NATIONAL LABOR RELATIONS BOARD

CASEHANDLING MANUAL

PART TWO

REPRESENTATION PROCEEDINGS

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SUMMARY OF TABLE OF CONTENTS

R CASE PROCEDURES

PURPOSE, MANUAL FORM, MODIFICATIONS

PREINVESTIGATION 11000–11009
- FILING OF PETITION 11000–11007
- INITIAL COMMUNICATIONS 11008–11009

PRELIMINARY INVESTIGATION 11010–11042
- PROCESSING OF PETITION PRIOR TO HEARING OR ELECTION 11010–11016
- NO-RAIDING PROCEDURES AMONG LABOR ORGANIZATIONS 11017–11019
- SHOWING OF INTEREST 11020–11042
  - INITIAL CONSIDERATIONS 11020–11023
  - INFORMATION TO BE OBTAINED 11024–11026
  - OTHER CONSIDERATIONS 11027–11029
  - CHECK OF SHOWING OF INTEREST 11030–11035
  - OBJECTIVE CONSIDERATIONS IN RM PETITION 11042

REGIONAL DETERMINATION 11080–11124
- INITIAL DETERMINATIONS 11080–11082
- ELECTION AGREEMENT 11084–11098
- DISMISSAL; WITHDRAWAL; DISCLAIMER 11100–11124
  - DISMISSAL 11100–11104
  - WITHDRAWAL 11110–11118
  - DISCLAIMER 11120–11124

PREHEARING 11140–11148

PREELECTION HEARINGS 11180–11248
- ISSUES PRELIMINARY TO HEARING 11180–11189
- CONDUCT OF HEARING 11190–11248
  - INITIAL ISSUES AT HEARING 11190–11209
  - SUBPOENAS 11210–11214
  - PRESENTATION OF EVIDENCE 11216–11228
  - CLOSE OF HEARING 11240–11248

POSTHEARING 11250–11284
- PREDECISION MATTERS 11250–11272
  - HEARING OFFICER REPORT 11250–11252
  - OTHER PREDECISION MATTERS 11258–11272
- DECISION 11273–11284
  - REGIONAL DIRECTOR DECISION 11273–11275
  - BOARD DECISION 11280–11284

ELECTIONS 11300–11350
- PRELIMINARY CONSIDERATIONS 11300–11301
- MANUAL ELECTION 11302–11335
  - ELECTION DETAILS 11302–11310

VOTING ELIGIBILITY LIST 11312–11313
NOTICE OF ELECTION 11314–11315
VOTING PROCEDURES 11316–11335
MAIL BALLOT ELECTION 11336
CHALLENGES 11338
COUNT 11340
CLOSE OF ELECTION 11342–11344
RUNOFF ELECTIONS 11350
RESCHEDULED ELECTIONS 11351

POSTELECTION CHALLENGES AND OBJECTIONS 11360–11438
RESOLUTION OF DETERMINATIVE CHALLENGES 11360–11367
INITIAL CONSIDERATIONS 11360–11363
ADMINISTRATIVE INVESTIGATION 11394
PROCESSING BY HEARING 11365–11366
BIFURCATED PROCEEDINGS—CHALLENGES 11367
COUNT OF OVERRULED CHALLENGED BALLOTS 11378
RESOLUTION OF OBJECTIONS TO ELECTION 11390–11397
INITIAL CONSIDERATIONS 11390–11393
ADMINISTRATIVE INVESTIGATION 11394
PROCESSING BY HEARING 11395–11396
BIFURCATED PROCEEDINGS—OBJECTIONS 11397
CHALLENGES/OBJECTIONS INVESTIGATION WHEN UNFAIR LABOR PRACTICE CHARGE ALSO INVOLVED 11407
HEARING ON CHALLENGES/OBJECTIONS 11420–11430
ISSUES PRELIMINARY TO HEARING 11420–11427
CONDUCT OF HEARING 11428–11430
POSTHEARING 11432–11438
HEARING OFFICER REPORT ON CHALLENGES/OBJECTIONS 11432–11434
BOARD OR REGIONAL DIRECTOR DECISION 11436–11438

RERUN ELECTIONS 11450–11456

CERTIFICATIONS 11470–11478

UC, AC, UD AND OTHER CASES 11490–11540
UC AND AC CASE PROCEDURES 11490–11498
UD CASE PROCEDURES 11500–11516
OTHER CASES 11520–11540

ITEMS COMMON TO ALL CASES 11700–11886
JURISDICTION 11700–11711
TRANSFER, CONSOLIDATION, AND SEVERANCE 11712-11720
CONCURRENT R AND C CASES 11730–11734
BLOCKING UNFAIR LABOR PRACTICE CHARGES; EXCEPTIONS 11730–11731
FINDING AS TO MERIT OF UNFAIR LABOR PRACTICE CHARGE 11732–11733
RESUMPTION OF PROCESSING OF PETITION 11734

PRIORITY OF CASES **11740**
SUBMISSION TO DIVISIONS OF ADVICE AND OPERATIONS-MANAGEMENT THE SPECIAL LITIGATION BRANCH AND THE OFFICE OF THE EXECUTIVE SECRETARY **11750–11754**
SUBPOENAS **11770–11784**
ENFORCEMENT OF SUBPOENA **11790–11808**
DISCLOSURES OF AGENCY DOCUMENTS AND SUBPOENAS OF, AND TESTIMONY BY, BOARD PERSONNEL **11820–11828**
COURT COSTS **11830**
SERVICE, FILING, AND COMMUNICATIONS WITH PARTIES **11840–11864**
CASE FILES AND DOCUMENTARY EVIDENCE **11850-11860**
REPORTING SERVICE **11870**
COMMUNICATIONS AND TRAVEL **11880–11886**
REGIONAL AND SUBREGIONAL OFFICES **15004**

INDEX
TABLE OF CASES

DETAILED TABLE OF CONTENTS

R CASE PROCEDURES

PURPOSE OF THE MANUAL

MANUAL FORM

MODIFICATIONS TO THE MANUAL

PREINVESTIGATION 11000–11009

FILING OF PETITION 11000–11007

Agency Objective 11000
Suit That Seeks to Enjoin Processing of Petition 11000.1
Prefiling Assistance 11001
Report on Inquiries 11001.1
Determination Whether Situation Covered 11001.2
Situation Not Covered 11001.3
Situation Covered 11001.4
Information as Contrasted With Advice 11001.5
Assistance in Preparation 11001.6
Assistance in Drafting Language of RD and UD Showings of Interest 11001.7
Assistance in Remedying Defects 11001.8
Types of Petitions; Who May File; Where to File 11002
Types of Petitions 11002.1
Representation ..... 11002.1(a)
Union-Security Deauthorization ..... 11002.1(b)
Unit Clarification ..... 11002.1(c)
Amendment of Certification ..... 11002.1(d)
Who May File 11002.2
Where to File 11002.3
Types of Petitions; What to File 11003
Required Submissions 11003.1
RC and RD Petitions ..... 11003.1(a)
RM Petition ..... 11003.1(b)
Petition Related to 8(b)(7)(C) Charge ..... 11003.1(c)
UC, AC, and UD Petitions ..... 11003.1(d)
Assignment of Case 11004
Communicating With Parties and Their Representatives 11006
Case Filing Docket 11007

INITIAL COMMUNICATIONS 11008–11009

Initial Communications With All Parties 11008
Interested Parties 11008.1
Petitioner; Submission of Showing of Interest 11008.2
Employer; Information Requested 11008.3
All Parties; Information Requested 11008.4
Provision of Notice of Employees' Voting Rights 11008.5
Right to Counsel; Notice of Appearance 11008.6
Designation of Representative as Agent for Service of Documents 11008.7
Initial Letter to Employer 11009
Information Requested 11009.1
Information Proffered 11009.2

PRELIMINARY INVESTIGATION.....11010–11042

PROCESSING OF PETITION PRIOR TO HEARING OR ELECTION 11010–11016

Initial Investigation 11010
RC Petition 11010.1
RM and RD Petitions..... 11010.2
Administrative Dismissal: No Question Concerning Representation 11011
Further Investigation 11012
Lack of Cooperation 11012.1
Amendment 11014
Priority of Issues 11016

