

REPRESENTATION CASE PROCEDURES

Amendments Effective April 30, 2012

Many Things Stay the Same

- Petition is filed in hard copy with a regional office
- Petition must be supported by 30% showing of interest (RC and RD petitions)
- Initial notice to employees (Form 5492) – still voluntary
- Timing of the hearing – scheduled as expeditiously as possible, consistent with *Croft Metal, Inc.*, 337 NLRB 688 (2002)

Many Things Stay the Same

- Employer has 7 days after a approval of election agreement or direction of election to provide its list of eligible employees
- Objections to elections must be filed within 7 days, and supporting evidence within another 7 days
- Regional Directors decide challenges and objections to elections through an investigation without a hearing when there are no substantial issues in dispute

Some Things Change Slightly

- Three types of agreements parties may enter into to schedule an election
 - Consent election agreement – no change
 - Full consent election agreement – no change
 - Stipulated election agreement – Board's review of Regional Director's post-election dispositions are discretionary (Section 102.69(d))

Will All Issues Be Litigated?



The hearing officer will allow any evidence that will support a party's contentions and is relevant to the existence of a **question concerning representation**, i.e., whether the petition concerns a unit appropriate for bargaining and whether an election is barred under the terms of the Act or Board precedent



Disputes regarding **individuals' eligibility to vote** or **inclusion in an appropriate unit** "ordinarily need not be litigated or resolved before an election is conducted"

Section 102.64(a)

Will All Issues Be Litigated?

Offers of Proof

- **Hearing officer may require an offer of proof from a party seeking to overcome a presumption or meet an assigned burden of proof.**
- **An offer of proof must include the substance of the excluded evidence, that is, the specific facts to be established.**
- **If the offer of proof is insufficient, the hearing officer may refuse to allow the issue to be litigated.**

Appeals of Rulings by the Hearing Officer or Regional Director

Out with the Old

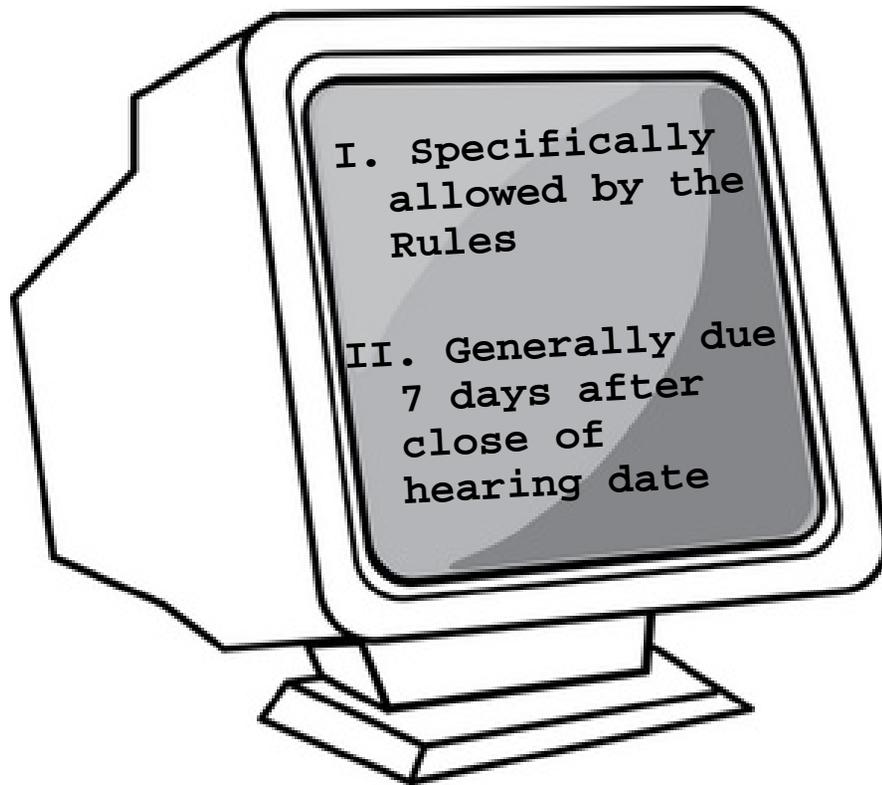
- I. Parties may file numerous appeals in a single case regarding individual rulings by the hearing officer or Regional Director, including evidentiary rulings
- II. No standard for the filing of such interlocutory appeals

