (address) on or before (date). No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of \_\_\_\_ copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

If you have any questions, please contact the Regional Office.

**11312.1(c) Direction of Election in Enlarged Unit; Showing Sufficient**

Directions of Elections issued by the Regional Director that enlarge the unit, and in which the petitioner or intervenor *already* has a sufficient showing, should so indicate, and the footnote in (b) above should be used.

**11312.1(d) Direction of Election in Enlarged Unit; Contingent on Showing**

Directions of elections issued by the Regional Director that enlarge the unit and are contingent on an adequate showing of interest should contain the following footnote:

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region \_\_\_\_ within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

In order to be timely filed, such list must be received in the Regional Office (address) on or before (date). No extension of time to file this list shall be granted nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of \_\_\_\_ copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

If you have any questions, please contact the Regional Office.

**NOTE:** Sec. 11031 discusses the showing of interest and the methods to be used in calculating it in an expanded unit. Also note that in the event a request for review is filed with respect to the Regional Director's direction of an election in an enlarged unit, the requirement to submit an additional showing of interest is suspended until the Board rules upon the request for review.

**11312.1(e) Election Directed in Subregion**

In those cases where an election is directed in the territory of a Subregion, the second sentence of the *Excelsior* footnote in the direction of election (see (b) and (d) above) will read:

Accordingly, it is hereby directed that an election eligibility list, containing the full names and addresses of all the eligible voters, must be filed by the Employer with the Officer-in-Charge for Subregion \_\_\_\_ within 7 days of the date of this Decision and Direction of Election.

**11312.1(f) Self-Determination (*Sonotone*) Election**

The letter or footnote directing production of any eligibility list should be modified to require separate eligibility lists for Group A and Group B (and others, if appropriate). Sec. 11091.

**11312.1(g) Multilocation Election**

In multilocation elections, if it is known that two or more polling places will be open simultaneously, the letter or footnote directing production of the eligibility list should be modified to require a separate list for each location. Sec. 11334.1 To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.) at each location. If the election is also large or complex, see Sec. 11312.4 regarding the utilization of identifying information for voters.

Sec. 11334 discusses the procedures in conducting such elections.

**11312.1(h) Mail Ballot Election**

Where the election will be conducted by mail (Sec. 11336), the following note should be added to the request for the eligibility list:

Because this is a mail ballot election, we request that one copy of the list be furnished in the form of mailing labels, if possible, for use by the Regional Office in mailing the voting kit to employees. While you are not required to comply with this request, your cooperation in doing so will assist in promptly sending mail ballots to each employee's correct address and maximize employee participation in the election.

If the request for the eligibility list was made prior to the determination to conduct the election by mail (Sec. 11301.3), an additional request for the list in the form of mailing labels may be made, if time permits.

**11312.1(i) Rerun Election**

A new 7 day period starts from the issuance of the notice by the Regional Director of a second election. The footnote in Sec. 11312.1(b) should be modified accordingly. Advice from the employer that the list has not changed or an updating of the original list may be accepted in lieu of a new list of names and addresses, but a fresh eligibility list will be needed for the voting. Sec. 11452.2 discusses establishing the eligibility cut off date for a rerun election.

**11312.1(j) Runoff Election**

Generally the employer will not be required to furnish a second list of names and addresses in runoff elections (Sec. 11350). In unusual circumstances, such as a change in eligibility date from the original election, a second list will be required.

**11312.1(k) Expedited Election**

The *Excelsior* requirement does not apply in expedited elections conducted pursuant to Section 8(b)(7)(C). *Excelsior Underwear*, 156 NLRB 1236, 1242 fn. 14 (1966).

**11312.2 Service of List**

Immediately upon receipt, the Regional Director should mail the list to all labor organizations or individual petitioners involved. Sec. 11006. If any party desires to pick up the list at the Regional Office, a receipt for the list should be obtained showing time and date of delivery.

**11312.3 Preparation of List**

Full cooperation should be offered with respect to any questions that arise in the course of preparing the list. Full names (and addresses) of eligible voters should be listed alphabetically, either as a whole or by departments or units.

The list of names and addresses furnished by the employer will normally be used as the voting list.

**11312.4 Preelection Check of List**

Once the list is in hand, the Regional Office should have the parties check and approve the list promptly, to allow maximum time to resolve eligibility questions and thus reduce the number of challenges. If the number or nature of challenges raised is significant, consideration should be given to withdrawal of the Regional Director's approval of the election agreement or to reconvening the parties for clarification. Sec. 11095. Arrangements should be made for keeping the list(s) up to date, with a final check made at a preelection conference. Sec. 11318.

The parties should be encouraged to air and to talk out their questions. Any agreed-upon changes may be made on the face of the list, all such changes being initialed by the parties' representatives. Finally, the original list — each page — should be initialed as "inspected." If specific agreements as to eligibility can be reduced to signed writings, so much the better; but such agreements must not only be written and signed, they must also expressly provide that the eligibility issues resolved therein are final and binding on the parties; in order to be considered by the Board to be final determinations of the issues involved, they must not be contrary to the Act or established Board policy, in whole or in part. Where statutory inclusions or exclusions are concerned — e.g., supervisors — the stipulation should not be one only as to the ultimate legal question of eligibility to vote, but rather should set forth the necessary facts concerning a factual stipulation as to the duties and authority or lack thereof of the individuals involved. See also Sec. 11084.3 concerning *Norris-Thermador* agreements.

After inspection, the Board agent should retain custody of the original eligibility list for use in the election.

Observers may bring to the election lists of employees they intend to challenge; alternatively, the parties may note on the eligibility list, at the preelection check, the persons they intend to challenge. Sec. 11338.4. Any such marks made prior to an election, however, must be easily distinguishable from the marks to be made by observers at the election. The observers may not maintain a list of those who do or do not vote. Sec. 11322.1.

**LARGE OR COMPLEX ELECTIONS:** In sufficiently large or complex elections, the Board agent should explore with the parties in advance of the election the identifying information to be utilized by voters as they approach the checking table (Sec. 11322.1). If agreement is not reached between/among the parties, the Regional Director should consider whether to require identifying information in addition to self-identification by voters. *Monfort, Inc.*, 318 NLRB 209 (1995); *Newport News Shipbuilding & Dry Dock Co.*, 239 NLRB 82 (1978). See also *Avondale Industries, v. NLRB*, --- F.3d ----, 161 LRRM 2729, 1999 WL 459255 (5<sup>th</sup> Cir. (La.) July 7, 1999) (NO. 97-60708).

#### **11312.5 Timely Filing of List**

The list of full names and addresses must be received by the Regional Director within the period required. The period of 7 days begins to run on the day following the date of the Regional Director's approval of the election agreement or the direction of election. For example, if an agreement is approved or an election is directed on Monday, March 14, the first day of the 7-day period is Tuesday, March 15; accordingly the list of eligible voters is due back in the Regional Office by close of business on the 7th day, Monday, March 21. Should the 7th day fall on a nonworkday, the first working day thereafter should be used for the final date for receipt of the list. The list must be received in the Regional Office at least 10 days before the election. Sec. 11302.1.

An extension of time to file this list should not be granted by the Regional Director except in extraordinary circumstances. Failure to file the list timely shall be ground for setting aside the election whenever proper objections are filed.

**LATE LIST:** Where the list is received, but not in timely fashion, e.g., on the 8th day, the Regional Director should normally proceed with the election and allow the matter to be resolved through the objections process. If a party other than the employer requests to withdraw from an agreement or delay a directed election because of the late filing of the list, the Regional Director has discretion to approve such if he/she believes the late filing of the list may have resulted in substantial prejudice.

#### **11312.6 Refusal to Furnish Eligibility List of Names and Addresses**

(a) If the employer in a RC case advises in advance that it will furnish names within 7 days, but not addresses or that it will not furnish any list until shortly before the election, the employer should be advised that such failure to comply with the requirement constitutes ground for setting aside the election.

If the parties enter into an election agreement anyway, the Regional Director should approve the agreement. The language of the covering letter to the parties should be modified as follows:

I have approved this agreement subject to the requirement with respect to election eligibility lists, of which you have previously been advised. In order to assure . . . etc. (Sec. 11312.1 (a).)

(b) If the employer in a RC case refuses to furnish the eligibility list of names and addresses yet is willing to agree to an election, but the petitioner or a union with a blocking interest (Secs. 11023.3 and 4) is not, notice of hearing should issue.

(c) In a RM case, if the employer refuses to furnish the eligibility list of names and addresses, the petition may be dismissed for lack of cooperation, unless an expedited election is involved (Sec. 11312.1(k)).

(d) In a RD or UD case, if the employer refuses to furnish the eligibility list of names and addresses, the Regional Director should proceed to an election unless requested not to by the *petitioner*. Frequently the incumbent union already has all the names and addresses of the employees. However, in any case where this assumption is false (i.e., the certified union has never gotten a first contract, etc.), a request not to proceed from the incumbent may be honored. Sec. 11312.8.

### **11312.7 Refusal to Furnish List of Voter Names for Conduct of Election**

If the election is to be held notwithstanding the continuing refusal of the employer to comply with the *Excelsior* eligibility list requirement and the employer refuses to furnish even a list of names for voter eligibility purposes, it should be informed of the possibility of subpoena or, alternatively, of the affidavit voting procedure (Sec. 11328). If the employer persists in its refusal, the Regional Director should decide whether to issue an appropriate subpoena or make arrangements for voting by affidavit. A subpoena may also be issued if the employer furnishes only a partial list or a list that does not provide the full names and addresses of voters as required in *North Macon Health Care Facility*, 315 NLRB 359 (1994).

### **11312.8 Request Not to Proceed to Election**

If a list of names and addresses is not received at all or a list of names only is received (Sec. 11312.6), the Regional Director should proceed with the election unless requested not to, in writing, by the petitioner or an intervenor with a petitioner's showing of interest (i.e., 30 percent or the equivalent).

An intervenor with less than 30-percent showing may file objections to the election, even if it cannot block it. The Board *may* set the election aside on grounds of failure to supply the list.

Where a request not to proceed to election is received from a petitioner or an intervenor with a petitioner's showing of interest, a subpoena to obtain the *Excelsior* list should issue.

## 11313 SUBPOENA TO COMPEL PRODUCTION OF ELECTION ELIGIBILITY LIST (NAMES AND ADDRESSES)

### **11312.9 Refusal; Second Election**

If the employer refuses to comply with the *Excelsior* requirement in a second election and the first one was set aside for that reason, the Regional Director should not proceed to an election, even if the parties wish to. In such cases, a subpoena to obtain the *Excelsior* list should be issued and enforcement proceedings instituted if appropriate.

### **11312.10 Subpoena Enforcement Problems**

Problems on subpoena enforcement should be referred to the Assistant General Counsel for Special Litigation; a copy of the report or memorandum should be sent to the Division of Operations Management.

### **11312.11 Ultimate Disposition of List**

At the election, the eligibility list serves as a prima facie roster of voters. After the election, it should be preserved as a part of the case file until the file is destroyed.