NO-RAIDING PROCEDURES AMONG LABOR ORGANIZATIONS.....11017–11019

Generally 11017
AFL–CIO No-Raiding Procedure 11018
Article XX—Preexisting Collective-Bargaining Relationships 11018.1
Article XXI—Initial Organizing Activities 11018.2
Other No-Raiding Agreements..... 11019

SHOWING OF INTEREST 11020–11042

INITIAL CONSIDERATIONS.....11020-11023
Showing of Interest: Purpose..... 11020
Administrative Matter 11021
Form of Showing of Interest 11022
Union in RC, RM, and RD Petitions 11022.1
Petitioner in RD..... 11022.2
Parties in RM Petition 11022.3
Petitioner in UD..... 11022.4
Person Acting on Behalf of Employees..... 11022.5
Degree of Participation 11023
Petitioner Interest..... 11023.1
Cross-Petitioner Interest 11023.2
Full Intervenor Interest 11023.3
Participating Intervenor Interest 11023.4
Representative of Employees in Related Units..... 11023.5
INFORMATION TO BE OBTAINED 11024–11026
Required Information: Petitioner and Intervenor 11024
Petitioner Evidence of Interest 11024.1
Intervenor Evidence of Interest 11024.2
Date Stamping of Designations by Regional Office..... 11024.3
Requested Information: Employer 11025
Preparation of Payroll List..... 11025.1
Late-Filed Evidence of Interest 11026
Petitioner 11026.1
Intervenor 11026.2
Notice Given to Intervenor, But Evidence Not Submitted Within 48 Hours.....11026.2(a)
Evidence Submitted Prior to Approval of Election Agreement or Close of Hearing ..... 11026.2(a)(1)
Evidence Submitted After Approval of Election Agreement or Close of Hearing.... 11026.2(a)(2)
Notice Not Previously Given to Intervenor ..... 11026.2(b)
Attempts to Intervene in Runoff or Rerun Elections .....11026.2(c)
OTHER CONSIDERATIONS 11027–11029
Validity; Designations; Dates; Age; Period 11027
Validity 11027.1
Designations 11027.2
Date of Authorization 11027.3

Age of Authorization 11027.4
Period for Showing of Interest 11027.5
Challenge to Showing of Interest 11028
Allegation of Fraud, Misconduct, or Supervisory Taint 11028.1
Finding of Merit to Challenge 11028.2
Attempt to Challenge at Hearing 11028.3
Postelection Challenge 11028.4
Possible and Alleged Forgery 11029
Investigation 11029.1
Impact of Other Investigations 11029.2
Subsequent Procedures 11029.3
Attempt to Introduce Evidence of Forgery at Hearing 11029.4
Union With History of Forgery 11029.5
CHECK OF SHOWING OF INTEREST 11030–11035
Check of Showing in Petitioned for Unit 11030
Check of Showing 11030.1
Payroll List Not Timely Submitted by Employer 11030.2
Full Check 11030.3
Spot Check 11030.4
Separate Check for Each Unit Involved 11030.5
Check of Showing in Enlarged Unit 11031
Showing of Interest in Enlarged Unit 11031.1
Additional Showing 11031.2
Check of Additional Showing 11031.3
Report on Check of Showing 11032
Ultimate Disposition of Showing of Interest 11034
Ultimate Disposition of Payroll List 11035
OBJECTIVE CONSIDERATIONS IN RM PETITION 11042
Objective Considerations in RM Petition: Generally 11042
Evidence Required to Satisfy the Uncertainty Standard 11042.1
Supporting Evidence Deficient or Not Submitted With Petition 11042.2
Investigation of Validity of Objective Considerations 11042.3
Levitz Requirements Satisfied 11042.4
Levitz Requirements Not Satisfied 11042.5

REGIONAL DETERMINATION 11080–11124

INITIAL DETERMINATIONS 11080–11082
Regional Determinations: Generally 11080
Reports 11080.1
Notice of Hearing 11082
Continuing Efforts to Obtain Election Agreement Prior to Hearing 11082.1
Service of Notice of Hearing 11082.2
Selection of Hearing Date 11082.3
Place of Hearing 11082.4
Withdrawal of Notice of Hearing 11082.5

ELECTION AGREEMENT 11084–11098
Election Agreement: Generally 11084
Difference Between Consent Election Agreement, Stipulated Election Agreement and Full Consent Election Agreement 11084.1
Obtaining Election Agreement 11084.2
Details of Election Agreement and Election Arrangements 11084.3
Agreements Resolving Eligibility Questions 11084.4
Preparation of Document 11086
Correct and Complete Name of Labor Organization 11086.1
Commerce Facts 11086.2

Place on Ballot; Payroll Period; Time and Place; Unit 11086.3
Parties 11088
Variation Not Permitted 11090
Self-Determination Election 11091
Election Involving Professional Employees 11091.1
Residual Election 11091.2
Severance Election 11091.3
Approval of Election Agreement 11094
Revocation of Election Agreement Approval 11095
Request to Withdraw From Election Agreement 11097
Request to Withdraw From Ballot After Election Agreement 11098

DISMISSAL; WITHDRAWAL; DISCLAIMER 11100–11124

DISMISSAL 11100–11104
Dismissal: Generally 11100
Basis for Dismissal 11100.1
Notification to Parties 11100.2
Regional Director Authority During Review Period 11100.3
Pattern Dismissal Letter 11102
Regional Office Action on Request for Review 11104
Regional Director Transmittal Memorandum 11104.1
Request for Review Sustained 11104.2

WITHDRAWAL 11110–11118
Generally 11110
Oral Withdrawal Requests 11110.1
Before Election: Before Approval of Election Agreement or Close of Hearing (Without Prejudice) 11111
Before Election: After Approval of Election Agreement or Close of Hearing (Prejudice Possible) 11112
RC Petition 11112.1
Petitioner Sole Union Involved ..... 11112.1(a)
Intervenor Desires Election ..... 11112.1(b)
RM Petition 11112.2
RD Petition 11112.3
Before Election: After Direction of Election in Substantially Different Unit 11113
After Election 11116
Generally 11116.1
Challenges Pending 11116.2
Objections Pending 11116.3
Election Set Aside 11116.4
Prejudice Period; Good Cause 11118
Good Cause: Application When Petition Filed Within Prejudice Period 11118.1
Intervention During Prejudice Period 11118.2
Showing of Interest After Prejudice Period 11118.3

DISCLAIMER 11120–11124
Disclaimer: Generally 11120
Effect Upon RC Petition 11122
Dismissal of RM and RD Petitions 11124
RM Petition 11124.1
RD Petition 11124.2
Good Cause 11124.3
Intervenor Desires Election 11124.4

PREHEARING 11140–11148
Prehearing: Generally 11140
Ongoing Efforts to Obtain Election Agreement Prior to Hearing 11140.1

Motions **11141**
Subpoenas **11142**
Postponement Requests **11143**
Generally 11143.1
Ruling on Request 11143.2
Review of Prehearing Determinations **11148**

PREELECTION HEARINGS **11180–11248**

ISSUES PRELIMINARY TO HEARING **11180–11189**
Final Efforts to Obtain Election Agreement Prior to Opening of Hearing and During Hearing **11180**
Nature and Objective of Hearing **11181**
Formality of Hearing **11182**
Misconduct at Hearing 11182.1
Payroll List Submitted at Hearing **11183**
Attempt to Litigate Showing of Interest at Hearing **11184**
Allegation of Improper Conduct in Obtaining Showing of Interest 11184.1
Hearing Officer **11185**
Hearing Materials **11186**
General 11186.1
Specific 11186.2
Hearing Officer Prehearing Responsibilities **11187**
Preparation 11187.1
Prehearing Preparation of Stipulations 11187.2
Foreign Language Witnesses 11187.3
Hearing Officer Responsibilities During Hearing **11188**
Complete and Concise Record 11188.1
Rulings 11188.2
Rulings to be Made During Hearing; Review of Rulings ..... 11188.2(a)
Rulings to be Referred to Regional Director ..... 11188.2(b)
Checklist **11189**