In with the New

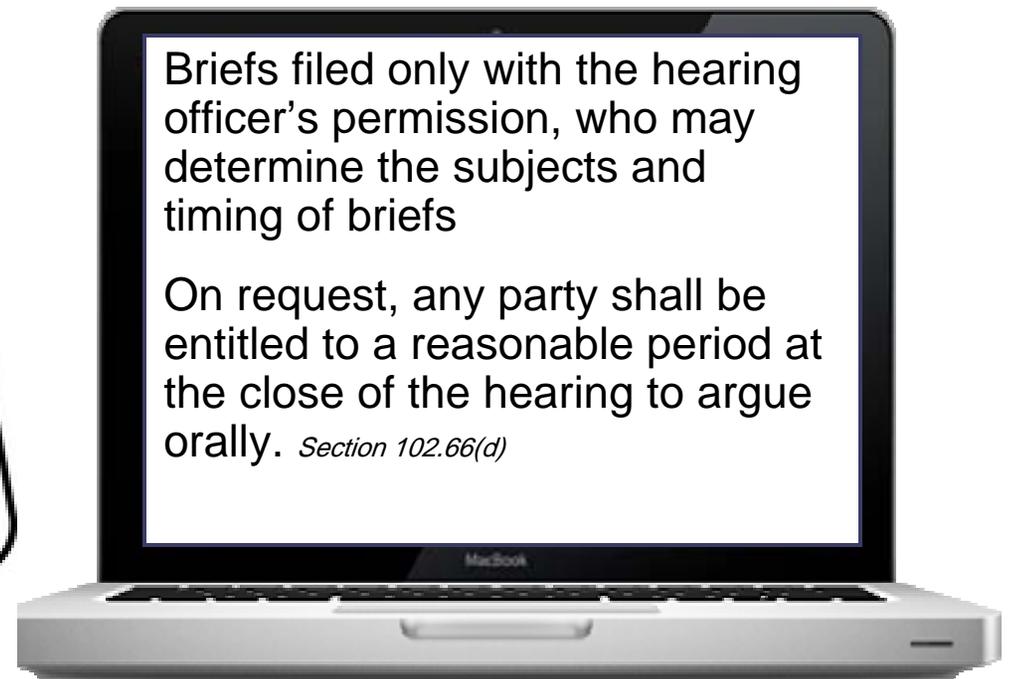
1. Board will grant interlocutory appeals only under "extraordinary circumstances where it appears that the issue will otherwise evade review"
2. A party is not required to file an interlocutory appeal to preserve an issue for appeal after an election (Section 102.65(c))

Right to File Post-Hearing Briefs

Out with the Old



In with the New





Request for Review

OLD

- Requests for Board review of pre-election issues, e.g., whether there is a question concerning representation, must be filed *before* the election has been held
- Requests for Board review of post-election issues, e.g., challenges to voter eligibility and objections to a party's conduct during an election, must be filed in a separate appeal *after* the election has been held

NEW

- Requests for Board review of all pre- and post-election issues are consolidated in a single request to be filed *after* the election has been held (Section 102.67(b))
- If no objections are filed and there are no determinative challenged ballots, request for review is due 14 days after tally of ballots is prepared.
- If objections are filed, or there are determinative challenged ballots, request for review must be filed within 14 days after Regional Director's decision on objections or challenged ballots.