Once the list has been furnished and a party withdraws from the ballot, or the petition is dismissed by the Board, or the election is held and the case is closed, the Regional Director should not take any action, either on his/her own motion or that of the employer, to secure return of the list.

## **11313 Subpoena to Compel Production of Election Eligibility List (Names and Addresses)**

One of the problems in cases in which the employer refuses to furnish the list voluntarily is that the original election eligibility date may have become obsolete by the time court enforcement of the subpoena has been secured. To meet this problem, the subpoena should provide that the list be furnished for the currently established payroll eligibility period or for such later eligibility period as the Regional Director or his/her designated representative may subsequently specify.

In initial elections, the designated payroll eligibility period will normally be the last period ending before the Direction of Election or election agreement and the list will be due within 7 days after the direction issues or the agreement is approved. *Excelsior Underwear*, 156 NLRB 1236, 1239–1240 (1966). If the employer fails to file the list and a subpoena is issued at that stage, the current eligibility period specified in the subpoena will simply be the one provided for in the Direction of Election or election agreement. However, in any case in which the payroll eligibility period is after the issuance of the Direction of Election or approval of the election agreement, the list will not be due until seven days after the close of the determinative payroll period (*Excelsior*, supra at 1240 fn. 5). In such cases, a subpoena directing production of the list should not issue until the payroll eligibility period has closed and the list is due to be filed. For example, if the first election has been set aside based on a valid objection of failure to file the *Excelsior* list, the Direction of Second Election will normally provide that the list should be filed within 7 days after the issuance of the notice of second election and that the eligible voters will be those employed during the payroll period ending immediately before the election notice issues. In those circumstances, the notice of second election must issue before the

## 11313SUBPOENA TO COMPEL PRODUCTION OF ELECTION ELIGIBILITY LIST (NAMES AND ADDRESSES)

subpoena and the subpoena appearance date must be at least 7 days after issuance of the election notice. (It is normally desirable practice to schedule the appearance date sufficiently far in advance to allow the employer 5 days to petition to revoke the subpoena and the Board several days to act on the petition.) At that point, the closing date of the designated payroll eligibility period will be known and can be specified as the current eligibility date in the subpoena.

Accordingly, the notice by the Regional Director of the second election should issue in such cases even though the employer has stated that it will not file the list and it is, therefore, anticipated that the second election will not actually be held. However, it will be sufficient to issue only one copy of the notice of second election with an explanatory letter indicating that copies for posting will be forwarded on a certain date. If the employer refuses to furnish the list, posting need not occur; if the employer does file the list, posting will take place in normal sequence before the election.

### **11313.1 Suggested Subpoena Format**

The subpoena appendix below is a suggested form only and should be modified to fit the needs of the particular case. Questions concerning subpoena format or enforcement should be directed to the Assistant General Counsel for Special Litigation.

**NOTE:** The appearance date set forth in the subpoena should normally be scheduled sufficiently far in advance to allow the employer 5 days to petition to revoke the subpoena and the Agency several days to act on the petition.

### **11313.1(b) Appendix to Subpoena**

#### **APPENDIX**

The books and records of [named employer], containing the full names and addresses of all employees employed during the payroll period ending [current eligibility date], or during such later payroll eligibility period as the Regional Director or his/her designated representative may subsequently specify, in the following collective-bargaining unit:

[Insert unit]

A list of the full employee names and addresses described above, signed by an authorized agent of the employer, will be accepted in lieu of the subpoenaed books and records; provided that designated agents of the National Labor Relations Board are permitted, on request, to verify the contents of the list by examination of the subpoenaed books and records at a time and place convenient to the employer, but not later than the date of appearance specified in the subpoena, or such later date as the Regional Director or his/her designated representative may subsequently specify.

**11314–11315 NOTICE OF ELECTION****11314 Notice of Election**

A standard notice of election Form NLRB-707 is used to inform eligible voters of the balloting details. A special Form NLRB-4910 is used for mail ballot elections. Sec. 11336.3. *Both* notices should be used in mixed manual-mail ballot elections. Sec 11335.4.

Notices must be posted by the employer 3 full working days prior to the day of the election and failure to do so shall be grounds for setting the election aside whenever proper and timely objections are filed. Sec. 11009.2(e); Sec. 103.20, Rules and Regulations.

The completion of this form requires insertions made by use of a template, which is a function of the support staff, but the basis for such action is the election order sheet Form NLRB-700 prepared by the assigned Board agent. The responsibility for the accuracy of the finished notice of election is the Board agent's.

**11314.1 Copies Required**

When election details are arranged, the necessary number of copies of notices should be determined. There should be provision for at least one copy for each location at the plant where notices to employees are customarily posted, one copy for each party and each legal representative, a reasonable additional number requested by any party and enough extra copies for use at the election and for the case file.

**11314.2 Insertions Required**

The notice should contain, at a minimum, the printed portion thereof with appropriate insertions in the sample ballot, description of the electorate (bargaining unit as modified by eligibility date and the Board's normal additions and exclusions), the date, place, and hours of election and, in split-session, multiple-site, and mail ballot elections, it should contain the date, time and place where ballots will be mingled and counted. Sec. 11336.3 discusses additional insertions that should be made on notices in mail ballot elections. Secs. 11350.5 and 11452.3 discuss additional insertions that should be made on notices in runoff and rerun elections, respectively.

**11314.3 Instructions to Voters**

Appropriate additions may be inserted: e.g., "You will be notified at the time when you may go to vote;" or "If you wish, you may vote on your own time while the polls are open;" or "You may vote on employer time in accordance with the attached Schedule of Voting."

**11314.4 Striker-Eligibility Language**

In a case where a strike is in progress at the time of the election, the Region shall insert an instruction on striker eligibility in the notice of election.

The following striker-eligibility language should be used, as appropriate:

(a) (If an economic strike began less than 12 months before the election date)

Also eligible to vote are those employees in the unit who are engaged in an economic strike that began less than 12 months before the election date, and their permanent replacements.

(b) (If an economic strike began more than 12 months before the election date)

Also eligible to vote are those employees in the unit who are engaged in an economic strike that began more than 12 months before the election date unless they have been permanently replaced.

(c) (In the event of a rerun election necessitated by election misconduct, and if an economic strike began more than 12 months before the election date)

Also eligible to vote are those employees in the unit who are engaged in an economic strike that began less than 12 months before the date of the first election herein and their permanent replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987).

#### **11314.5 Self-Determination Election**

Appropriate insertions should be made for self-determination elections. See Sec. 11091, self-determination elections, for wording to be used.

#### **11314.6 Supplements**

Supplements to the notice may be provided; for example, a voting schedule or a list of eligible voters. (In the latter case, the list should always be accompanied by a statement that the list is of those *presumed* to be eligible, subject to correction on appropriate notification.) Supplements should be prepared by the Regional Office or, if prepared by the employer, should be approved by the Regional Office.

#### **11314.7 Posting and Distribution**

##### **11314.7(a) Employer's Premises**

Copies of the notice should be posted in conspicuous places by the employer at the workplace before the election. Posting places include, but are not limited to, bulletin boards and timecard racks.

If a complaint of insufficient posting is presented to the Regional Director, it should be investigated and appropriate action taken.

Regional Director decisions that direct elections, letters approving election agreements, and letters forwarding election notices should include the following language:

Your attention is directed to Section 103.20 of the Board's Rules and Regulations, which provides that the Employer must post the Board's official

Notice of Election at least three (3) full working days before the day of the election, excluding Saturdays, Sundays, and holidays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

#### **11314.7(b) Additional Distribution**

Notices should be distributed by mail or in person to eligible or disputed eligible voters if the Regional Director thinks this advisable; e.g., to persons who are not actually working during the posting period.

Where newspaper or radio or TV publicity is recommended because, for example, personal notification is made impossible because of lack of information as to voters' whereabouts or because the employer is not cooperating, there should be clearance with the Division of Operations Management.

If the employer is not cooperating in the election and the election is being held off the premises, the Regional Director may have notices posted in the vicinity of the employer's facility in advance of the election.

#### **11314.8 Postponed or Canceled Elections**

In the event a scheduled election is postponed or canceled after the notice of election has been distributed, the parties should be immediately advised. Thereafter, written notification should be provided in an expeditious manner, such as by facsimile transmission. The employer should be requested to post the Regional Office's written notification next to the notice of election previously posted.

The Regional Director may unilaterally set the date of a rescheduled or canceled election. *Superior of Missouri, Inc.*, 327 NLRB No. 53 (1998); Secs. 11084.3 and 11302.1(b).

#### **11314.9 Runoff and Rerun Elections**

See Secs. 11350.5 and 11452.3 concerning changes that should be made in the notice of election when runoff and rerun elections, respectively, are being conducted.

### **11315 Foreign Language Notice of Election and/or Ballots**

#### **11315.1 Utilization**

The use of foreign languages may be required in Board elections. As detailed in Sec. 11315.2, notices of election, including side panels and/or center panels and/or ballots in languages other than English, may be provided in addition to English notices, where the need is shown in appropriate circumstances. As an alternative or a supplement to these arrangements, foreign language interpreters may be provided at the polling site. Parties should advise the Regional Director of the need for foreign language translations and/or interpreters.

Because the preparation of foreign language notices may be extremely costly and may delay the election, the Regional Director should carefully evaluate requests for such notices. In deciding whether to provide translated notices and/or ballots, the Regional Director may consider the following factors:

(a) the portion of the voting group which speaks a foreign language and does not read English

(b) the number of foreign language translations that would be required to accommodate these voters

(c) whether written communication between the employer and these employees is in English or their native language. (The mere fact that employees may communicate among themselves in a language other than English is insufficient to demonstrate that they do not understand written English.)

Costs of translations can be minimized or eliminated by using translations previously prepared. Regional Offices should consult with the Executive Secretary to determine whether samples are available. As a general rule, technical job classifications, such as “respiratory therapist” or “turret lathe operator” need not be translated.

### **11315.2 Arrangements; Notice of Election**

Arrangements for voters who do not read English may take a number of different forms, including translation of part or all of the notice of election and/or the use of multilingual ballots. As indicated above, foreign language interpreters at the polling site may be used as an alternative or a supplement to these arrangements.

#### **11315.2(a) Translated Side Panels on Notice of Election**

Translations of the side panels of election notices, which provide the important explanation of the purpose of the election and the rights of voters, have been prepared by the Agency in the past in many languages. In appropriate circumstances, translated side panels alone may be provided for an election, with the center panel setting forth the unit, the date, and time of the election and the sample ballot in English. In small elections, or where there are only a few foreign language voters, this partial translation may suffice, if the circumstances are such that the Regional Director concludes the affected voters will thereby be fully informed as to the election. For example, the Regional Director may conclude that most employees, regardless of their native language, will receive information orally about the date, time and place of the election.

#### **11315.2(b) Translated Notice of Election and Ballots**

Translated notices of election (center panel as well as side panels) may be provided and bilingual and (rarely) multilingual ballots may be provided to voters at the election. Translated ballots with three or more languages should usually be avoided, as they often present problems of readability, particularly if one or more of the languages must be handwritten. *Kraft, Inc.*, 273 NLRB 1484 (1985).