CONDUCT OF HEARING **11190–11248**
INITIAL ISSUES AT HEARING **11190–11209**
Opening of Hearing **11190**
Hearing Officer Opening Statement 11190.1
Introduction of Formal Papers **11192**
Motions to Intervene **11194**
Based on Existing or Recently Expired Contract 11194.1
Based on Evidence of Interest 11194.2
Check of Intervenor Showing 11194.3
Tests for Granting or Denying Intervention 11194.4
Levels of Intervention Permitted 11194.5
Correct and Complete Name of Labor Organization **11198**
Shortened Name Requested 11198.1
Amendment of Petition to Reflect Correct Name 11198.2
Single or Joint Parties 11198.3
Attempt to Appeal During Hearing From Ruling by Hearing Officer **11203**
Amendment to Petition **11204**
Postponement Requests **11207**
Ground—Lack of Counsel 11207.1
Ground—To Submit Additional Information 11207.2
Adjournment **11208**
Withdrawal Request **11209**
SUBPOENAS **11210–11214**
Issuance **11210**
Petition to Revoke **11212**

Delay for Enforcement **11214**
PRESENTATION OF EVIDENCE **11216–11228**
Presentation of Evidence: Generally **11216**
Introduction of Material Contained in Regional Office File 11216.1
Statement of Parties' Positions on Record **11217**
Order of Presentation **11218**
Witnesses **11220**
Foreign Language Witnesses **11221**
Stipulations During Hearing **11222**
Off the Record Efforts at Stipulations 11222.1
Exhibits **11224**
Identification and Authentication; Voir Dire 11224.1
Relevant Portion Specified 11224.2
Withdrawal of Original Copy 11224.3
Rejected 11224.4
Custody 11224.5
Exhibits Outstanding; Provision for Receipt 11224.6
Motion Made at Hearing **11225**
Offer of Proof **11226**
Special Admissibility Problems (Jurisdiction; Unfair Labor Practices; Alleged Violations of Other Statutes by Labor Organizations; Election Arrangements; Limitations on Intervenors' Participation in the Hearing) **11228**
CLOSE OF HEARING **11240–11248**
Close of Hearing: Generally **11240**
Oral Argument at Hearing **11242**
Briefs **11244**
Filing of Briefs 11244.1
Request for Extension of Time to File Brief 11244.2
Closing Statement **11246**
Hearing Completed 11246.1
Hearing Adjourned 11246.2
AC, UC, and UD Petitions 11246.3
Closing Checklist **11248**

POSTHEARING **11250–11284**
PREDECISION MATTERS **11250–11272**
HEARING OFFICER REPORT **11250–11252**
Hearing Officer Report: Generally **11250**
Format of Hearing Officer Report **11252**
Full Report 11252.1
Checklist 11252.2
OTHER PREDECISION MATTERS **11258–11272**
Correcting Transcript **11258**
Motions **11262**
Answers to Motions **11264**
Withdrawal Request **11268**
Request for Use of Shortened Name **11272**
DECISION **11273–11284**
REGIONAL DIRECTOR DECISION **11273-11275**
Regional Director Decision: Generally **11273**
Contents of Regional Directors Decision 11273.1
Direction of Election 11273.2
Request for Review of Regional Director Decision **11274**
Transmission of Regional Director Decision to Washington **11275**

BOARD DECISION **11280–11284**
Board Decision: Generally **11280**
Dismissal 11280.1
Remand 11280.2
Direction of Election 11280.3
Motion for Reconsideration of Board Decision **11282**
Extension of Time for Holding Election **11284**

ELECTIONS **11300–11350**

PRELIMINARY CONSIDERATIONS **11300–11301**
Elections: Generally **11300**
Suit to Enjoin Election 11300.1
Arrangements for Conducting Election **11301**
Generally 11301.1
Manual or Mail Ballot Election: Determination 11301.2
Time of Determinaton 11301.3
Manner of Determination 11301.4
Informing Parties 11301.5

MANUAL ELECTION **11302–11335**
ELECTION DETAILS **11302–11310**
Date, Place, and Hours **11302**
Selection of Date 11302.1
Impounding of Ballots ..... 11302.1(a)
Postponed or Canceled Election ..... 11302.1(b)
Selection of Place 11302.2
Multiple Polling Places ..... 11302.2(a)
Selection of Hours 11302.3
Absentee Ballots Not Permitted 11302.4
Election Equipment **11304**
Election Kit 11304.1
Equipment Maintained in Regional Office 11304.2
Voting Booth 11304.3
Ballot Bag or Box 11304.4
Equipment for Specific Election 11304.5
Ballots **11306**
Generally 11306.1
Question on Ballot 11306.2
Shortened Name Request 11306.3
Ballots in Multiunion Election 11306.4
Color of Ballot 11306.5
Instructions on Ballot 11306.6
Board Personnel **11308**
Observers **11310**
Generally 11310.1
Designation of Observers 11310.2
Role of Observers 11310.3
Observer Identification 11310.4
VOTING ELIGIBILITY LIST **11312–11313**
Eligibility List **11312**
Request for List 11312.1
Election Agreement ..... 11312.1(a)
Direction of Election ..... 11312.1(b)
Direction of Election in Enlarged Unit; Showing Sufficient ..... 11312.1(c)
Direction of Election in Enlarged Unit; Contingent on Showing ..... 11312.1(d)
Election Directed in Subregion ..... 11312.1(e)

Self-Determination *(Sonotone)* Election ..... 11312.1(f)
Multilocation Election ..... 11312.1(g)
Mail Ballot Election ..... 11312.1(h)
Rerun Election ..... 11312.1(i)
Runoff and Rescheduled Election ..... 11312.1(j)
Expedited Election ..... 11312.1(k)
Service of List 11312.2
Preparation of List 11312.3
Preelection Check of List 11312.4
Timely Filing of List 11312.5
Refusal to Furnish Eligibility List of Names and Addresses 11312.6
Refusal to Furnish List of Voter Names for Conduct of Election 11312.7
Request Not to Proceed to Election 11312.8
Refusal; Second Election 11312.9
Subpoena Enforcement Problems 11312.10
Ultimate Disposition of List 11312.11
Subpoena to Compel Production of Election Eligibility List (Names and Addresses) 11313
Suggested Subpoena Format 11313.1
Appendix to Subpoena ..... 11313.1(a)
NOTICE OF ELECTION 11314–11315
Notice of Election 11314
Copies Required 11314.1
Insertions Required 11314.2
Instructions to Voters 11314.3
Striker-Eligibility Language 11314.4
Self-Determination Election 11314.5
Supplements 11314.6
Posting and Distribution 11314.7
Employer's Premises ..... 11314.7(a)
Additional Distribution ..... 11314.7(b)
Postponed, Canceled, or Rescheduled Election 11314.8
Runoff and Rerun Elections 11314.9
Foreign Language Notice of Election and/or Ballots 11315
Utilization 11315.1
Arrangements; Notice of Election 11315.2
Translated Side Panels on Notice of Election ..... 11315.2(a)
Translated Notice of Election and Ballots ..... 11315.2(b)
Translated Notice of Election, With English Ballots at Election ..... 11315.2(c)
Foreign Language in Mail Ballot Election 11315.3
VOTING PROCEDURES 11316–11335
Size and Arrangement of Polling Place 11316
Preelection Conference 11318
Distribution of Badges 11318.1
Instructions to Observers 11318.2
Representatives of Parties 11318.3
Sealing of Ballot Box 11318.4
Employees Who Arrive Before Opening of Polls 11318.5
Opening of Polls 11320
Progress of Voters 11322
Procedure at Checking Table 11322.1
Voting Booth 11322.2
Spoiled Ballots 11322.3
Ballot Box 11322.4
Close of Polls 11324
Late-Arriving Employees 11324.1
Electioneering 11326

Insignia Worn by Observers 11326.1
Electioneering by Observers Prohibited 11326.2
Voters 11326.3
Area Surrounding Polling Place 11326.4
Distribution of Literature; Sound Truck 11326.5
Voting by Affidavit 11328
Form of Affidavit 11328.1
Procedure at Checking Table 11328.2
Voting on Employer Time 11330
Voters Scheduled Alphabetically 11330.1
Voters Scheduled by Work Unit 11330.2
Voting Schedule Preparation and Posting 11330.3
Method of Releasing Voters 11330.4
Off-Schedule Voters 11330.5
Split-Session Election 11332
Multiple Polling Places 11334
Polls Open Simultaneously 11334.1
Traveling Election 11334.2
Closings of Polls and Election 11334.3
Mixed Manual-Mail Election 11335
Generally 11335.1
Determination 11335.2
Preparation of Separate Lists 11335.3
Procedures 11335.4