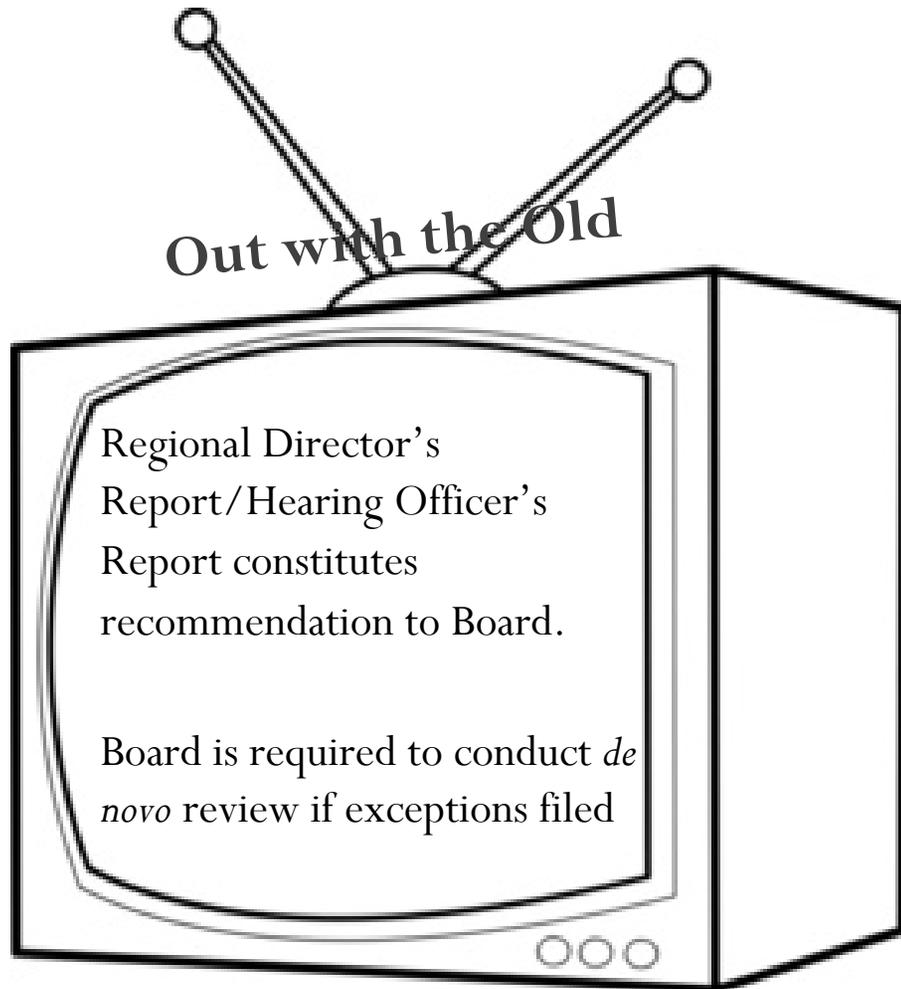
Scheduling Elections After Issuance of Regional Director Decisions

No longer required to wait 25-30 days from issuance of decision

10-day period for having the eligibility list may be waived



Post Election Appeal Standard

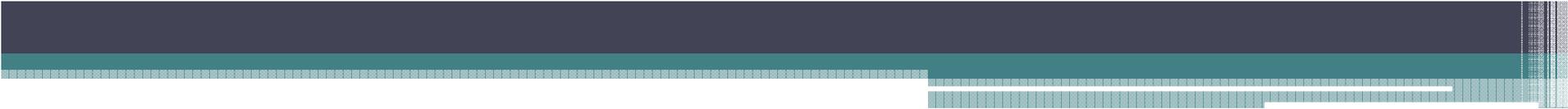


In with the New

Exceptions to Hearing Officer's Report must be filed with the Regional Director w/in 14 days from date of issuance.

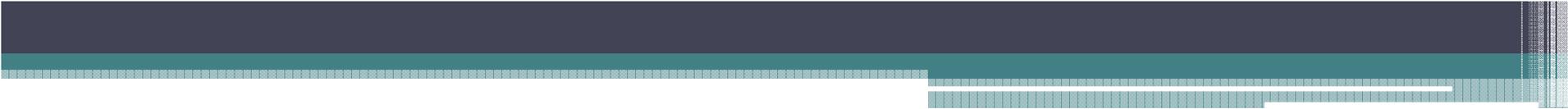
RD issues Decision adopting/modifying/rejecting Hearing Officer's recommendations.

RD Decisions are final and binding unless Board grants request for review.