**11315.2(c) Translated Notice of Election With English Ballots at Election**

Translated notices of election (center panels as well as side panels) may be provided, as in paragraph (b) above, while English-only *ballots* are provided to the voters at the election. In this case, the ballot appears on the notice of election, translated into the foreign language with the following notation above it:

The sample ballot reproduced in this notice appears in [foreign language] and is a translation of the ballot you will receive in the election. However, the ballot you receive in the election will be printed in English.

*Precise Castings*, 294 NLRB 1164 (1989), *enfd.* 915 F.2d 1160 (7th Cir. 1990), *cert denied* 499 U.S. 959 (1991).

**11315.3 Foreign Language in Mail Ballot Election**

In the event a translation is utilized on the notice of election in a mail ballot election, inquiries, including by telephone, may be received in a foreign language from prospective voters. Sufficient arrangements should be made by the Regional Office to ensure that appropriate responses are provided to these inquiries. Secs. 11336.2(c) and 11336.3.

**11316–11335 VOTING PROCEDURES****11316 Size and Arrangement of Polling Place**

The size of a polling place depends on the nature of the election. The number of voters and the extent of the period(s) within which they may be expected to vote are controlling here.

Preparations should be made for the peak load. With a well-prepared eligibility list (i.e., one that is prepared in such form that names can easily be found and one that contains a minimum of mistakes) and where there is a minimum of challenges, one checking table can process 250–400 voters per hour. Each checking table, under these circumstances, can accommodate voters using up to five voting booths. With these guides in mind, election needs may be scaled up or down according to the given election. In elections involving fewer than 25 voters, no more than one booth and one checking table are necessary. In large elections, a separate headquarters and/or challenge table may be necessary.

A polling place should be so arranged that the voters may, with a minimum of confusion, enter, stop at the checking table, proceed to a voting booth, go next to the ballot box, and then leave.

Enough space between the entrance and the checking table(s) should be provided so that a line (or lines) of voters may form without “scaring away” newcomers voters. Enough space should be provided in the area traversed thereafter so that, with a minimum of cross-conversation and “usher” assistance, the voters will perceive and do what is expected of them.

Adequate light and heat should be provided. There should be at least one chair available for each participating Board agent and observer.

### **11318 Preelection Conference**

The Board agent(s) and observers (Sec.11310) should assemble at the polling place from 30 to 45 minutes (depending on the complexity of the election) prior to the opening of the polls. In very large elections it may be prudent to hold the preelection conference on the preceding day.

Those present should identify themselves. Substitute observers should be secured for absent observers, if possible; also see Secs. 11310.1 and 11310.2 in the event of absent observers. The parties, not Board agents, should obtain substitutes.

Board agent(s) should examine the polling place with the parties and check to see that all equipment is available and in place. Sec. 11316. "Voting place" and "Warning" signs should be posted. Arrangements for the release of voters should be confirmed. Sec. 11330.4. Last-minute changes to the election eligibility list should be discussed. Sec. 11312.4.

The Board agent should not routinely inspect the notice of election posting, but may do so when requested by the parties. It may be desirable for the Board agent to post an extra notice of election in the polling place so that voters may refer to it if they have questions. A no-electioneering area may be designated. Sec. 11326.

Secs. 11318.1 through 11318.5 discuss other matters that should be addressed during the preelection conference.

#### **11318.1 Distribution of Badges**

Board agents should wear "Agent" badges. Observers badges should be distributed to the observers, with strict instructions as to their return. Observers are not permitted to wear observer badges when they are not acting as observers. The badge worn by the observers is provided by the Board. Secs. 11310.4 and 11326.1.

#### **11318.2 Instructions to Observers**

Procedures for designating observers are discussed in Sec. 11310.

The Board agent should give a copy of the Instructions to Observers Form NLRB-722 to each observer at the preelection conference, if this has not already been done (Sec.11310.2). The observers should be given the opportunity to read it and ask additional questions.

The following specific areas should be covered briefly:

(a) prohibition of observers' electioneering and unnecessary conversation with voters (Sec. 11326.2)

(b) prohibition of observers' keeping lists of names of voters (Secs. 11312.4 and 11322.1)

(c) procedure for checking voters' names (Sec. 11322.1) and for challenged voters (Secs. 11338.2(a) and 11338.3 through 11338.5).

### **11318.3 Representatives of Parties**

During this preelection period, if not earlier, representatives of the parties should be permitted to inspect the polling place. Such representatives may be present during the preparation of the ballot box. Their objections should be disposed of in accordance with their merit. Finally, *before* the polls are opened, they should be asked to leave.

In the rare case in which the employer on whose premises the election is being conducted refuses entrance to such representatives, the employer should be told that inspection of the polling place by representatives of the parties is customary and that, if the employer persists in its refusal, objections may be filed based on lack of opportunity to inspect the polls.

### **11318.4 Sealing of Ballot Box**

The sealing of the ballot box should be made a formal occasion. All observers should be asked to look into it while it is open and to affirm that it is empty. Then it should be closed and securely sealed. All present should be required thereafter to stand clear of the ballot box.

### **11318.5 Employees Who Arrive Before Opening of Polls**

"Early-birds" should not be permitted to vote prior to the time scheduled. Those who arrive should not be sent away but should be asked to line up. If a person must leave, he/she should be informed of the voting hours.

## **11320 Opening of Polls**

The polls should be opened at the time scheduled. The Board agent will select the official timepiece and so inform the observers.

If the polls open late, the Board agent in charge should note the time and the details, including whether and how many individuals have come to vote and have left without voting. If no one has left, it is good practice to secure the signatures of all observers on a statement to this effect.

## **11322 Progress of Voters**

On entering the polling place, the voter proceeds to the checking table. A voter entering a polling place will at least momentarily be unaware of the steps to be taken and will tend to hesitate, attempt to appraise the situation and perhaps discuss it with other entering voters. The voter may invite others to precede him or her and, without preventive steps, there may be a "pileup" in this approach area. Affirmative steps should be taken to prevent confusion. If possible, the checking table should be the most prominently visible object to an incoming person. If necessary, a directional sign should

point to it. If more than one checking table is involved, informational signs (e.g., “Last names A–F vote here”) should be displayed. Finally, a set of observers may be assigned to act as ushers in this area.

The lists at the checking tables should be so divided that a voter’s name will not be found at more than one table.

### **11322.1 Procedure at Checking Table**

At the checking table are a set of observers, who sit behind the table, and a Board agent, who sits at one end. Before them is the part of the voting list applicable to that table. The observer for each party should be issued a different color pencil, which should be noted on the list.

Observers should not be permitted to make lists of those who have or have not voted. The official eligibility list is the only record made and shows whether a person named thereon has voted. The observers’ attention should be directed to the important task of checking that list and they should not be distracted by keeping other records. Observers may, however, maintain a list of voters they intend to challenge. Secs. 11312.4 and 11338.4.

The approaching voters, who should by that time have formed a line, should be asked to call out their names, last names first, as they reach the table. They may also be asked for other identifying information, as necessary. In sufficiently large or complex elections, the identifying information to be utilized by voters as they approach the checking table should be explored with the parties in advance of the election. Sec. 11312.4.

The voter should give his/her identifying information, not an observer. Once a voter’s name has been located on the eligibility list, all observers are satisfied as to the voter’s identity and no one questions his/her voting status, each observer at the checking table should make a mark beside the name. One party marks before the name and the other after the name, both using a straight line or check mark, each with a different colored pencil.

Once a voter has been identified and checked off, the observers —or one of them designated by the others — should indicate this to the Board agent, who will then hand a ballot to the voter. The agent must look at each ballot to make sure that the ballot material has been photocopied onto the form and that there are no blanks.

Only the Board agent handles unused ballots. They must remain in his/her personal custody at all times.

It is at the checking table, normally, that challenges are made. (For procedure to be followed, see Challenges, Sec. 11338.) In large elections, a challenge table may be established, to which challenged voters may be ushered directly.

### **11322.2 Voting Booth**

The voter proceeds from the checking table to a voting booth. The Board agent should police the booth to see that there are no cross-conversations between occupants

and that there is no more than one occupant per booth. The Board agent should also occasionally inspect the interior of the booth.

### **11322.3 Spoiled Ballots**

A voter who spoils his/her ballot and returns it to the Board agent should be given a new ballot. On request, the Board agent should show the spoiled ballot to the observers, provided no voting preferences are thereby disclosed. Spoiled ballots should be preserved.

### **11322.4 Ballot Box**

The voter leaves the booth and drops his or her folded ballot into the ballot box. The observers at the ballot box should not insert the ballot for the voter; they should remain at least 3 feet away and, if the ballot “sticks” in the slot, advise only the voter to push it through.

The voter should immediately leave the polling place after voting. Voters should not be permitted to loiter or wait for other voters.

## **11324 Close of Polls**

As the election approaches its close, there may be a lull in activities. This should not be an excuse for a general relaxation of formality.

The polls should not be closed early even though it may appear that 100 percent of the eligible voters have voted.

The polls should be declared closed exactly at the scheduled time determined by the Board agent as indicated by the timepiece selected prior to the opening of the polls. Sec. 11320.

The closing time should not be extended just because the election opened late. Only in unusual cases may voting time be extended at the discretion of the Board agent or by written agreement of the parties with acquiescence of the agent.

All in the voting line at the time scheduled for closing should be permitted to vote, even though the election is prolonged thereby. For those who arrive and attempt to join the line thereafter, the Board agent should follow the same procedure as for voters who arrive after the polls have been declared closed (Sec. 11324.1).

The slot in the ballot box should be sealed with tape at the close of the polls. The Board agent should thereafter, until the count, maintain personal custody of the ballot box unless, by unanimous agreement, other arrangements are made.

### **11324.1 Late-Arriving Employees**

An employee who arrives at the polling place after the designated polling period has ended is not entitled to have his or her ballot counted, absent extraordinary circumstances, unless the parties agree not to challenge the ballot. *Laidlaw Transit, Inc.*, 327 NLRB No. 63 (1999); *Monte Vista Disposal Co.*, 307 NLRB 531 (1992). In order to

permit an orderly investigation if necessary after the election as to whether there were extraordinary circumstances, the following procedure should be followed when a voter arrives after the designated polling period has ended: the Board agent should determine whether there is agreement of all the parties as to whether such voter should be allowed to cast a ballot; if no such agreement is reached, the Board agent should permit the voter to cast a ballot, which the Board agent should then challenge.

### **11326 Electioneering**

No electioneering will be permitted at or near the polling place during the hours of voting, nor should any conversation be allowed between an agent of the parties and the voters in the polling area or in the line of employees waiting to vote. Indeed, agents of the parties (other than observers) should not be allowed in the polling area during the election hours.

Neither the Board agent nor anyone else from the Agency will venture an opinion, in advance, with respect to any given preelection electioneering practice; and, while the parties may reach any agreements they can with respect to electioneering either prior to or during the election, such agreements will be regarded as those of the parties themselves — it cannot be predicted that violations of the agreements will or will not be valid grounds for objecting to the election.