MAIL BALLOT ELECTION 11336

Mail Ballot Election: Generally 11336
Determination 11336.1
Notification and Distribution Procedures 11336.2
Election Eligibility List ..... 11336.2(a)
Notification ..... 11336.2(b)
Voter Kit ..... 11336.2(c)
Deadline ..... 11336.2(d)
Posting of Notice of Election 11336.3
Kit Not Received by Voter; Duplicate Kit 11336.4
Receipt of Envelopes by Regional Office ..... 11336.4(a)
Unsigned Ballot Envelopes ..... 11336.4(b)
Check and Count of Ballots 11336.5
Parties' Observers ..... 11336.5(a)
Count ..... 11336.5(b)
Late or Unsigned Envelopes ..... 11336.5(c)

CHALLENGES 11338

Challenges: Generally 11338
Basis 11338.1
Who May Challenge 11338.2
Observers ..... 11338.2(a)
Board Agent ..... 11338.2(b)
Challenge Procedure 11338.3
Notation of Potential Challenges 11338.4
Proper Time to Challenge 11338.5
Merit of Challenge Not to be Argued 11338.6
Specific Exclusions and Inclusions in Decision 11338.7
Voters Challenged/Ballots Impounded, Pending Board Ruling on Request for Review 11338.8
Mail Ballots Challenged 11338.9
Treatment of Challenged Ballots 11338.10

COUNT 11340

Count of Ballots **11340**
Time and Place 11340.1
Persons Present 11340.2
Clearing Challenges 11340.3
Examples ..... 11340.3(a)
Procedure on Cleared Challenges ..... 11340.3(b)
Mechanics of Counting 11340.4
Informal Method 11340.5
Formal Method 11340.6
Interpretation of Ballots 11340.7
Challenge of Board Agent Interpretation ..... 11340.7(a)
Preparation of Tally of Ballots 11340.8
Sample Tally of Ballots
Tally—Severance, Craft, or Professional Elections ..... 11340.8(a)
Storage of Nondeterminative Challenged and Voided Ballots ..... 11340.8(b)
Postelection Objections to Interpretation or Validity of Ballots ..... 11340.8(b)(1)
Securing Determinative Challenged, Questioned Interpretation and Impounded Ballots at Conclusion of Election 11340.9
Determinative Challenged and Questioned Interpretation Ballots ..... 11340.9(a)
Impounded Ballots ..... 11340.9(b)
Execution of Tally of Ballots 11340.10
Distribution of Tally of Ballots 11340.11

CLOSE OF ELECTION 11342–11344
Closing Checklist **11342**
Storage of Determinative Challenged, Questioned Interpretation and Impounded Ballots **11344**
Determinative Challenged and Questioned Interpretation Ballots 11344.1
Impounded Ballots 11344.2
Additional Procedures Relating to Determinative Challenged, Questioned Interpretation and Impounded Ballots 11344.3

RUNOFF ELECTIONS 11350
Runoff Elections **11350**
Occasion 11350.1
Examples 11350.2
Time of Runoff 11350.3
Attempt to Withdraw 11350.4
Procedure for Conduct of Runoff 11350.5

RESCHEDULED ELECTIONS 11351
Rescheduled Elections **11351**
Notice of Election for Rescheduled Election 11351.1
Pattern Statement to be Included in Notice of Election ..... 11351.1(a)
Voting Procedures 11351.2
Objections 11351.3

POSTELECTION CHALLENGES AND OBJECTIONS 11360–11438
RESOLUTION OF DETERMINATIVE CHALLENGES 11360–11367
INITIAL CONSIDERATIONS 11360–11363
Challenges **11360**
Context 11360.1
Treatment 11360.2
Processing of Challenges With Objections 11360.3
Methods of Resolution **11361**
Administrative Investigation or Hearing 11361.1
Voluntary Resolution 11361.2
Partial Resolution of Challenges 11361.3

Opening Challenged Ballots Prior to Resolution 11361.4
Initial Consideration of Challenges 11362
Generally 11362.1
Nature and Scope of Processing 11362.2
Procedures Applicable to Challenges 11363
ADMINISTRATIVE INVESTIGATION 11364
Administrative Investigation: Generally 11364
Investigation Methods 11364.1
Conclusion of Investigation; Informing Parties 11364.2
Evidence to Support Report or Supplemental Decision 11364.3
Type of Document Issued 11364.4
Contents of Report or Supplemental Decision 11364.5
Service 11364.6
Board Review 11364.7
Obtaining Review ..... 11364.7(a)
Board Decision on Review ..... 11364.7(b)
Treating Exceptions or Request for Review as Motion for Reconsideration 11364.8
Scheduling Opening of Challenged Ballots 11364.9
PROCESSING BY HEARING 11365–11366
Processing by Hearing: Generally 11365
Circumstances Warranting Hearing 11365.1
Issuance of Notice of Hearing 11365.2
Date of Hearing 11365.3
Notice of Hearing Procedures 11366
Notice of Hearing 11366.1
Contents of Notice of Hearing ..... 11366.1(a)
Authority to Conduct Hearing ..... 11366.1(b)
Directions to Hearing Officer 11366.2
Conclusion 11366.3
Hearing Procedures 11366.4
BIFURCATED PROCEEDINGS—CHALLENGES 11367
Bifurcated Proceedings—Challenges: Generally 11367
COUNT OF OVERRULED CHALLENGED BALLOTS 11378
Count 11378
Revised Tally of Ballots 11378.1
RESOLUTION OF OBJECTIONS TO ELECTION 11390–11397
INITIAL CONSIDERATIONS 11390–11393
Objections 11390
Context 11390.1
Treatment 11390.2
Processing of Objections With Challenges 11390.3
Methods of Resolution 11391
Administrative Investigation or Hearing 11391.1
Voluntary Resolution 11391.2
Partial Resolution of Objections 11391.3
Initial Consideration of Objections 11392
Generally 11392.1
Objections to Interpretation or Validity of Ballots ..... 11392.1(a)
Objections Period; Timeliness 11392.2
Objections to Initial Election ..... 11392.2(a)
Period of Alleged Objectionable Conduct ..... 11392.2(a)(1)
Timeliness of Filing ..... 11392.2(a)(2)
Impact of Determinative Challenged Ballots ..... 11392.2(a)(3)
Impounded Ballots ..... 11392.2(a)(4)
Objections to Rerun or Runoff Election ..... 11392.2(b)

Rerun Election ..... 11392.2(b)(1)
Runoff Election ..... 11392.2(b)(2)
Objections to Revised Tally of Ballots ..... 11392.2(c)
Objections Not Timely Filed 11392.3
Who May File Objections 11392.4
Reasons for Objections 11392.5
Duty to Timely Furnish Evidence 11392.6
Prefiling Assistance 11392.7
Filing Requirements 11392.8
Service on Parties 11392.9
Nature and Scope of Processing 11392.10
Unalleged Objectionable Conduct 11392.11
Procedures Applicable to Objections 11393
ADMINISTRATIVE INVESTIGATION 11394
Administrative Investigation: Generally 11394
Investigation Methods 11394.1
Conclusion of Investigation; Informing Parties 11394.2
Evidence to Support Report or Supplemental Decision 11394.3
Type of Document Issued 11394.4
Contents of Report or Supplemental Decision 11394.5
Service 11394.6
Board Review 11394.7
Obtaining Review ..... 11394.7(a)
Board Decision on Review ..... 11394.7(b)
Treating Exceptions or Request for Review as Motion for Reconsideration 11394.8
PROCESSING BY HEARING 11395–11396
Processing by Hearing: Generally 11395
Circumstances Warranting Hearing 11395.1
Issuance of Notice of Hearing 11395.2
Nonspecific and Unalleged Objections 11395.3
Date of Hearing 11395.4
Notice of Hearing Procedures 11396
Notice of Hearing 11396.1
Contents of Notice of Hearing ..... 11396.1(a)
Authority to Conduct Hearing ..... 11396.1(b)
Directions to Hearing Officer 11396.2
Conclusion 11396.3
Hearing Procedures 11396.4
BIFURCATED PROCEEDINGS—OBJECTIONS 11397
Bifurcated Proceedings—Objections: Generally 11397
CHALLENGES/OBJECTIONS INVESTIGATION WHEN UNFAIR LABOR PRACTICE CHARGE ALSO INVOLVED 11407
Challenges/Objections Investigation: G enerally 11407
Circumstances Affecting Choice of Procedures 11407.1
HEARING ON CHALLENGES/OBJECTIONS 11420–11430
ISSUES PRELIMINARY TO HEARING 11420–11427
Issues Preliminary to Hearing: Generally 11420
Procedures: Unfair Labor Practice Charge Also Involved 11420.1
Nature and Objective 11422
Participating Agency Personnel 11424
Administrative Law Judge 11424.1
Selection of Hearing Officer 11424.2
Functions and Duties of Hearing Officer 11424.3
Prehearing ..... 11424.3(a)
Hearing ..... 11424.3(b)