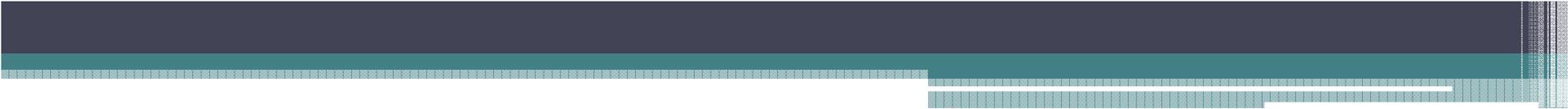
Proposed Amendments That Were *Not* Adopted

- Employer's statement of position would include a list of employees in petitioned-for unit and a list of employees the Employer would add to the unit.
- Eligibility and inclusion issues affecting less than 20% of the unit would not be litigated at the pre-election hearing.
- A requirement that the final voter eligibility list include e-mail addresses and phone numbers.
- Shortening the time to provide the voter eligibility list from 7 to 2 work days.
- A requirement that parties file an offer of proof with their objections.



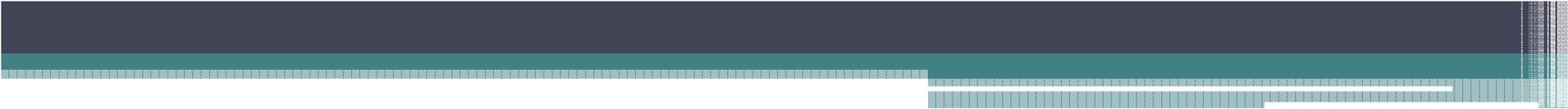
Proposed Amendments That Were *Not* Adopted

- Electronic filing of petitions
- Petitioner would directly serve copies of the petition on the parties
- Petitioner would have to file its showing of interest together with the petition
- The employer would be required to post a notice describing the petition as well as explaining employee rights
- The requirement that the non-petitioning parties complete a statement of position



*Specialty Healthcare & Rehabilitation
of Mobile, 357 NLRB No. 83 (2011)*

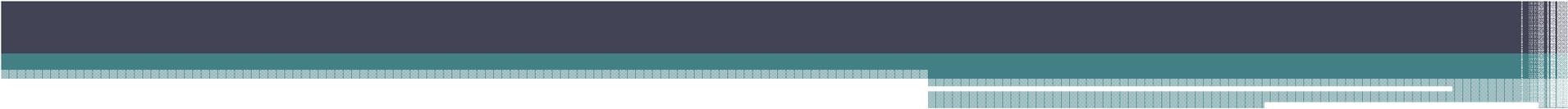
- Analytical framework where a party contends that the smallest appropriate bargaining unit must include additional employees or classifications



*Specialty Healthcare & Rehabilitation
of Mobile, 357 NLRB No. 83 (2011)*

If the petitioned-for unit *is* presumptively appropriate

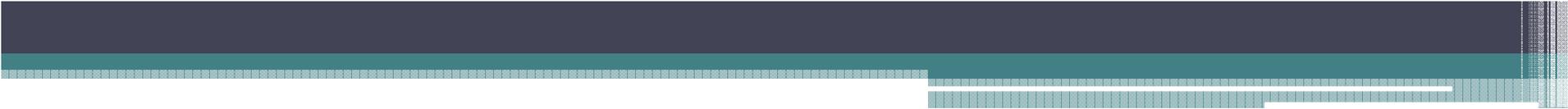
- **Burden shifts to the party challenging the presumptively appropriate unit to show that employees in excluded classifications share an “overwhelming community of interest” with the employees in the presumptively appropriate unit**



*Specialty Healthcare & Rehabilitation of
Mobile, 357 NLRB No. 83 (2011)*

If the petitioned-for unit is *not* presumptively appropriate:

- **Step 1: The petitioner must show that petition is for a unit of employees “readily identifiable” as a group and the petitioned for unit is appropriate under traditional community of interest factors**
- **Step 2: Burden shifts to the party challenging the petitioned-for unit to show that employees in excluded classifications share an “overwhelming community of interest” with the employees in the presumptively appropriate unit**



*Specialty Healthcare & Rehabilitation
of Mobile, 357 NLRB No. 83 (2011)*

If a party is seeking to exclude employees or job classifications from a petitioned-for unit, the traditional community of interest analysis applies.