In the absence of the filing of an unfair labor practice charge, complaints of improper preelection electioneering should not be investigated prior to the election, except to the extent that they involve abuse of the Board's processes. For example, defacement of notices of election should be corrected, if brought to the Region's attention, usually by the posting of fresh copies.

The Board agent should note in the file information as to all electioneering incidents.

#### **11326.1 Insignia Worn by Observers**

It is required that all observers wear the official observer badge. It is preferred, but not required, that they wear no other insignia (Secs. 11310.4 and 11318.1). Observer badges must be collected at the end of the election.

#### **11326.2 Electioneering by Observers Prohibited**

Election observers may not electioneer during their hours of observer duty, whether at or away from the polling place. In order to remove any possibilities of electioneering, an observer away from the polling place for any reason during his/her duty hours should be accompanied by observers representing the other parties. Observers should not be permitted to engage in unnecessary conversation with incoming voters.

#### **11326.3 Voters**

Voters need not remove insignia, even though they constitute electioneering material. Nor need their conversations be policed, unless there is talk loud enough to constitute a disturbance.

**11326.4 Area Surrounding Polling Place**

In some exceptional situations it may be desirable for the Board agent, before the polls open, to determine an area surrounding the polling place in which all electioneering is forbidden. The Board agent should not undertake to set up an area that cannot be policed. The Board agent periodically should check the voting area and booths for electioneering material, including defaced notices of election.

**11326.5 Distribution of Literature; Sound Truck**

There should be no prohibition on the part of the Board agent against the distribution of literature on the day of the election even though it takes place during the voting hours. However, electioneering materials visible from the polls should be removed.

If electioneering from a sound truck should penetrate to the polling place during the voting the Board agent, if possible, should take appropriate steps to have the sound lowered.

**11328 Voting by Affidavit**

Where efforts to obtain a list of eligible voters (Sec. 11312.1) have failed, voting may be done by affidavit, unless, in the discretion of the Regional Director, it is more appropriate to make an effort to obtain the list by subpoena. Secs. 11312.6 through 11312.10 and 11313.

An election may not be run partly by the employer's list and partly by affidavit. Where an employer has submitted a list that is alleged to be incomplete, voters whose names are not included on the list must be voted under challenge. Sec. 11338.

**11328.1 Form of Affidavit**

Preparations should be made in advance. Mass affidavit forms should be duplicated along the following lines:

I swear or affirm that I have seen the Notice of Election describing eligibility in the [described] election; I was employed in the bargaining unit listed on the Notice on [eligibility date] and I am still employed in the unit today; I am, in all respects, eligible to vote in this election.

I have read the foregoing and, declare, under oath, that it is true.

Signature

Address

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Subscribed and sworn to before me at \_\_\_\_\_ this \_\_\_\_\_ day  
of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_

**Board agent**

### **11328.2 Procedure at Checking Table**

On the day of election, extra copies of the notice of election should be available for distribution to voters to be read by them as they approach the checking table. On reaching the table, each voter is asked his/her name, shown an affidavit sheet and asked to read it. The voter should sign and fill in required information, after which the voter should be sworn in, either alone or with others. Right hand upraised, the voter should affirmatively answer the question, "Do you solemnly swear (or affirm) that what you have just signed is the truth, the whole truth, and nothing but the truth, so help you God?" The jurat may be completed as the page becomes filled with signatures. Affirmation will also be accepted. The voter may then be given a ballot.

The regular challenge procedure (Sec. 11338) applies equally to employees voting by affidavit.

### **11330 Voting on Employer Time**

Where it has been decided that eligible voters may vote during working hours, specific arrangements should be made in this respect. It should be noted that employees have a right to refrain from voting and no one should be ordered to go to the polling place.

Except where the number of employees is small, permitting them to leave their work at will and not by specific arrangement may result in (a) undue disruption of production and (b) upsetting of the regular voting flow.

#### **11330.1 Voters Scheduled Alphabetically**

One method of releasing voters during working hours, which will ensure that at any given time, a constant, small number of employees will be away from their workplaces and the voting flow will be regular and steady, is to permit voting at preposted times according to the first letter of the last name.

**NOTE:** Since no further method of release will be utilized, the schedule of voting posted alongside the notice of election should instruct that "Voters may leave work to vote at the times indicated. However, in the event a voter is unable to do so, he or she may vote at any time the polls are open."

#### **11330.2 Voters Scheduled by Work Unit**

Usually, however, the employer will prefer to shut down a whole department or work unit for the few minutes it will take for all in that department or unit to vote.

Assuming adequate checking tables, good eligibility lists, and minimum challenges, 90 to 100 employees can be scheduled to vote in each 15-minute period and any given voter may be expected to be away from his/her workplace a minimal period of time.

### **11330.3 Voting Schedule Preparation and Posting**

In preparing a voting schedule, the time just before and just after a change of shifts should be left open for those who prefer to vote on their own time, either before reporting for work or after leaving work. The schedule should note that employees may vote on their own time during the hours the polls are open, if they prefer.

The voting schedule may be posted in advance (alongside the notice of election). The legend should state whether voters may leave their work or will be released at the time indicated.

### **11330.4 Method of Releasing Voters**

The method of releasing voters must be made clear to all parties and should be resolved well in advance of the election. In many instances the parties will agree that employees may release themselves and go to vote in accordance with the posted notice. In other cases releasing may be done via public address system or by a traveling crew of observers (one observer representing each party) who may or may not be accompanied by a Board agent. Release by supervisors should be avoided to the extent possible. Therefore, whenever possible, the releasing should be done by the releasing crew or other agreed upon method, not by a supervisor.

### **11330.5 Off-Schedule Voters**

At the polling place itself, the question of whether a voter presenting himself/herself is off-schedule should not be raised. The method of voting at a scheduled time is designed to eliminate confusion; a too-close scrutiny and policing of the execution of the schedule may result in confusion itself. Of course, a gross deviation from the schedule (e.g., large numbers of voters pouring in at the "wrong" time) may denote some independent interference with the election, a situation that may call for on-the-spot correction by the Board agent.

## **11332 Split-Session Election**

What has been said of opening and closing elections (Secs. 11320 and 11324) applies equally to split-session elections. Polls should be opened and closed in accordance with the times designated in the notice of election.

At the close of a voting session that is not the last one, the ballot box slot should be securely sealed and observers should be encouraged to sign across the seals in order to assure themselves, upon resumption of voting, that the box has not been tampered with. Badges should be collected.

Between voting sessions, the ballot box is retained by the Board agent who is solely responsible for the custody of the box. The box should be in the personal possession of the Board agent or securely locked up. These arrangements should be

communicated to the parties when the election details are first determined. Secs. 11086.3, 11273.2, and 11280.3. The Board agent need not inform the parties of exactly where the ballot box will be kept, but only that it will be in Board custody.

Preelection arrangements should also include agreement on the time and place ballots will be mingled and counted; this information becomes part of the notice of election. Sec. 11314.2.

### **11334 Multiple Polling Places**

Where more than one polling place is open, either simultaneously, at different times, or with overlapping periods, the procedures are basically the same as those applying to a single polling place multiplied by the actual number of polling places. Each polling place should be set up consistent with the procedures noted in Sec. 11316.

The same ballot box may be used at more than one polling place if the voting periods do not overlap. The voting hours at each place, as well as the date, time, and place where ballots will be mingled and counted, should appear on the notice of election. Sec. 11314.2. At the close of voting, the ballot boxes used at all polls should be brought together and the contents of all the boxes thoroughly mixed before the count takes place.

If no two polling places are open simultaneously and only one eligibility list is used, voters may normally vote at any poll. If the election is large or complex, see Sec. 11312.4 regarding the utilization of identifying information for voters.

#### **11334.1 Polls Open Simultaneously**

Where the polls are open simultaneously, the emphasis should be on the absolute prevention of duplicate voting. A voter should normally be required to vote at a place (usually determined by work location) that has been designated in the notice of election. The employer should furnish a separate eligibility list for each location, either when submitting the election eligibility list (Sec. 11312.1(g)) or when simultaneously open polls are arranged (Sec. 11302.2(a)). A voter's name will appear on the eligibility list only at his/her work location. If the election is large or complex, see Sec. 11312.4 regarding the utilization of identifying information for voters.

In appropriate circumstances (e.g., where the assignment of work to delivery truckdrivers or roving repair crews' work is not subject to a predetermined reporting-in time or place), a voter's name should appear on the eligibility list for the polling place he/she is most likely to use. If an individual votes "out of location," his/her name will not appear on the list for that location and the voter will cast a challenged ballot. Efforts should be made to clear such challenges before any votes are counted. Sec. 11340.3.

#### **11334.2 Traveling Election**

In appropriate circumstances, the polls may move from place to place. An example is the situation of an election among employees of an employer who work at several different locations. The voting is conducted by a traveling Board agent. It is desirable, but not required, to have the same observer representing each party at all locations.

### **11334.3 Closings of Polls and Election**

The opening and closing of each voting period at each polling place should be accompanied by the same formalities, i.e., sealing the ballot box (Sec. 11324), as those involving the opening and closing of a single polling place. Voting should not end earlier than the scheduled time.

As noted in Sec. 11334, at the close of voting, the ballot boxes used at all polls should be brought together and the contents of all the boxes thoroughly mixed before the count takes place.

## **11335 Mixed Manual-Mail Election**

### **11335.1 Generally**

A mixed manual-mail election is an election in which one portion of the unit votes manually and the other portion votes by mail ballot. Ordinarily, a mixed manual-mail election should be arranged only where a manual election is otherwise appropriate and

(a) some of the employees cannot vote in person at the manual election because of employer action (e.g., assignment of employees to duties that make it impossible or impractical for them to come to the polling place); or

(b) all parties agree that employees on layoff status should be sent mail ballots; or

(c) appropriate circumstances are present (Sec. 11335.2) involving “scattered” employees or a strike, lockout or picketing. Sec. 11301.2.

**NOTE:** Absentee ballots are not provided in Board elections. Sec. 11302.4.

### **11335.2 Determination**

A mixed manual-mail election imposes additional complexity upon the election process and requires substantially more Agency resources than either a manual election or a mail ballot election. *North American Plastics Corp.*, 326 NLRB No. 70 (1998). The election’s additional complexity arises from the need to determine which voters are to vote manually and which by mail; for example, information on voters’ schedules must be gathered and analyzed in order to determine the voters whose schedules warrant mail ballots, as contrasted with those whose schedules permit manual balloting. Further complexity arises from the need to ensure that ballots sent to employees scheduled to vote by mail are not utilized for chain voting during the manual polling period. These steps may also contribute to delay in arranging and conducting the election. Increased Agency resources are required because of the need to make the administrative determinations just described and because two election procedures are being used rather than one. Accordingly, a mixed manual-mail election should be conducted only where there are sufficient reasons to warrant both the administrative burden arising out of such an election’s additional complexity and the substantial increase in Agency resources such an election requires.

Two instances that warrant a mixed manual-mail election are recited in Sec. 11335.1(a) and (b). The other instances are appropriate circumstances involving

“scattered” employees or a strike, lockout or picketing. Sec. 11301.2. Examples of such circumstances are exceptionally “scattered” employees, such as nonworking seasonal employees who are voting with working employees or striking or locked-out employees who are likely to have difficulty participating in a manual election because they have left the area or are temporarily employed elsewhere. In other situations, either a manual election or a mail election should be held, rather than a mixed manual-mail election.