Functions and Duties of Representative of Regional Director 11424.4
Prehearing ..... 11424.4(a)
Hearing ..... 11424.4(b)
Hearing After Remand ..... 11424.4(c)
Prehearing Procedures 11426
Regional Office Preparation 11426.1
Formal Papers ..... 11426.1(a)
Statements of Witnesses ..... 11426.1(b)
Foreign Language Witnesses ..... 11426.1(c)
Postponement Requests 11427
CONDUCT OF HEARING 11428–11430
Hearing Procedures 11428
Generally 11428.1
Opening Statement 11428.2
Introduction of Formal Papers 11428.3
Order of Presentation 11428.4
Witnesses 11429
Board Agent Testimony 11429.1
Production of Statements of Witnesses 11429.2
Copies of Statements of Witnesses 11429.3
Foreign Language Witnesses 11429.4
Briefs 11430
POSTHEARING 11432–11438
HEARING OFFICER REPORT ON CHALLENGES/OBJECTIONS 11432–11434
Hearing Officer Report 11432
Exceptions to Hearing Officer Report 11434
BOARD OR REGIONAL DIRECTOR DECISION 11436–11438
Decision 11436
Withdrawal After Election Invalidated 11438

RERUN ELECTIONS 11450–11456
Rerun Elections: Occasion 11450
Timing and Conditions 11452
Date of Rerun Election 11452.1
Terms of Rerun Election 11452.2
Notice of Election 11452.3
Consolidated Representation and Unfair Labor Practice Cases 11452.4
Voting Procedures 11454
Count; Tally 11456
Challenges 11456.1
Results 11456.2
Objections 11456.3

CERTIFICATIONS 11470–11478
Certifications: Generally 11470
Issuance 11472
Election Pursuant to Consent Election Agreement 11472.1
Election Pursuant to Stipulated Election Agreement 11472.2
Election Directed by Regional Director or Board 11472.3
Form 11474
File 11476

Authority of Regional Director to Correct, Amend, or Revoke **11478**
Correction 11478.1
Amendment 11478.2
Revocation 11478.3

UC, AC, UD AND OTHER CASES 11490–11540

UC AND AC CASE PROCEDURES 11490–11498

UC and AC Case Procedures: Generally **11490**
UC (Unit Clarification) Petition 11490.1
AC (Amendment of Certification) Petition 11490.2
Concurrent Unfair Labor Practice Charge 11490.3
Processing UC and AC Petitions **11491**
Initial Communications 11491.1
Interested Parties 11491.2
Information Requested 11491.3
Investigation **11492**
Generally 11492.1
Lack of Cooperation 11492.2
Withdrawal 11492.3
Amendment **11493**
Regional Determination **11494**
Hearing **11495**
Patterns **11496**
Pattern Dismissal of UC Petition 11496.1
Pattern Dismissal of AC Petition 11496.2
Pattern Decision and Clarification of Bargaining Unit 11496.3
Pattern Decision and Amendment of Certification 11496.4
Transmission of Regional Director Decision to Washington **11498**

UD CASE PROCEDURES 11500–11516

Objective **11500**
Initiation **11502**
Initial Notification and Service **11504**
Investigation **11506**
Generally 11506.1
Question Concerning Representation Precludes Processing 11506.2
Concurrent Unfair Labor Practice Charge 11506.3
Jurisdiction 11506.4
Evidence in Support of Petition 11506.5
Union-Security Clause 11506.6
Contract as Bar 11506.7
Bargaining Unit 11506.8
Regional Determination **11508**
Basis of Disposition 11508.1
Direction of Election by Regional Director 11508.2
Pattern Direction of Election 11508.3
Prehearing and Hearing Procedures **11510**
Election **11512**
Postelection Procedures **11514**
Certification of Results **11516**
Certification of Results of Election 11516.1

OTHER CASES 11520–11540

Last-Offer Elections **11520**
Certification of Representative Under FLSA **11540**

ITEMS COMMON TO ALL CASES 11700–11886

JURISDICTION 11700–11711

Jurisdictional Standards 11700
Investigation 11702
Obtaining Commerce Information from Employer 11702.1
Examination of Employer Records 11702.2
Commerce Affidavit 11702.3
Action on Basis of Commerce Investigation 11702.4
Subpoenas for Commerce Information 11704
Representation Cases 11704.1
Unfair Labor Practice Cases 11704.2
Failure to Comply with Subpoena 11704.3
Other Sources for Obtaining Commerce Information 11705
Contacts with Other Agencies 11705.1
Jurisdictional Standards Not Met 11706
Jurisdictional Policy Question 11707
Proof in Formal Proceedings 11708
Advisory Opinions 11709
Regional Office Action 11709.1
Declaratory Orders 11710
National Mediation Board Jurisdiction 11711
Jurisdiction Clear 11711.1
Arguable RLA Jurisdiction 11711.2

TRANSFER, CONSOLIDATION, AND SEVERANCE 11712-11720

Generally 11712
Interregional Transfers 11714
Individual Case(s) Transfer 11714.1
Interregional Assistance Program 11714.2
Consolidation 11716
Severance 11718
Motions to Consolidate or Sever 11720
Unfair Labor Practice Cases 11720.1
Representation Cases 11720.2
CONCURRENT R (REPRESENTATION) AND C (ULP) CASES 11730–11734
BLOCKING UNFAIR LABOR PRACTICE CHARGES; EXCEPTIONS 11730–11731
Blocking Charge Policy—Generally 11730
Types of Blocking Charges 11730.1
Type I Charges: Charges that Allege Conduct that Only Interferes With Employee Free Choice (Request to Proceed May be Honored) 11730.2
Type II Charges: Charges that Affect the Petition or Showing of Interest, that Condition or Preclude a Question Concerning Representation, or that Taint an Incumbent Union's Subsequent Loss of Majority Support (Request to Proceed May be Honored in Limited Circumstances) 11730.3
Charges That Affect The Petition Or Showing Of Interest ..... 11730.3(a)
Charges that Condition or Preclude a Question Concerning Representation ..... 11730.3(b)
Charges that Taint an Incumbent Union's Subsequent Loss of Majority Support ..... 11730.3(c)
Decision Whether to Hold Petition in Abeyance 11730.4
AC and UC Cases 11730.5
Period of Pendency of Charge 11730.6
Informing Parties 11730.7
Notification to Board 11730.8
Exceptions to Blocking Charge Policy 11731
Exception 1: Request to Proceed 11731.1
Receipt of Request to Proceed in Type I and Type II Charges ..... 11731.1(a)
Rescission of Request to Proceed ..... 11731.1(b)