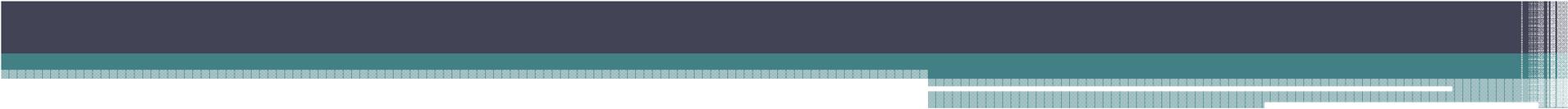
Changes in Documents and Forms



Docket Letters in RC, RD, RM Cases

- Hearing will be scheduled for 7 days (5 working days) from the date the Notice of Hearing is issued
- Requests for postponement of the hearing to a date more than 14 days after the petition was filed will normally not be granted absent extraordinary circumstances

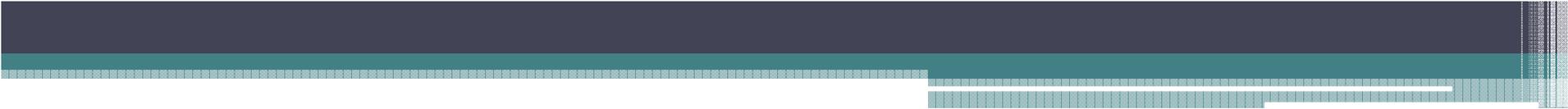
Hearing: Enclosed is a Notice of Hearing to be conducted on (insert date 7 days or 5 working days from date notice of hearing issued) if the parties do not voluntarily agree to an election. If a hearing is necessary, it is expected to run on consecutive days until concluded. The enclosed NLRB Form-4339 provides information about rescheduling the hearing. Requests for postponement of the hearing to a date more than 14 days after the petition was filed will normally not be granted absent extraordinary circumstances.



Form 4339 Notice Regarding Representation Hearings

Approval of a postponement request may be conditioned upon one or more of the following:

- (1) The agreement of all parties to participate at a conference to be held at the Regional Office, or, alternatively at the Regional Director's discretion, in a teleconference, at least one full day before the rescheduled hearing date;
- (2) Agreement by the requestor that if briefs are permitted, extensions of time for filing of briefs will not be sought or granted; and/or
- (3) The requestor's execution of stipulations on matters not in dispute, e.g., jurisdiction, labor organization status, appropriate unit.



Docket Letters in RC, RD, RM Cases

New joint conference language:

A joint conference may be held at the Regional Office or by teleconference before the hearing to explore all potential areas of agreement in order to eliminate or limit the significant costs associated with formal hearings.

Form 4812 Statement of Procedures in Representation Cases

Purpose of Hearing: The purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a petition has been filed concerning a unit appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily do not need to be litigated or resolved before an election is conducted.

Form 4812 Statement of Procedures in Representation Cases

Oral Argument and Briefs – Upon request, any party shall be entitled to a reasonable period at the close of the hearing for oral argument, which shall be included in the official transcript of the hearing. At any time prior to the close of the hearing, any party may file a memorandum addressing relevant issues or points of law. *Post*-hearing briefs shall be filed only upon special permission of the hearing officer and within the time and addressing the subjects permitted by the hearing officer. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the Regional Director.

If allowed, briefs are to be double-spaced on 8½ by 11 inch paper. Briefs must be filed in accordance with the provisions of Section 102.111(b) of the Board's Rules. E-Filing of briefs through the Board's website, www.nlr.gov, is encouraged, but not required. Facsimile transmission of briefs is NOT permitted.