### **11335.3 Preparation of Separate Lists**

Once the determination has been made as to which groups of voters are to vote manually and which by mail (Sec. 11335.2), separate lists of manual voters and mail ballot voters should be prepared for use in the different portions of the election. The Regional Director may require the employer to prepare these separate lists. Alternatively, if sufficient information is available to the Regional Director, he/she may use the election eligibility list submitted by the employer (Sec. 11312) to prepare the separate lists.

### **11335.4 Procedures**

Appropriate elements of the manual election and the mail ballot election procedures should be combined when conducting a mixed manual-mail election.

**Notification and Date of Election:** When scheduling the election, sufficient time should be allowed for written notification to the parties setting forth the time and date on which the mail ballots will be dispatched to the voters. Sec. 11336.2(b). The deadline for receipt of mail ballots may precede or follow the date of the close of the manual voting portion; thereafter, all ballots should be counted together. Secs. 11314.2 and 11336.3. The manual and mail ballots should be commingled before the count. Sec. 11336.5(b).

**Ballot:** The instructions to voters on the ballot used in a mixed manual-mail ballot election should be as follows:

“IF YOU ARE CASTING THIS BALLOT MANUALLY, AT A POLLING PLACE WITH A BOARD AGENT PRESENT, follow these Instructions:

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.  
If you spoil this ballot, return it to the Board agent for a new one.

IF YOU ARE CASTING THIS BALLOT BY MAIL, see enclosed Instructions.”

**Notice of Election:** *Both* the standard notice of election Form NLRB-707 used in manual elections *and* the notice of election Form NLRB-4910 for mail ballot elections (Sec. 11314) should be used for mixed manual-mail ballot elections. The words “INSTRUCTIONS TO ELIGIBLE EMPLOYEES VOTING MANUALLY” should be inserted at the top of the center panel of the manual election notice. The remainders of

the respective center panels should contain the information appropriate to the manual and mail portions of the election. The sample ballot on both notices must be identical.

## **11336 MAIL BALLOT ELECTION**

### **11336 Generally**

These Sections deal only with procedures for conducting a mail ballot election. Secs. 11302–11334 discuss procedures for conducting manual elections.

#### **11336.1 Determination**

Secs. 11301.2 and 11335.2 discuss the Regional Director's determination as to whether to conduct a manual, mail or a mixed manual-mail election.

#### **11336.2 Notification and Distribution Procedures**

The mail ballot election process involves the following steps.

##### **11336.2(a) Election Eligibility List**

As in any election, a list of eligible voters is prepared and checked for accuracy. Sec. 11312. The employer should be requested to provide a copy of the list on mailing labels. Sec 11312.1(h). The list should contain the current or last known address of each person who is to vote by mail. A key number is then placed beside each name on the list.

##### **11336.2(b) Notification**

Written notification is sent to the parties at least 24 hours before the time and date on which mail ballots will be dispatched to the voters, informing the parties of the dispatch time and thus the time of the "start" of the election for application of the *Peerless Plywood* rule. *Oregon Washington Telephone Co.*, 123 NLRB 339 (1959); *Peerless Plywood*, 107 NLRB 427 (1953). The notification should also set forth a terminal time and date by which the ballots should be returned to the Regional Office, as well as the date and time of the ballot count.

For the information of the parties, a copy of Form NLRB-4175 Instructions to Eligible Employees Voting by United States Mail, which will be sent to the voters, should also be enclosed with the notification.

##### **11336.2(c) Voter Kit**

A kit is mailed to each voter, not only to those agreed to be eligible, but also to those alleged to be eligible by any party.

The kit contains Form NLRB-4175 Instructions to Eligible Employees Voting by United States Mail. Inserted on the bottom of the Instructions should be the name of a designated Regional Office employee, the Regional Office address, and the designated Regional Office employee's telephone number. The designated Regional Office employee named in the Instructions as the contact person should be an individual who is

readily available in the event voters attempt to contact him/her. If foreign language voters are involved and translations are being provided (Sec. 11315.2), sufficient arrangements should also be made to deal appropriately with foreign language inquiries (Sec. 11315.3).

Also included in the kit is a ballot. Note that the instructions to voters that appear on the ballot used in a mail ballot election are unique to that election. Sec. 11306.6.

The kit further contains a blue mail-ballot envelope and a yellow postage-paid return envelope addressed to the Regional Office. The key number of the addressee should be inserted on the yellow return envelope in each case. (Pursuant to Postal Service regulations, the yellow return envelopes should be stamped by the Regional Office postage meter, with the date left blank.)

Voters should *not* ordinarily be sent the Notice of Election Form NLRB-4910 (Sec. 11314) posted by the employer in mail ballot elections, unless the considerations in Sec. 11314.7(b) entitled “Additional Distribution of Notices” are present. In the event a Notice of Election is sent to a voter, an additional Instruction should be included in the kit advising the voter to mark and return the enclosed ballot, *not* the sample ballot in the Notice of Election.

Returned envelopes are treated as prospective voters for purposes of identification, challenges, etc.

#### **11336.2(d) Deadline**

The deadline for return of the ballots depends on the circumstances.. Usually two weeks should be allowed from the date of mailing to date of return. Slightly more time may be needed around holiday periods.

#### **11336.3 Posting of Notice of Election**

Copies of the notice of election should be posted at conspicuous places at the employer’s business location frequented by voting employees and, if any, at the employer’s scattered bases of operation. As indicated in Sec. 11336.2(c), voters should *not* ordinarily be sent a copy of the notice of election unless the considerations in Sec. 11314.7(b) entitled “Additional Distribution of Notices” are present.

The following language should appear on the notice of election:

Voting will be by mail. If you believe you are an eligible voter and you do not receive a ballot in the mail by [date—2 or 3 days after the last date any ballots should have been received], communicate immediately with [designated Regional Office employee, Regional Office address, and designated Regional Office employee’s telephone number].

As indicated in Sec. 11336.2(c), the designated Regional Office employee named on the notice of election as the contact person should be an individual who is readily available in the event voters attempt to contact him/her. If foreign language voters are involved and translations are being provided (Sec. 11315.2), sufficient arrangements should also be made to deal appropriately with foreign language inquiries (Sec. 11315.3).

Preelection arrangements should include agreement on the time and place ballots will be mingled and counted; this information becomes part of the notice of election. Sec. 11314.2.

#### **11336.4 Kit Not Received by Voter; Duplicate Kit**

Any contacts from prospective voters who report they have not received a kit should be given the action warranted. If the prospective voter, from the office records, has never been sent a mail kit, a duplicate should be sent immediately, the name inserted on a supplemental list, and one of a new series of “key” numbers given. If the caller has moved and it appears merely that the mail is delayed by the necessity for forwarding, advise a 2 day wait unless the deadline is imminent, in which case forward a new kit bearing the old number plus “(dupl)” and note the fact on the eligibility list.

If the caller has lost or spoiled the ballot or ballot envelope, the caller should also be sent a duplicate kit bearing the old number plus “(dupl).” In the event both the original and the duplicate envelopes are received from an employee to whom a duplicate was mailed, only the ballot in the envelope having the earlier postmark should be counted. In the event postmarks are not discernible, only the envelope bearing the earlier Regional Office date stamp should be counted. In the event two ballots are received in one envelope, the voter’s ballots should be challenged. If the parties agree, one of the ballots may be counted, providing secrecy can be maintained. Those duplicates not counted should not be entered in the tally as challenged or voided ballots, but preserved, unopened, for display to the parties as “duplicates.” The envelope bearing the earlier postmark or date stamp that contained the counted ballot should be attached to the envelope containing the duplicate that was not counted.

#### **11336.4(a) Receipt of Envelopes by Regional Office**

All envelopes should be date stamped when received back by the Regional Office to establish the date of receipt. Preserve, for display to the parties, all kits returned as “undelivered.”

#### **11336.4(b) Unsigned Ballot Envelopes**

If a ballot envelope is returned without signature, the election support staff person should, if sufficient time remains before the deadline, send a duplicate kit with a letter explaining that failure to sign voids a returned ballot. Sec. 11336.5(c).

#### **11336.5 Check and Count of Ballots**

##### **11336.5(a) Parties’ Observers**

The parties may select observers for purposes of identification, checkoff, challenges, etc. Since the ballots have already been marked at the time of receipt, the employer may designate supervisory employees as observers and the labor organization may designate union officials.

**11336.5(b) Count**

At the time scheduled for the count, the returned envelopes are treated as “voters” approaching the checking table. The observers at the table make their marks alongside the respective names on the list. The observers may, if they wish, challenge ballots. Challenged ballots should not be opened, but simply labeled “challenged” on the yellow outer return envelope. Sec. 11338.9.

After the yellow outer return envelopes have been checked against the list, all should be opened at once. Next, the blue ballot envelopes should be mixed thoroughly before the envelopes are opened and ballots are extracted. The ballots should be mixed again before being counted.

**11336.5(c) Late or Unsigned Envelopes**

Ballots contained in envelopes received before the count should be counted, even if they are received after the close of business on the return date. *Kerrville Bus Co.*, 257 NLRB 176 (1981). Ballots that are returned in envelopes with no signatures or with names printed rather than signed should be voided. *Thompson Roofing, Inc.*, 291 NLRB 742 (1988).

**11338 CHALLENGED BALLOTS****11338 Generally**

The challenge procedure provides a method whereby a voter’s eligibility to vote may be called into question, the ruling on the question may be at least temporarily reserved and the questioned voter may memorialize his/her desires in the event these desires should have relevance in the future—all without disrupting the regular flow of votes.

**11338.1 Basis**

When a request for review of a Regional Director’s Decision and Direction of Election raises questions concerning a ruling on eligibility or unit placement, the Board may choose to postpone ruling by directing that those employees in the disputed classification be permitted to vote subject to challenge. Also, if the Board has not ruled upon or has granted a request for review, it may be necessary at the election to challenge and/or to segregate and impound ballots. Secs. 11274, 11302.1(a), 11338.2(b), and 11338.8; Sec. 102.67(b), Rules and Regulations. In any of these circumstances, the Board agent is responsible for challenging such ballots if no party does so. When a large number of challenges can be expected in a case, it may be desirable to prepare challenge envelopes in advance, to the extent possible.

Discharged employees who state that they believe they have been unlawfully terminated may be allowed to vote subject to challenge even absent current charges being on file in the Regional Office where the discharged employees state that they intend to file charges concerning their discharges. *Alabaster Lime Co.*, 190 NLRB 396 (1971). If the Board agent knows that such individuals may try to vote, he/she should so inform the

employer and ensure that such individuals are not excluded from the employer's premises and thus the polls.

## **11338.2 Who May Challenge**

### **11338.2(a) Observers**

Any observer has the right to challenge a voter for cause. Observers may maintain a list of employees they intend to challenge. Sec. 11338.4.