Section 8(a)(2) *Carlson* Waiver ..... 11731.1(c)
Withdrawal and Attempted Reinstatement of Charge ..... 11731.1(d)
Exception 2: Free Choice Possible Notwithstanding Charge 11731.2
Exception 3: Charges Otherwise Appropriate for Deferral Under *Collyer* or *Dubo* 11731.3
Exception 4: Petition and Charge Raise Significant Common Issues; UC and AC Petitions 11731.4
Exception 5: Scheduled Hearing 11731.5
Exception 6: Scheduled Election 11731.6
FINDING AS TO MERIT OF UNFAIR LABOR PRACTICE CHARGE 11732–11733
Charge Found Not to Have Merit 11732
Charge Found to Have Merit 11733
Blocking of Petition Warranted 11733.1
Dismissal of Petition Warranted 11733.2
Types of Violations Found ..... 11733.2(a)
Violations that Affect the Petition or Showing of Interest ..... 11733.2(a)(1)
Violations that Condition or Preclude a Question Concerning Representation ..... 11733.2(a)(2)
Violations that May Affect an Incumbent Union's Subsequent Loss of Majority Support ..... 11733.2(a)(3)
Dismissal of Petition ..... 11733.2(b)
RESUMPTION OF PROCESSING OF PETITION 11734
Resumption of Processing of Petition Upon Disposition of Charge 11734
PRIORITY OF CASE PROCESSING 11740
Priority of Cases—Impact Analysis 11740
Category III Cases: Exceptional Impact 11740.1
Category II Cases: Significant Impact 11740.2
Category I Cases: Important Impact 11740.3
Priority of Cases Within Each Category 11740.4
SUBMISSIONS TO DIVISIONS OF ADVICE AND OPERATIONS-MANAGEMENT, THE SPECIAL LITIGATION BRANCH AND THE OFFICE OF THE EXECUTIVE SECRETARY 11750–11754
Unfair labor Practice Cases 11750
Submissions to Division of Advice 11750.1
Format and Content of Request for Advice 11750.2
Requests by Division of Advice for Further Investigation 11750.3
Suits Against the Agency and Requests for Intervention 11751
Precomplaint Submissions to Division of Operations-Management 11752
Postcomplaint, Posthearing, and Compliance Submissions 11753
Postcomplaint Submissions 11753.1
Posthearing Submissions 11753.2
Compliance 11753.3
Equal Access to Justice Act (EAJA) 11753.4
Representation Cases 11754
Generally 11754.1
Authorization From Headquarters 11754.2
SUBPOENAS 11770–11784
Investigative Subpoenas 11770
Application for Investigative Subpoena 11770.1
Scope of Regional Director's Discretion 11770.2
Notification of Counsel or Representative 11770.3
Clearance by Headquarters 11770.4
Financial Institution Records 11770.5
Problems Regarding Enforceability; Reports to Headquarters 11770.6
Trial or Hearing Subpoenas 11772
Persons Subpoenaed 11774
Subpoenas Duces Tecum 11776
Service of Subpoenas 11778
Witness Fees 11780

Petition to Revoke 11782
Filed Prior to Hearing 11782.1
Filed at Hearing 11782.2
Notice of Filing 11782.3
Five-Day Period 11782.4
Not a Part of the Record 11782.5
Witness Claims of Privilege Against Self-Incrimination 11784
ENFORCEMENT OF SUBPOENA 11790–11808
Enforcement of Subpoena 11790
Issued at Request of Private Parties 11790.1
Issued at Request of the General Counsel 11790.2
Notification to Headquarters 11790.3
Appeal Proceedings 11790.4
Stays Pending Appeal 11790.5
Subpoena Authority of the Board/Court Jurisdiction 11792
Authority of Board to Issue Subpoenas 11792.1
Jurisdiction of Courts to Enforce Subpoenas 11792.2
Collateral Proceedings 11792.3
Relevance 11794
"Fishing Expedition" as a Defense 11796
Subpoena Enforcement Procedures 11798
Order to Show Cause Procedure 11798.1
Motion Procedure 11798.2
Subpoena Enforcement Documents 11800
Patterns Provided 11800.1
Procedural Issues 11800.2
Pattern 51, Application for Order Enforcing Subpoena ad Testificandum 11802
Pattern 51 ..... 11802.1
Pattern 52, Application for Order Enforcing Subpoena Duces Tecum 11804
Pattern 52 ..... 11804.1
Pattern 53, Order to Show Cause 11806
Pattern 53 ..... 11806.1
Pattern 54, Notice of Institution of Proceeding to Enforce Subpoena ad Testificandum 11808
Pattern 54 ..... 11808.1
DISCLOSURE OF AGENCY DOCUMENTS AND SUBPOENAS OF, AND TESTIMONY BY, AGENCY PERSONNEL 11820–11828
Policy on Disclosure of Documents and Board Agent Testimony 11820
FOIA Disclosure of Documents 11822
Subpoena of Agency Documents and Personnel 11824
Delegation of General Counsel Authority 11824.1
Steps to be Taken on Receiving Subpoena 11824.2
Witness Fees and Allowances 11824.3
Agency Motion to Quash or Petition to Revoke 11826
Motion to Quash/Petition to Revoke—Non-Board Proceedings 11826.1
Petition to Revoke—Board Proceedings 11826.2
Petition to Revoke Denied—Board Proceedings 11826.3
Instructions to Testify or Produce Records Without Permission in Non-Board Proceedings 11826.4
Production of Documents in Formal Proceedings 11828
SERVICE, FILING, AND COMMUNICATIONS WITH PARTIES 11840–11846
Service and Filing of Documents 11840
Computation of Period of Time 11840.1
Date of Service and Proof 11840.2
Receipt of Documents and Postmark Rule 11840.3
Receipt of Documents—Exceptions to Postmark Rule 11840.4

Service by the Regional Offices 11842
Service of Charge by the Regional Office 11842.1
Service of Other Formal Documents 11842.2
Service on Attorney or Other Representative 11842.3
Service on Multiple Attorneys or Other Representatives 11842.4
Oral and Electronic Communications with Parties or Persons 11844
Filing and Service by Parties 11846
Facsimile Filing Permitted 11846.1
Facsimile Filing Permitted only with Consent 11846.2
Facsimile Filing Prohibited 11846.3
Electronic Filing and Service 11846.4
Service by Party on Other Parties 11846.5
CASE FILES AND DOCUMENTARY EVIDENCE 11850–11860
Case Files 11850
Organization of Files 11850.1
File Should Contain Complete History of Case 11850.2
Documentary Evidence 11860
Reporting Service 11870
Official Reporting Service 11870
Notification of Hearing Schedule 11870.1
Coordination with the Local Reporter 11870.2
Scheduling Hearings 11870.3
Timely Notification of Cancellations or Postponements 11870.4
Report of Obligated Cost of Hearing, Form NLRB-4237 ..... 11870.5
Sales of Copies of Transcript 11870.6
Reporting Service Compliance with Contract 11870.7
Other Contract Provisions 11870.8
COMMUNICATIONS AND TRAVEL 11880–11886
Communication with Headquarters 11880
Communication with the Board 11881
Travel Beyond Regional Boundaries 11882
Communication With Other Agencies 11884
Congressional Inquiries 11886
Reply by Regional Directors 11886.1
Reply by the Division of Operations-Management 11886.2

REGIONAL AND SUBREGIONAL OFFICES 15004
Alphabetical List 15004
Areas Served By Regional and Subregional Offices 15010

INDEX

TABLE OF CASES

PURPOSE OF THE MANUAL

The Casehandling Manual is intended to provide procedural and operational guidance for the Agency's Regional Directors and their staffs when making decisions as to unfair labor practice and representation matters under the National Labor Relations Act. The Manual consists of three volumes: Part One—Unfair Labor Practice Proceedings; Part Two—Representation Proceedings; and Part Three—Compliance Proceedings.

This Manual has been prepared by the General Counsel for use by Agency personnel, pursuant to authority under Section 3(d) of the Act and as delegated by the Board. The Manual has been neither reviewed nor approved by the Board.

As to matters on which the Board has issued rulings, the Manual seeks to accurately describe and interpret Board law; while the Manual can thus be regarded as reflecting Board policies as of the date of its preparation, in the event of conflict, it is the Board's decisional law, not the Manual, that is controlling. Similarly, while the Manual reflects casehandling policies of the General Counsel as of the date of its preparation, such policies may be revised or amended from time-to-time.

The Manual is not a form of binding authority, and the procedures and policies set forth in the Manual do not constitute rulings or directives of the General Counsel or the Board. The Manual is also not intended to be a compendium of either substantive or procedural law, nor can it be a substitute for a knowledge of the law.

Although it is expected that the Agency's Regional Directors and their staffs will follow the Manual's guidelines in the handling of cases, it is also expected that in their exercise of professional judgment and discretion, there will be situations in which they will adapt these guidelines to circumstances. Thus, the guidelines are not intended to be and should not be viewed as binding procedural rules. Rather, they provide a framework for the application of the Board's decisional law and rules to the facts of the particular situations presented to the Regional Directors and their staffs, consistent with the purposes and policies of the Act.