Docket Letters to Parties Who Are Entitled to Eligibility List

Right to waive *Excelsior* list:

Eligibility List: On approval of an election agreement or on issuance of a Direction of Election, the employer must file with the Regional Director a list of the full names and address of eligible voters as of the last payroll period ending before the approval of the agreement or the Direction of Election. This list must be filed within 7 days after approval of the election agreement or 7 days after the Regional Director or Board has directed an election. **Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 days after the date when the Employer must file the eligibility list with the Regional Office. However, a petitioner and/or union entitled to receive the eligibility list may waive all or part of the 10-day period. If you wish to waive all or part of the 10-day period, you should complete the enclosed Form 4483. That waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.**

Waiver of Time for Eligibility List

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WAIVER

Case: [Case Name] Case [case number]

Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 days after the date when the Employer must file the eligibility list with the Regional Office. In order to proceed to an election in this case at an earlier date, the undersigned party waives having the eligibility list for the full 10 days and waives its right to file objections to the election based on the fact that it did not have the eligibility list for the full 10 days.

This waiver is contingent upon the party signing below having the eligibility list for at least _____ days before the start of the election.

(insert number of days)

This waiver is effective only if all the parties who will receive a copy of the eligibility list agree to the terms of this waiver.

[Name of Petitioner, Union, *or* Intervenor]
(Petitioner) (Union) (Intervenor)

By: _____
Signature

Date: _____

Docket Letter to Employer in RC and RD Cases

Requested Information:

Information Needed Immediately: To process the petition in this matter, we need certain information from you. Accordingly, please submit to this office, as soon as possible, the following information:

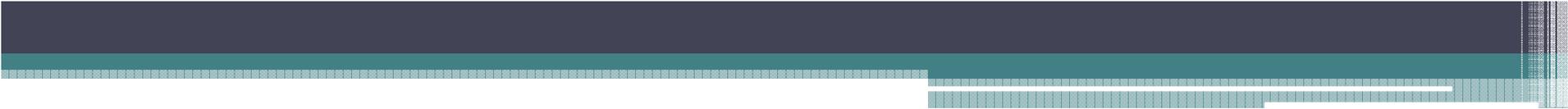
- (a) The correct name of your organization;
- (b) A copy of any existing or recently expired collective-bargaining agreements, and any addenda or extensions, or any recognition agreements covering any of your employees in the unit involved in the petition (the petitioned-for unit);
- (c) The name and contact information for any other labor organization (union) claiming to represent any of the employees in the petitioned-for unit;
- (d) Your position as to the appropriateness of the petitioned-for unit;
- (e) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any;
- (f) An alphabetized list of employees in the petitioned-for unit, with their job classifications, for the payroll period immediately before the date of this petition. This list will be used to resolve possible eligibility and unit questions as well as to determine the adequacy of the Petitioner's showing of interest. If such a list is not submitted promptly, any later submission and request for an evaluation of the Petitioner's showing of interest will be considered untimely and no check of the showing of interest will be conducted absent unusual circumstances; and
- (g) A completed commerce questionnaire (form enclosed) to enable us to determine whether the NLRB has jurisdiction in this matter. If the Employer contends that it does not meet the Board's jurisdictional standards, it must submit documents to establish its contention.

Unless, in response to this request, the Employer submits to us before the close of the formal hearing the information that is necessary to establish whether its operations satisfy the Board's jurisdictional standards, we shall proceed in this matter in accordance with the policy set forth by the Board in **Tropicana Products, Inc.**, 122 NLRB 121 (1958). That policy provides that if an employer does not agree that it meets the Board's jurisdictional standards and refuses a reasonable request to provide information establishing whether it meets those standards, jurisdiction will be asserted if the record at a hearing establishes that the Board has statutory jurisdiction.

Docket Letter to Employer in RC and RD Cases

(g) A completed commerce questionnaire (form enclosed) to enable us to determine whether the NLRB has jurisdiction in this matter. If the Employer contends that it does not meet the Board's jurisdictional standards, it must submit documents to establish its contention.