### **11338.2(b) Board Agent**

The Board agent must challenge anyone whose name is not on the eligibility list or who has been permitted by the Regional Director or the Board to vote subject to challenge (Sec. 11338.8). Also, the Board agent must challenge a voter if he/she knows or has reason to believe that the voter is ineligible to vote, but in this instance only if none of the parties voices a challenge on that ground.

The Board agent will not make challenges for parties when such parties have observers present. *Galli Produce Co.*, 269 NLRB 478 (1984). However, if any party does not have an observer, the Board agent should, upon request and on good cause alleged by the party, state that party's challenge to a voter whose eligibility that party questions. The Board agent should advise the party that he/she does not assume responsibility for assuring that the voter's ballot will be challenged. The challenge is not made by the Board, but is in terms of stating the party's challenge (e.g., "the union has challenged your right to vote on the ground that you are a supervisor").

When directed by the Regional Director or the Board, the Board agent's challenge is to be expressed in terms of the basis for the Regional Director's or the Board's reservation. (For example, "the Regional Director (or the Board) has been unable to decide whether you are eligible to vote based on the union's contention that you are a supervisor rather than an employee.") The voter should then be voted under the challenge.

The reason for the challenge should be stated at the time the challenge is made.

## **11338.3 Challenge Procedure**

When a voter is challenged, a small "c" is placed beside his/her name by the checking observer for the challenging party. The other observer should make the usual check mark. (If the voter's name does not appear on the list, it should be added to the list, and the "c" inserted.) The Board agent (at the checking table or, in a large election, at a challenge table) fills out the information called for on the stub of a challenged ballot envelope—the voter's name, job classification, employer, place and date of election, the reason given for the challenge, the identity of the challenger, and the agent's initials. If time permits, the agent may elicit specific information surrounding the voter's status, for insertion on the reverse side of the stub, which should be initialed by the voter.

The voter is then given a ballot and instructed to enter the booth, mark the ballot, fold it so as to keep the mark secret and return to the voting table. The Board agent and the observers should make sure that when the challenged voter comes out of the booth,

he/she goes to the voting table and does not drop the ballot in the box before placing it in the envelope. On return to the voting table, the voter should be required to display the ballot, without disclosing how it is marked. The voter is then given a challenged ballot envelope. The *voter* places the marked ballot in the challenged ballot envelope, seals the envelope and drops the envelope in the box.

#### **11338.4 Notation of Potential Challenges**

Observers may maintain lists of employees they intend to challenge; alternatively, the parties may note on the eligibility list, at the preelection check, the persons they intend to challenge. Any such marks made prior to an election, however, must be easily distinguishable from the marks to be made by observers at the election. Sec. 11312.4.

The observers may not keep a list of those who have or have not voted. Sec. 11322.1.

#### **11338.5 Proper Time to Challenge**

Challenges should be handled as they come up, if feasible. Challenged voters should not be told to return later; however, they may be permitted to remain at the polling place awaiting a slack period.

In the Board agent's oral instructions to observers, the Board agent should urge the observers to challenge as the voter comes up to the checking table. Sec. 11318.2. Normally, a challenge should be made before the questioned voter receives a ballot. However, a challenge voiced at any time before the ballot is dropped into the ballot box should be honored.

#### **11338.6 Merit of Challenge Not to be Argued**

Arguments on the merits of a challenge should not be permitted. The challenge steps outlined above should be taken quietly and quickly and the regular voting flow should be impeded as little as possible. The Board agent should be prepared to explain to the voter the measures that will be taken to protect the secrecy of the challenged ballot.

#### **11338.7 Specific Exclusions and Inclusions in Decision**

Persons in job classifications specifically excluded by the Decision and Direction of Election should be refused a ballot, even under challenge, unless there have been changed circumstances. The Board agent must exercise discretion in deciding whether to allow a vote under challenge when the person presents plausible reasons for being permitted to vote despite the exclusion or when there is some question as to whether the person is actually within the excluded group.

Persons in job classifications specifically included by the Decision and Direction of Election should be given a ballot and permitted to vote without challenge based upon classification, unless there have been changed circumstances. Allegations of changed circumstances by the person seeking to challenge the employee should be reviewed by the Board agent. Unless plausible reasons are given for the challenge, the person specifically included should be permitted to vote without casting a challenged ballot.

In all situations where reasonable doubt exists concerning whether the prospective voter falls within an included or excluded category or whether changed circumstances have altered the voter's eligibility status, the challenged ballot procedure should be used.

### **11338.8 Voters Challenged/Ballots Impounded, Pending Board Ruling on Request for Review**

As indicated above, where a request for review has been filed and is still pending before the Board concerning the Regional Director's placement of a certain classification(s), whether included or excluded and the election is to be conducted but ballots are to be impounded (Secs. 11274, 11302.1(a), and 11338.1; Sec. 102.67 (b), Rules & Regulations), the Board agent conducting the election should ensure that individuals in the disputed classification(s) who appear at the polls to vote do so by challenged ballot. Sec. 11338.2(b).

### **11338.9 Mail Ballots Challenged**

Challenged mail ballots need not be placed in challenge envelopes. "Challenged" should be written across the face of the yellow outer return envelope and the information otherwise entered on a challenge envelope should be inserted on the reverse side of the envelope. Sec. 11336.5(b).

### **11338.10 Treatment of Challenged Ballots**

With respect to the treatment of challenged ballots after the close of voting, see Sec. 11340.3, Clearing Challenges.

With respect to the handling of challenged ballots after the tally of ballots has been completed, see Secs. 11340.9 and 11344.

**NOTE:** See Sec. 11340.8(b) NOTE concerning disputed classifications permitted to vote subject to challenge (Sec. 11338.8), where the Board or the Regional Director did not rule on eligibility or unit placement prior to an election.

## **11340 COUNT**

### **11340 Count of Ballots**

#### **11340.1 Time and Place**

The count of ballots should take place as soon after the close of voting (Sec. 11324) as possible.

If more than one polling place is involved, the count should begin after the ballot boxes from all polling places have been collected. If the voting hours have been long and arduous, if the count is expected to be time-consuming (see below) and if the personnel participating in the count are the same as those who participated in the conduct of the election, a rest period or meal period before the count may be arranged. When there is any intervening period, care should be taken not only to preserve the integrity of the ballot box(es), but also to display this fact.

The count may take place at any central location. Typically, in the small election, the count is taken at the polling place. In a large election, if one of the polling places is large enough, the tally can take place there.

As a consideration in determining the time and place of a count, the Board agent should be aware that, using the “formal” method of counting (Sec. 11340.6), each counting table, attended by a team of one caller, two unfolders, and tallying observers can dispose of approximately 1000 votes per hour; considering this, as altered by the circumstances of the instant case, a fair estimate can be made of the period that will be consumed by the counting.

### **11340.2 Persons Present**

The actual participants in the count are the Board agents and official observers, in the number necessary.

Also present may be members of the press and other interested persons to the extent permitted by the physical facilities and the permission of the owner of the premises being used. The Board agent in charge of the election should use his/her discretion in limiting numbers.

### **11340.3 Clearing Challenges**

Prior to the count, the parties may wish to resolve some challenged ballots (i.e., remove or sustain the challenge) by consent. Any such desires should be encouraged by the Board agent, but should not be urged if there is reluctance in any quarter.

Such clearance, on behalf of each party, should be done by someone specifically authorized so to act, not by an observer. A challenging party may withdraw from his/her position on the basis of discussion with the Board agent and/or other parties. This applies to the disposition of challenges that have been the subject of requests for review to the Board, including those on which the Board has deferred ruling to resolution by the challenge procedure. In such event, however, the other parties should be given the opportunity to challenge the same voter.

It is important that a challenge clearance situation not be allowed to devolve into an argument on the merits or to delay the count unduly.

#### **11340.3(a) Examples**

The most common example of a possible clearance situation is the challenge of the voter whose name was not on the eligibility list. The Board agent should review with the parties the names of those who were thus challenged. Secs. 11334.1 and 11338.2(b). If it turns out that all parties agree that the omission of a name was inadvertent and that the voter in question is eligible in all respects, the challenge may be resolved.

Another example is the challenge that was made by an observer by mistake, or without full knowledge. If facts can be quickly adduced that convince all parties that the person is eligible, the challenge may be resolved.

**11340.3(b) Procedure on Cleared Challenges**

Cleared challenges should be given the following treatment:

(1) the details of the disposition should be noted on the reverse side of the envelope stub;

(2) parties should signify their agreement by signing or initialing thereon;

(3) the stub should be removed (and preserved in the file); and

(4) the ballot, still folded, should be dropped from the envelope into the ballot box with the other ballots.

Challenges may also be cleared after the ballots have initially been tallied but before the tally of ballots has been completed. In this event, every effort should be made to ensure the secrecy of the votes cast by employees whose challenged ballots are thus cleared.

Once the official tally of ballots has been completed and signed by the parties, further challenges should not be resolved without the approval of the Regional Director.

**11340.4 Mechanics of Counting**

There are two methods of counting, informal and formal. The Board agent in charge of the election may elect which method to use, but with respect to large elections, or elections in which there are or have been strong feelings between the parties, the formal method should be used.

With either method, the precourt announcements are the same. *They should be made at every election count.* Their specificity assures that the employees and the parties present are fully informed as to the principles that will be observed during the count. They will also set the proper tone by emphasizing that the counting process to follow will be conducted by recognized rules.

The Board agent should announce the following to those present:

(a) A majority of the valid votes cast will decide the election. A tie vote will mean the union has not won, because it has not achieved a majority. (UD election exception: Sec. 11512.)

(b) Any ballot that clearly reflects the intention of the voter will be counted in accordance with the apparent intention, even though the marking is unorthodox — for example, even though a checkmark is used; or the word “yes” is written in the yes box, or the word “no” in the no box; or the mark appears within the outer rather than the inner box; or there are erasures; or there are markings in more than one box.

(c) A ballot the intent of which is not clear will be considered void.

(d) A ballot that contains a means of identifying the voter will be considered void.

(e) Only a Board agent will touch any ballot, even if a ballot drops to the floor.

Then, the Board agent will instruct the participating representatives as to the method of tallying. See below for formal and informal methods. *Only after these instructions have been fully announced should the box(es) be opened.* The contents should be thoroughly intermixed before counting. If more than one Board agent is involved, the Board agents other than the instructing one may now start unfolding ballots, placing them face down.

#### **11340.5 Informal Method**

The Board agent(s), stationed alone on one side of a counting table, removes the ballots from the box, opens them one by one, calling out and displaying the preference expressed and places them, face up, in piles according to the preferences expressed. On the other side of the table are witnesses representing all parties (and behind them are spectators, if any), who watch the proceedings. When the box is empty — parties' representatives should be allowed to inspect it at close range — a Board agent should count aloud the different piles, displaying each ballot to the witnesses as it is counted. Ballots should be packaged, according to preference, in groups of 50.

#### **11340.6 Formal Method**

Here again, the Board agents are alone on one side of a table. All but one of them unfolds ballots, placing them face down; the other Board agent takes each ballot as it comes, calling out and displaying the preference expressed and placing it, face up, on the pile representing that choice.