MANUAL FORM

This Manual is available in printed form from the U.S. Government Printing Office (GPO) and in electronic form at the Agency's web site (www.nlrb.gov). Periodic revisions to the Manual can only be obtained electronically through the Agency's website, not through the GPO.

MODIFICATIONS TO THE MANUAL

Modifications to the Manual will be announced through memoranda issued by the Division of Operations-Management. These memoranda are available to the public through the Agency's publication "Weekly Summary of NLRB Cases." At the time of announcement, the electronic versions of the Manual maintained on the Agency's web site (www.nlrb.gov) and internal Bulletin Board will be revised in accord with the

modifications. All memoranda announcing modifications will be retained for 1 year at the web site and Bulletin Board UPDATE PAGE.

Printed versions of the Manual available in Agency libraries will be kept current. Printed compilations of modifications will be prepared annually. Printed copies of the Manual distributed following its original publication date will contain the original Manual as well as all annual compilations.

11000-11009 PREINVESTIGATION

11000-11007 FILING OF PETITION

11000 Agency Objective

The expeditious processing of petitions filed pursuant to the Act represents one of the most significant aspects of the Agency's operations. The processing and resolution of petitions raising questions concerning representation, i.e., RC, RM, and RD petitions, are to be accorded the highest priority.

11000.1 Suit That Seeks to Enjoin Processing of Petition

If the Regional Director is served with a copy of a complaint in a suit to enjoin a representation proceeding, the Assistant General Counsel for Special Litigation should be advised immediately, and the matter should be referred promptly to that branch and the Division of Operations Management. Sec. 11750.1.

11001 Prefiling Assistance

Prefiling assistance may be obtained by contacting a Regional Office. Information concerning the processing of representation petitions is also available on the Agency's Internet web site (www. nlrb.gov).

11001.1 Report on Inquiries

Board agents serving as Information Officers should keep a record of time spent in rendering prefiling assistance and answering inquiries of the public and other Government agencies, as well as sufficient salient facts, as appropriate.

11001.2 Determination Whether Situation Covered

When a Board agent is contacted by an individual seeking information about or assistance in filing a petition, the agent should make an initial determination regarding whether the matter raised is one covered by the Act.

11001.3 Situation Not Covered

If the situation clearly is not covered by the representation provisions of the Act, the Board agent should point out this fact and discourage the filing of a petition. The individual should be advised that he/she still has the right to file a petition if he/she so desires. If a petition is filed under these circumstances, it should be processed just as any other. In any event, a brief memo of the salient facts should be prepared for the Regional Office records. Sec. 11001.1.

11001.4 Situation Covered

If the situation is one that would appear to be covered by the representation provisions of the Act, the individual should be advised of the right to file a petition. General information as to Board policy and procedure with respect to the type of situation involved may be outlined; however, care should be taken to advise that any ultimate result may hinge on various considerations. The individual should be told that the Agency's representation processes are, in the normal case, invoked by the filing of a petition and, in the absence of a petition, no investigation into the matter will be made.

11001.5 Information as Contrasted With Advice

Requests for prefiling assistance may be honored only to the extent that they seek information, as contrasted with advice, concerning rights, obligations and general contents of the Act. Answers should be succinct, and should include all reservations that are necessary in a field as fluid as the area covered by the Act. (For example, at one point or another, some such statement as "We cannot, of course, give advice," "cannot give advisory opinions," or "cannot commit the General Counsel or the Board" may be called for.) Extended correspondence should be discouraged and, if advice is persistently sought, resort to private counsel should be suggested. Under no circumstances should specific counsel be recommended.

Regional personnel should not give advisory opinions as to the legality of given conduct or contract clauses.

11001.6 Assistance in Preparation

Assistance in the preparation of a petition may be rendered to the filing party, to the extent that such assistance involves the furnishing of forms, reasonable support staff assistance, and the wording of the petition itself.

11001.7 Assistance in Drafting Language of RD and UD Showings of Interest

Secs. 11020–11034 discuss showing of interest in general; Secs. 11022.2 and 11506.5 discuss showing of interest in RD and UD cases, respectively.

Individual employees may call or visit Regional Offices seeking information regarding the filing of RD and UD petitions and the showing of interest requirements for such petitions. Board agents may provide assistance to such individuals, if requested, concerning the appropriate language to be used on showing of interest signature petitions.

In connection with RD petitions, Board agents may provide the following wording:

> "We the undersigned employees of _____ (the employer) no longer wish to be represented for purposes of collective bargaining by _____ (the union)."

In connection with UD petitions, Board agents may provide the following wording:

> "We the undersigned employees of _____ (the employer) want to withdraw the authority of _____(the union) to require, in the

> contract between the employer and the union, that we be union members or make certain lawful payments to the union in order to keep our jobs."

Marquez v. Screen Actors Guild, 119 S.Ct. 292 (1998); *Communications Workers v. Beck*, 487 U.S. 735 (1988).

The Board agent should also advise these individuals that the employees' signatures should be dated (Sec. 11027.3), preferably next to each signature. These individuals should further be advised that it would be helpful to the Agency if signers would also print their full names next to their signatures.

NOTE: The language on a list of signatures to be used as the showing of interest in support of a RD petition may not ordinarily be used as a showing of interest in support of a UD petition, or vice versa.

11001.8 Assistance in Remedying Defects

If petitions (or amendments thereto) are received in the Regional Office that contain errors on their face, assistance may be rendered in remedying the defects. In such cases, docketing may be delayed pending a prompt communication with the filing party. If the filing party insists that the petition be docketed as is, these wishes should be honored. If the filing party cannot be reached by the end of the day the petition is received, the petition normally should be docketed that day.

11002 Types of Petitions; Who May File; Where to File

11002.1 Types of Petitions

11002.1(a) Representation

A representation case, initiated by the filing of a petition under Section 9(c) of the Act, takes the form of:

(1) a RC case, asserting the designation of the filing party as the bargaining agent by a substantial number of employees in the described bargaining unit

(2) a RM case, alleging that one or more claims for recognition as the exclusive bargaining agent have been received by the employer or that the continued majority status of the incumbent union is in question

(3) a RD case, asserting that the certified or currently recognized bargaining agent is no longer the representative as defined in Section 9(a).

11002.1(b) Union-Security Deauthorization

A UD case is initiated by the filing of a petition under Section 9(e) of the Act, alleging that the employees covered by a union-security clause existing under the proviso in Section 8(a)(3) desire that the authority to maintain such a clause be rescinded.

11002.1(c) Unit Clarification

A UC case is initiated by the filing of a petition under Section 9(b) of the Act, alleging that a labor organization is currently recognized by the employer, but the petitioner seeks clarification of the placement of certain employees in the unit.

11002.1(d) Amendment of Certification

An AC case is initiated by the filing of a petition under Section 9(b) of the Act, seeking amendment of a certification. Amendments of certifications are most frequently sought when there is a change in the name or affiliation of the employer or the certified labor organization.

11002.2 Who May File

(a) RC or RD petition: A RC or RD petition may be filed by an employee or a group of employees, an individual or a labor organization acting on their behalf, or by two or more labor organizations acting jointly. **EXCEPTION:** Neither a supervisor nor a confidential employee may file a RD petition. *Star Brush Mfg*., 100 NLRB 679 (1952); *Clyde J. Merris*, 77 NLRB 1375 (1948).

(b) RM petition: A RM petition may be filed only by an employer.

(c) UD petition: A UD petition may be filed by an employee or a group of employees in the bargaining unit covered by a collective-bargaining agreement.

(d) UC or AC petition: A UC or AC petition may be filed by the labor organization or employer involved.

NOTE: The petition should clearly indicate the party filing it, as opposed to the representative who signs it.

11002.3 Where to File

A petition is filed in person, by mail, or by facsimile transmission. It is normally filed with the Regional Office in the Region in which the bargaining unit exists. If the unit exists in two or more Regions, the petition may be filed in any of such Regions. For filing with the General Counsel, see Sec. 102.72, Rules and Regulations.

11003 Types of Petitions; What to File

Forms (NLRB-502) for the filing of petitions are furnished by the Regional Offices or may be obtained on the Agency's Internet web site (www.nlrb.gov). Reasonably similar versions of the forms are acceptable. The forms are self-explanatory with respect to the information called for. Sec. 102.61, Rules and Regulations. Inclusion of telephone and facsimile numbers, when they exist and are known, is particularly helpful and should be encouraged.