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Election Notices

VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

Those eligible to vote are:

EMPLOYEES NOT ELIGIBLE TO VOTE:

OTHERS PERMITTED TO VOTE: At this time, no decision has been made regarding whether (classifications) are included in, or excluded from, the bargaining unit, and individuals in those classifications may vote subject to challenge. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

DATE AND PLACE OF ELECTION

Date:

Time:

Place:

Letter Requesting Eligibility List After Stipulated Election Agreement

Election Eligibility List

It is longstanding Board policy that all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. In accordance with the terms of the election agreement, the Employer must file with me an election eligibility list, containing the **full** names and **complete** addresses (including postal zip codes) of all the eligible voters who were on the Employer's payroll for the period ending **(date – based on date in stip)**. **The list must be of sufficiently large type to be clearly legible, and the names should be alphabetized.** *[If applicable add: The election eligibility list submitted by the Employer should also contain the same information for those individuals whom the parties have agreed will vote subject to challenge. That information should be placed on a separate page of the list or a separate portion of the list so that the individuals who will be voting subject to challenge are clearly identified.]* *If applicable add:* Separate lists should be provided for each location or each voting group or the mail ballot and manual ballot voters. I will make this list available to all parties to the election.

[If applicable add: The election eligibility list submitted by the Employer should also contain the same information for those individuals whom the parties have agreed will vote subject to challenge. That information should be placed on a separate page of the list or a separate portion of the list so that the individuals who will be voting subject to challenge are clearly identified.]

Eligibility List Language in Decision and Direction of Election

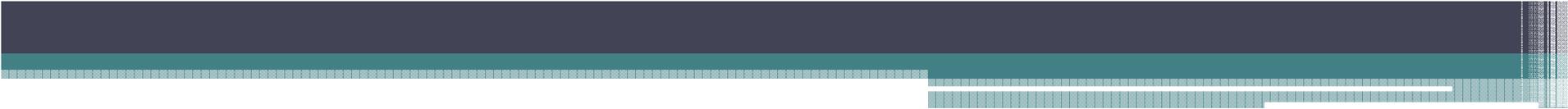
Employer to Submit List of Eligible Voters

To ensure 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, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). 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. **[If applicable add: The election eligibility list submitted by the Employer should also contain the same information for those individuals who have been directed to vote subject to challenge. That information should be placed on a separate page of the list or a separate portion of the list so that the individuals who will be voting subject to challenge are clearly identified.]**

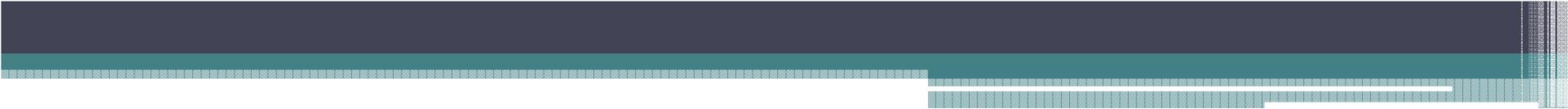
Frequently Asked Questions





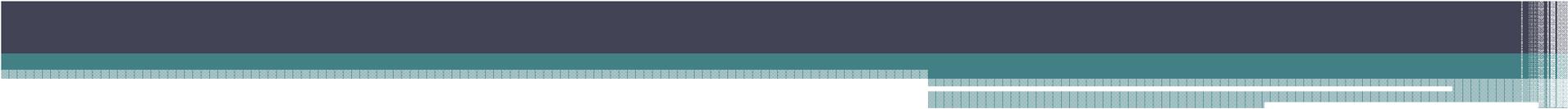
What impact will the new rule have on cases that are pending when the rule become effective on April 30, 2012?

- The rule will be applied to those cases filed on or after April 30, 2012, but not to cases that were filed before April 30, 2012. This was not specifically addressed by the Board, but is a presumptively appropriate and more easily administered means for enforcing the revised rule, rather than changing rules in the middle of a pending proceeding.



How soon after a petition is filed will the region conduct a pre-election hearing, if the parties do not reach an election agreement?

- Revised rules do not specify how soon the pre-election hearing should be held.
- The Acting General Counsel has adopted the practice, previously used by some regions, to normally issue the NOH on the day the petition is filed, and schedule the hearing 7 days (or 5 working days) from the date of issuance of the NOH.
- This satisfies the Board's holding in *Croft Metals, Inc.*, 337 NLRB 688 (2002), which requires that parties in representation cases must receive notice of hearing not less than 5 days prior to hearing, excluding intervening weekends and holidays.
- Hearings should be conducted within 14 days from the date of filing, absent extraordinary circumstances.