On the representatives' (and spectators') side of the counting table, there should be a tally sheet Form NLRB-741 for the votes received by *each* party. Seated at each tally sheet should be a representative of *another* party; that representative tallies (/// ///) each of the votes received by that party as it is called out. Behind the representative, as a check, is a representative of the party whose votes are being tallied on that sheet. When a party's tally reaches 50, the calling is temporarily halted while the particular pack of 50 is recounted in view of the representatives and then packaged. The totals subsequently arrived at are checked against the packs. Completed tally sheets Form NLRB-741 are signed by the tallier and the checker.

#### **11340.7 Interpretation of Ballots**

The Board agent should rule on and count each ballot as it comes up; interpretation of other-than-normal ballots should not be postponed. If the voter's intention is clear despite unorthodox markings, extra markings or erasures (Sec. 11340.4), the ballot should be counted in accordance with the intention displayed. *Osrarn Sylvania, Inc.*, 325 NLRB No. 147 (1998). If the voter's name, number or other means of identification appears on the ballot, the ballot is void.

Void ballots should be counted as such and packaged separately.

**NOTE:** If *objections* are filed after the election concerning the interpretation or validity of voided ballots, see Sec. 11340.8(b)(1).

**11340.7(a) Challenge of Board Agent Interpretation**

If the intent of the voter is clear, the Board agent should not allow the ballot to be challenged. However, if a party's challenge to the interpretation of the ballot is based on good cause, the Board agent should segregate the ballot and the ballot should be listed on the tally as a challenged ballot. Should such ballots be determinative or be among determinative challenged ballots, they should be photocopied at the voting place, if possible, and copies given to the parties. (In the event it is not possible to provide copies to the parties at the election and the parties wish to examine the ballots during the course of a postelection investigation, see Sec. 11344.1 regarding the procedure to be followed.) Thereafter, the Board agent should place the questioned interpretation ballots in an envelope reserved exclusively for them. Sec. 11340.9(a). Because it may be necessary to examine such ballots during a postelection investigation, these ballots should be kept segregated from other challenged ballots, although they must be safeguarded in the same manner as other challenged ballots. During *any* examination of questioned interpretation ballots, including by Agency personnel, during the postelection investigation, the parties should be given the opportunity to be present. Sec. 11344.1.

**NOTE:** If *objections* are filed after the election concerning the interpretation of ballots, see Sec. 11340.8(b)(1).

**11340.8 Preparation of Tally of Ballots (Sample Tally of Ballots)**

Each copy of the tally of ballots Form NLRB-760 should be completed in ink in the presence of the representatives of the parties in attendance. Form NLRB-760 is reproduced below.

Ensure that the appropriate type of election box has been checked. In an election conducted by mail, the mail ballot box should be checked. Item 1 — “Approximate number of eligible voters” — should be completed with the number originally appearing on the eligibility list plus those not originally on the list but who nevertheless cast a ballot under challenge.

The blank spaces in items 2–9 are self-explanatory. The “(not)” in item 10 concerning challenged ballots should be crossed out or underlined, whichever is applicable.

Challenges are not sufficient to affect the results, if, added to the presently trailing choice, they would not shift the majority; they are sufficient if they would shift the majority. In determining whether challenges might affect the results, it should be kept in mind that a union, to obtain a majority, must receive one vote more than 50 percent of the valid votes cast. (See Sec. 11512 regarding the different majority required in a UD election.)

If the “(not)” in item 10 is crossed out (i.e., where the number of challenged votes is sufficient to affect the results), item 11 should be stricken in its entirety.

If the “(not)” in item 10 is underlined (i.e., where the number of challenged votes is *not* sufficient to affect the results), the Board agent's action with respect to item 11 may take any one of a number of forms:

In a one-union election, the “(not)” should be crossed out or underlined, whichever is applicable and the name of the union should finish out the sentence.

In a multiunion situation, if any union or “Neither” or “None” received a majority of the valid plus challenged votes, the “(not)” should be crossed out and the name of the winning choice should fill out the line.

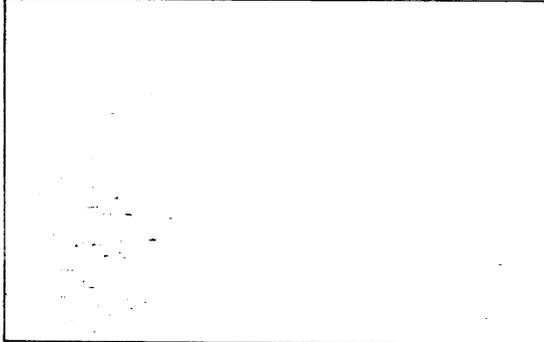
If *none* of the choices on the ballot received a majority of the valid votes plus challenged ballots, the word “(not)” should be underlined and the sentence “A MAJORITY OF THE VALID VOTES COUNTED PLUS CHALLENGED BALLOTS HAS (NOT) BEEN CAST FOR:” should be filled out with “any of the choices on the ballot.”

(See subitem (a) for preparation of the tally when a severance, craft, or professional election is held.)

### Sample Tally of Ballots

FORM NLRB-760  
(12-82)

UNITED STATES OF AMERICA  
**NATIONAL LABOR RELATIONS BOARD**



Date Filed \_\_\_\_\_

Case No. \_\_\_\_\_

Date Issued \_\_\_\_\_

**Type of Election**  
*(Check one:)*  
 Stipulation  
 Board Direction  
 Consent Agreement  
 RD Direction  
Incumbent Union *(Code)* \_\_\_\_\_

*(If applicable check either or both:)*  
 8(b) (7)  
 Mail Ballot

#### TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

- 1. Approximate number of eligible voters \_\_\_\_\_
- 2. Number of Void ballots \_\_\_\_\_
- 3. Number of Votes cast for **SAMPLE** \_\_\_\_\_
- 4. Number of Votes cast for \_\_\_\_\_
- 5. Number of Votes cast for \_\_\_\_\_
- 6. Number of Votes cast against participating labor organization(s) \_\_\_\_\_
- 7. Number of Valid votes counted (sum of 3, 4, 5, and 6) \_\_\_\_\_
- 8. Number of Challenged ballots \_\_\_\_\_
- 9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) \_\_\_\_\_
- 10. Challenges are (not) sufficient in number to affect the results of the election. \_\_\_\_\_
- 11. A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for \_\_\_\_\_

For the Regional Director \_\_\_\_\_

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For \_\_\_\_\_ For \_\_\_\_\_

For \_\_\_\_\_ For \_\_\_\_\_

**11340.8(a) Tally—Severance, Craft, or Professional Election**

In a severance election, the tally of ballots of the departmental or craft group, where appropriate, should be made up first. In the event the union seeking to represent the department or craft receives less than a majority of the valid votes plus challenged ballots cast by that group, where appropriate, the votes cast by this group should then be pooled with those of the residual group in a tally of ballots covering the residual plus department or craft group. (The name of the union that sought the smaller group must be inserted in the tally for the larger group, with the number of votes it received duly credited.)

In an election involving professional employees only (Sec. 11091.1), a separate tally of ballots is prepared showing the results of the voting on each question, *provided* a majority of the valid votes plus challenged ballots on the first question were cast in the affirmative; otherwise, there need be a tally (and count) only on the first question.

**NOTE:** When there are two voting groups (professional employees and nonprofessional employees), there will be one tally and the votes will be pooled if a majority of the valid plus challenged votes on the first question were cast in the affirmative; otherwise there will be no pooling and there will be a separate tally of ballots for each group.

See Sec. 11091.1 EXCEPTION for the voting procedure to be followed in elections where only a single professional employee is involved.

**11340.8(b) Storage of Nondeterminative Challenged and Voided Ballots**

Where challenges are not determinative, individual challenged ballot envelopes and voided ballots should be securely stapled to and preserved in the file.

**NOTE:** If the Board or the Regional Director did not rule on eligibility or unit placement prior to an election and directed that the disputed classification be permitted to vote subject to challenge (Sec. 11338.8) and those challenges are not determinative of the results, appropriate language should be added to any certification that issues to indicate that the challenged classifications are neither included in nor excluded from the bargaining unit inasmuch as no determination has been made regarding the disputed placements. Sec. 11474.

**11340.8(b)(1) Postelection Objections to Interpretation or Validity of Ballots**

If objections are filed after the election that concern the interpretation or validity of any ballot, including voided ballots (Sec. 11392.1(a)), those ballots should then be stored in a similar manner as questioned interpretation ballots. Sec. 11344.

**11340.9 Securing Determinative Challenged, Questioned Interpretation and Impounded Ballots at Conclusion of Election****11340.9(a) Determinative Challenged and Questioned Interpretation Ballots**

In the event there are determinative challenged voters (Sec. 11340.8) and/or questioned interpretation ballots (Sec. 11340.7(a)), the following steps should be part of the tally process.

Information regarding determinative challenged voters or questioned interpretation ballots should be listed on the front of Form NLRB-5126, a large envelope designed for this purpose. The case name and number, the election date, a description of the contents of the envelope, the total number of large envelopes when more than one is used, and the name of the Board agent who is to seal the envelope(s) should be included on the face of Form NLRB-5126. The determinative challenged ballot envelopes and/or the questioned interpretation ballot envelopes should then be placed, in the presence of the parties' representatives, into the Form NLRB-5126 envelope(s). Note that separate Form NLRB-5126 envelopes should be established for determinative challenged ballot envelopes and/or the questioned interpretation ballot envelopes. Sec. 11340.7(a). After sealing the Form NLRB-5126 envelope(s), the Board agent and the parties' representatives should sign their names across the flap. The flap should then be secured with transparent tape in such a manner as to ensure against accidental opening.

See Sec. 11344 concerning handling of determinative challenged and/or questioned interpretation ballots upon return to the Regional Office.

**11340.9(b) Impounded Ballots**

In the event there are impounded ballots (Secs. 11338.8 and 11731.5), the following steps should be part of the conclusion of the election. Information regarding impounded ballots should be listed on the front of Form-NLRB 5126, a large envelope designed for this purpose. The case name and number, the election date, a description of the contents of the envelope, the total number of large envelopes when more than one is used, and the name of the Board agent who is to seal the envelope(s) should be included on the face of Form NLRB-5126.

All ballots to be impounded should be removed from the ballot box in the presence of the parties' representatives. The impounded ballots should then be placed into one or more of the Form NLRB-5126 envelopes. After sealing the Form NLRB-5126 envelope(s), the Board agent and the parties' representatives should sign their names across the flap. The flap should then be secured with transparent tape in such a manner as to ensure against accidental opening.

Since a tally of ballots will not be issued, it is not known if challenges will be determinative. Accordingly, challenges should not be segregated or listed on the face of the envelope.

As indicated in Sec. 11392.2(a)(4), if ballots are impounded, the time for filing objections runs from the time the ballots are subsequently counted and the tally of ballots prepared and made available to the parties.

See Sec. 11344 concerning handling of impounded ballots upon return to the Regional Office.

#### **11340.10 Execution of Tally of Ballots**

The Board agent should sign at the place indicated on the tally. Representatives of the parties should also sign at the appropriate places on the tally.