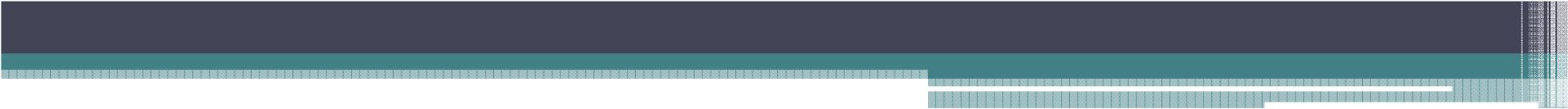


How will the Board's revised rules affect existing time targets for conducting elections?

The revised rules do not establish new time goals for processing petitions and/or conducting elections.

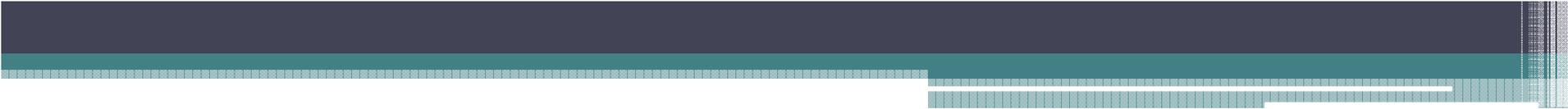
As in the past, variables affecting the timing will include:

- whether the parties enter into an election agreement;
- the scheduling of the pre-election hearing;
- the length of the hearing;
- the number and complexity of the issues; and
- the regional director's exercise of discretion, considering the preferences of the parties, in setting the election date.



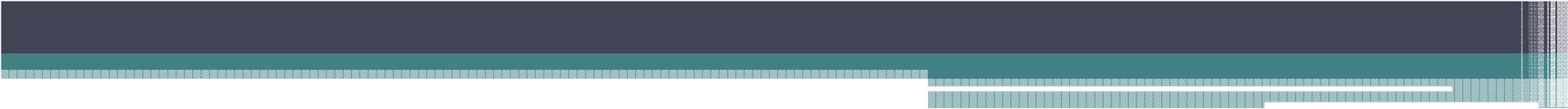
What issues will typically be litigated in a pre-election hearing?

- The revised rules limit pre-election hearings to matters which are both relevant to a question concerning representation and support a party's contention.
- Issues affecting jurisdiction, labor organization status, scope of and appropriateness of the unit, and bars to an election will be litigated in the pre-election hearing.



What are the kinds of individual eligibility or inclusion questions that need not be litigated at the pre-election hearing?

- Whether individuals or groups of individuals, otherwise falling within the terms used to describe an appropriate unit, are nevertheless ineligible because they are excluded from the Act's definition of employee.
- Whether individuals or groups of individuals fall within the terms used to describe the unit.



When can eligibility or inclusion issues be litigated in the pre-election hearing and when will they be deferred?

- The Acting General Counsel has decided to use the current guideline that applies to election agreements and gives regional directors discretion to defer the resolution of up to 10% of the unit to the post-election stage.
- Regional directors will continue to have discretion to exceed that 10% threshold, where appropriate.
- Some eligibility or inclusion issues cannot be deferred to the post-election stage, even if the number of individuals in dispute is small, because that would be contrary to our statute, policies and/or case law.

*If a hearing officer makes an obvious mistake in ruling on a critical matter, do I have a right to take a special appeal to the regional director?
To the Board?*

- You may request special permission to appeal from that ruling to the regional director.
- You may also request to file for special permission to appeal from the regional director's ruling to the Board, but this special appeal will only be considered by the Board under "extraordinary circumstances" when it appears that the "issue will otherwise evade review."

This narrower standard is not applicable to requests for special permission to appeal rulings of the Hearing Officer to the regional director.

- The hearing officer's rulings will be reviewed by the regional director and ultimately, the Board, if a request for review is granted, regardless of whether or not a pre-election request for special permission to appeal has been filed with the regional director or Board.