Should a party be absent or decline or fail to sign the tally, the Board agent should insert the words "No representative present" or "Declined to sign" (whichever is applicable) on the appropriate line.

#### **11340.11 Distribution of Tally of Ballots**

As soon as the tally of ballots has been prepared, a copy should be made available to a representative of each party.

If, at the time the tally is made available, one of the parties has no representative present, a copy of the tally should be mailed to that party as a courtesy. A party's absence or refusal to accept the tally at the time it is made available does not affect the time for filing objections. Sec. 11392.2(a)(2); Sec. 102.69(a), Rules and Regulations.

### **11342-11344 CLOSE OF ELECTION**

#### **11342 Closing Checklist**

The file, at the close of an election, should contain a signed copy of the tally of ballots, tally sheets, if they were used, the voting list and memos respecting unusual occurrences. Marked ballots, in bundles of 50, should be preserved until the case is finally closed. Unmarked ballots should be carried away from the premises.

Voting equipment, including signs, should be collected. The appreciation of the Agency should be extended for whatever cooperation was rendered by the parties.

#### **11344 Storage of Determinative Challenged, Questioned Interpretation and Impounded Ballots**

The following procedures with respect to the storage of uncounted determinative challenged, questioned interpretation and impounded ballots must be observed.

##### **11344.1 Determinative Challenged and Questioned Interpretation Ballots**

Upon the Board agent's return to the Regional, Resident, or Subregional office, the envelope(s) Form NLRB-5126 containing determinative challenged ballots and/or questioned interpretation ballots must be stored promptly. Sec. 11340.9(a) describes the procedure for preparing these envelopes after the ballot count.

A photocopy of the face of the envelope(s) and a memorandum stating where the ballots have been stored should be placed in the case file. The envelope(s) must then be stored in the office safe.

## 11344 STORAGE OF DETERMINATIVE CHALLENGED, QUESTIONED INTERPRETATION AND IMPOUNDED BALLOTS

The Regional Director, officer-in-charge, or resident officer is the custodian of the safe. The Regional Director may designate others as agents for this purpose, but the ultimate responsibility remains with the Regional Director, officer-in-charge, or resident officer.

A log should be maintained by the Regional Director, officer-in-charge, resident officer or the duly designated agent concerning the challenged ballots that are stored in the safe. If a designated agent is appointed, the Regional Director should set forth the name of the designated agent in this log and this designation should be signed by the Regional Director.

When the large envelope(s) containing ballots is to be removed from the safe, the following procedure must be followed. The parties should be advised and provided an opportunity to be present at the opening of the large envelope(s). *Paprikas Fono*, 273 NLRB 1326 (1984). The Regional Director, officer-in-charge, resident officer, or designated agent will make an entry in the log showing the removal from the safe and this removal entry will be signed by one of the aforementioned persons. The log should indicate the reason for the removal, the date of the removal, the Board agent to whom the envelope is released, and the nature of the contents authorized to be removed (e.g., all determinative challenged ballots or the identity, as shown on the large envelope, of the challenged ballots that are authorized to be removed).

As indicated above, the large envelope(s) should not be opened unless the parties have been allowed the opportunity to be present. In addition, when some, but not all, of the challenged ballots are removed from the large envelope for the purpose of counting, such removal shall be done at the count in the presence of the parties' representatives who choose to be present.

The Board agent should put a memorandum in the case file recording the number of ballots removed, their identity, their disposition, and the number of ballots remaining in the large envelope. A copy of the memorandum is to be placed in the large envelope, which should again be secured in the manner described above by the Board agent and the parties' representatives at the count and placed in the safe.

### **11344.2 Impounded Ballots**

Impounded ballots (Sec. 11340.9(b)) are to be secured in the same manner as determinative challenged ballots. Sec. 11344.1.

### **11344.3 Additional Procedures Relating to Determinative Challenged, Questioned Interpretation and Impounded Ballots**

All personnel are instructed not to remove from the safe or open the Form NLRB-5126 envelope(s) without express approval of the Regional Director, officer-in-charge, resident officer, or designated agent.

Written approval of the Regional Director, officer-in-charge, or resident officer must be obtained before determinative challenged, questioned interpretation or impounded ballots *that have been counted* are finally discarded or destroyed. This approval memorandum should be placed in the representation case file. A professional employee should prepare a case file memorandum giving the date of the destruction or

discarding of specified counted ballots and the name of the person who destroyed or discarded the ballots.

The following procedures should be strictly followed with respect to where and how long uncounted determinative challenged, questioned interpretation and impounded ballots should be retained:

(a) Determinative challenged, questioned interpretation and impounded ballots that remain uncounted are to be kept in the safe for a *minimum* of 1 year after the representation case is closed.

(b) During the pendency of a related unfair labor practice case, uncounted determinative challenged, questioned interpretation and impounded ballots are to be retained in the safe. In this way, ballots will be available to the Board and/or the Court of Appeals should they be needed in conjunction with a test of certification. A label is to be affixed to the large envelope containing the ballots and noted in the log, setting forth the name and number of the related unfair labor practice charge and its filing date.

(c) After a period of 1 year from the closing of the representation case, if there is no pending related unfair labor practice case, the Regional Director, officer-in-charge, resident officer, or designated agent may give written authorization to remove the large Form NLRB-5126 envelope(s) containing the determinative challenged, questioned interpretation or impounded ballots from the safe. Once the envelope(s) are removed from the safe, they are to be stapled inside the representation case file with the seal unbroken. The ballots are not to be destroyed until or unless the case file is destroyed pursuant to Agency and GSA regulations. If a related unfair labor practice case is filed after the 1-year period, the envelope(s) containing the determinative challenged, questioned interpretation or impounded ballots must be returned to the safe and the procedures for handling such ballots set forth in the preceding paragraphs strictly followed.

## **11350 RUNOFF ELECTIONS**

### **11350 Runoff Elections**

#### **11350.1 Occasion**

There can be no runoff of an election in which there are but two choices on the ballot. In a one-union election, the results are final (once all determinative challenges are resolved) if “Yes” receives a majority of the valid votes cast or if “No” receives at least 50 percent of the valid votes cast. Likewise in a severance election, where there are but two choices on the ballot, either “Yes” or “No” or both of them unions, a tie vote would not result in a runoff; it would result in a pooling of votes with the residual election, if there was one; in a dismissal, if there was none.

Where, on the other hand, there are three or more choices on the ballot, an election in which (after any determinative challenges have been resolved) none of the choices receives a majority of the valid votes cast is considered an *inconclusive* election. In such case, the Regional Director should conduct a runoff election between the choices on the original ballot that received the highest and the next highest number of votes.

**EXCEPTION:** Where, in the original election, all choices receive an equal number of votes or where, two choices having received an equal number of votes, a third choice receives a higher but less-than-majority vote, the Regional Director should declare this election a nullity and conduct a rerun election (Secs. 11450–11456) with the same choices on the ballot. If the second election results in another such nullity, the petition should be dismissed; if the results of the second election require a runoff pursuant to the principles set forth in the preceding paragraph, a runoff election should be conducted.

**FURTHER EXCEPTION:** Where two or more choices receive an equal number of votes, another receives no votes, there are no challenges and all eligible voters have voted, neither a runoff nor a rerun election should be conducted. A certification of results should be issued. The Board agent in charge of an election, the results of which call for a runoff, should so indicate on the tally of ballots. General instructions for preparing a tally of ballots are set forth in Sec. 11340.8. No runoff election should be held with respect to a severance election.

### 11350.2 Examples

Examples of election results illustrating the principles set forth in Sec. 11350.1 follow. No challenged ballots are involved:

(a) **Runoff** election should be held:

(1) Eligible 17

Union A 8 (x)

Union B 8 (x)

Neither 1

(2) Eligible 77

Union A 36 (x)

Union B 0

Neither 36 (x)

(3) Eligible 10

Union A 4 (x)

Union B 4 (x)

Neither 0

(4) Eligible 19  
Void 1  
Union A 9 (x)  
Union B 9 (x)  
Neither 0

(b) A **nullity; rerun** election should be held:

(1) Eligible 17 or 15  
Union A 5  
Union B 5  
Neither 5

(2) Eligible 16  
Union A 4  
Union B 4  
Union C 4  
None 4

(3) Eligible 16 or 17  
Union A 5  
Union B 5  
Neither 6

(4) Eligible 16  
Union A 4  
Union B 4  
Neither 8

(5) Eligible 40  
 Union A 10  
 Union B 10  
 Union C 5  
 None 15

(c) **No runoff** indicated; certification of results should issue.

(1) Eligible 18  
 Union A 9  
 Union B 9  
 Neither 0

(2) Eligible 16  
 Union A 0  
 Union B 8  
 Neither 8

(3) Eligible 77  
 Union A 36  
 No Union 36

(4) Eligible 17  
 Union A 4  
 Union B 4  
 Neither 9

### **11350.3 Time of Runoff**

A runoff election should not be held during the period in which objections to the original election may be filed, unless all parties, in writing, waive their rights to file objections. If objections to the original election are timely filed, the holding of any runoff election is postponed until such objections have been resolved. Objections timely filed with respect to the runoff election will not be considered to the extent that they relate to the circumstances preceding or surrounding the original election. Sec. 11392.2(b)(2).

**11350.4 Attempt to Withdraw**

An attempt to withdraw the petition or withdraw from the ballot between original and runoff election should be dealt with in accordance with the principles set forth in Secs. 11098–11116. If the withdrawal from the ballot of one of the only two unions on the runoff ballot is permitted, the choices on the ballot should be converted to “Yes” or “No” with respect to the remaining union.

**11350.5 Procedure for Conduct of Runoff**

A runoff election should be held as soon after the original as it can be arranged, but not before the expiration of the objections period (Sec. 11350.3).

Intervention for the first time in a runoff election should not be permitted. *Waste Management of New York*, 326 NLRB No. 106 (1999); *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987); *General Motors Corp.*, 17 NLRB 467 (1939).

Those eligible to vote in a runoff election are those who were eligible to vote in the original election and are still in an eligible category as of the date of the runoff election. No one who was not eligible to vote in the original election can be eligible to vote in the runoff election.

The eligibility list used may be the one used at the original election or a duplicate thereof. Sec. 11312.1(j). Parties should be made aware of any changes. (Note that the list can only change *downward*; i.e., names may be eliminated.) The same general principles apply to ensuring the accuracy of a runoff list as to a list in an original election.

If the Regional Director is of the opinion that a different, more recent eligibility list should be used in the runoff, he/she should seek advice from the Executive Secretary.

The standard notice of election, when used in a runoff election, should be modified so that the description of the voting unit spells out the exclusion “employees who have since [the eligibility date] quit or been discharged for cause and who were not rehired or reinstated prior to the election held on [date of original election]. . . .” In addition, the fact that this is a runoff election should be noted on the notice of election and tally of ballots. Sec. 11314.2. Arrangement of polling places, duties and responsibilities of personnel, order of voting, challenge procedure, and counting procedures may be the same for runoff elections as they are for original elections.

There can be no runoff of a runoff election. There can, however, be a rerun of a runoff.