11003.1 Required Submissions

11003.1(a) RC and RD Petitions

In a RC or RD case, the petition should be accompanied by the petitioner's showing of interest or be supplied within 48 hours after filing. Alternatively, it must be supplied within such further time as the Regional Director may allow, but in no event later than the last day on which the petition may timely be filed. Sec. 101.17, Statements of Procedure. A showing of interest should be accompanied by an alphabetical list of names appearing on such interest.

NOTE: The showing of interest may not be submitted by facsimile transmission. Sec. 102.114(g), Rules and Regulations. Secs. 11024.1 and 11026.1.

If the showing of interest is not received with the petition, processing of the petition should nonetheless be initiated upon receipt of the petition. Thereafter, the petition should not be processed further unless the showing of interest has been timely received.

11003.1(b) RM Petition

In a RM case, the petition should be accompanied by proof of demand for recognition made by a labor organization upon the employer or the employer's evidence of objective considerations (*Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001); Sec. 11042). If the proof of demand and/or the evidence of objective considerations is not received with the petition, the employer has 48 hours within which to submit such proof/evidence. However, processing of the petition should nonetheless be initiated upon receipt of the petition. Thereafter, the petition should not be processed further unless the proof of demand and/or the evidence of objective considerations has been timely received.

11003.1(c) Petition Related to 8(b)(7)(C) Charge

When a petition is filed involving an employer which is also involved in a pending 8(b)(7)(C) charge, the petitioning individual, labor organization, or employer is not required to allege that a claim was made on the employer for recognition or that the labor organization involved represents a substantial number of employees. Depending upon the outcome of the investigation of the 8(b)(7)(C) charge, the situation may result in the direction of an expedited election.

11003.1(d) UC, AC, and UD Petitions

See Secs. 11490-11516 regarding submissions with UC, AC, and UD petitions.

11004 Assignment of Case

After a petition has been docketed, it is assigned for investigation to a Board agent. Assignments should be made with the view that petitions, especially those raising questions concerning representation, will be processed as quickly and as efficiently as possible. The following factors should be considered in the assignment of cases.

(a) complexity of the case, relative to the respective skills of Board agents

(b) availability of Board agents

(c) respective workloads of Board agents

(d) location of the unit involved relative to cases presently assigned to respective Board agents

(e) familiarity with the case (e.g., because the Board agent received the petition initially or because the agent has handled prior cases involving the same employer)

Every effort should be made to assign a case so that the Board agent to whom the case will ultimately be assigned can begin the investigation immediately.

11006 Communicating With Parties and Their Representatives

Except where a party has designated an agent for exclusive service (Sec. 11008.7), the following instructions should be followed.

After a copy of the petition together with the initial communication has been served on the parties and an attorney or other representative has entered an appearance on behalf of a party, copies of all further documents served, with the exception of subpoenas, will be served on the attorney or representative of record in addition to the party. Sec. 102.111, Rules and Regulations. If a party is represented by more than one attorney or representative, service on any one of such persons in addition to the party satisfies the requirements of Sec. 102.111 of the Rules and Regulations, but, as a matter of courtesy, an effort should be made to serve all counsel or representatives who have entered an appearance on behalf of the party. Sec. 11840.

Copies should not be marked "courtesy" or otherwise distinguished from the original except as copies. Note particularly that copies of the following documents and communications should be sent to the party and to the attorney or representative of record:

(a) notices and orders issued in connection with unfair labor practice hearings, representation case hearings, and 10(k) hearings

(b) Regional Director's decisions, reports, and supplemental decisions

(c) dismissal letters

(d) letters approving withdrawal requests

(e) election agreements

(f) representation case certifications.

Where arrangements for an election have been agreed upon by the parties with participation by counsel or representative, notices of election should be sent directly to the parties, with copies to counsel or representative. By the same token, the letter requesting the *Excelsior* list of eligible voters which accompanies a copy of the approved consent or stipulated election agreement may be sent to the employer, with a copy to counsel or representative. Sec. 11312. The *Excelsior* list of eligible voters supplied by

the employer should be sent by the Regional Office directly to the petitioning and intervening parties involved. In addition, copies of correspondence that confirms some previously agreed-upon arrangement or appointment may be sent to the parties involved.

All other communications, both oral and written, should be with or through only the attorney or representative of record. However, whenever an attorney, representative, or party requests that copies of all written communications be sent to the party or has authorized that a party or person be contacted directly, such requests and/or authorizations should be honored.

11007 Case Filing Docket

All Regional, Subregional and Resident Offices will maintain and make readily available either a daily case filing docket Form NLRB-4706 or files containing copies of all petitions for inspection by members of the public. Copies of petitions should be maintained for the current and the immediately preceding calendar years.

11008-11009 INITIAL COMMUNICATIONS

11008 Initial Communications With All Parties

Upon the docketing of a petition, an acknowledgment of the filing is immediately sent to the petitioner. Notification of the filing, along with a copy of the petition, is also immediately sent to the employer and other interested parties. Parties are given the name and telephone number of the Board agent to whom the case has been assigned, along with an invitation to communicate with that individual if the party has any questions. These initial notifications are sent to the parties by facsimile transmission, whenever possible, in addition to being sent by regular mail.

Initial communications should include information about the joint conference and hearing being scheduled in the case and may also include the notice of hearing, notice of intent to issue notice of hearing, etc. The fact that the Regional Director intends to conduct the hearing, without postponement, on consecutive days until completed, should also be included. Secs. 11009.2(g), 11082.3, 11012, 11143, 11207, and 11207.1. However, it should be emphasized that it is the Agency's policy to make every effort to secure an election agreement and to avoid the delay and expense of a hearing. Sec. 11012.

11008.1 Interested Parties

Interested parties for the purposes of this Section consist of the employer involved and labor organizations and individuals who claim or are believed to claim to represent any employees within the unit claimed to be appropriate and/or whose contractual interests would be affected by the disposition of the case. They include:

(a) the petitioner

(b) the employer, if other than the petitioner

(c) any other employer which might be a joint employer (for example, a contractor, an employment service, or a supplier of leased or temporary employees) or the operator of a leased department in a case involving a retail store where there are leased departments

(d) any individual or labor organization named in the petition as having an interest in or as being party to a currently existing or recently expired collective-bargaining agreement covering any of the employees involved

(e) any labor organization that has notified the Regional Office by letter within the past 6 months that it represents any employees of the employer involved or is presently actively campaigning among employees of the employer

(f) any labor organization whose name appears as an interested party in any prior case involving the same employees that has closed within 2 years

(g) any individual or labor organization which is a party to a currently existing or recently expired collective-bargaining agreement covering other employees of the employer in other related units, when such information is made known to the Region.

If the interest of a party is not apparent at the outset, as soon as the party's interest becomes apparent, that party should be notified of the proceeding and its current status. If a labor organization, it should also be advised to submit its showing of interest within 48 hours. Sec. 11024.2. For purposes of initial communication, it is preferable to err on the side of considering a party to be interested rather than on the side of ignoring it. Blanket requests for notice of "all" petitions filed should not be honored.

11008.2 Petitioner; Submission of Showing of Interest

A petitioner should submit a showing of interest with its petition. Sec. 11003.1.

11008.3 Employer; Information Requested

A description of the information necessary for processing the case that is requested exclusively from the employer is set forth in Sec. 11009.

11008.4 All Parties; Information Requested

All parties should be requested to submit to the Board agent copies of any presently existing or recently expired collective-bargaining agreements covering any of the employees involved in the petition, as well as any correspondence bearing on the representation question. They should also be requested to notify the Board agent at once of any other interested parties who should be apprised of the proceedings. Sec. 11008.1. The parties should be advised that failure to disclose the existence of an interested party may affect the processing of the petition to a final conclusion. Sec. 11026.2(b). In appropriate situations, information concerning striking employees and their eligibility to vote under Section 9(c)(3) should also be obtained from the employer and all other parties having the necessary information. Secs. 11023.1, 11025.1, and 11314.4.

11008.5 Provision of Notice of Employees' Voting Rights

Form NLRB-5492 Notice to Employees should be sent to the employer with the initial communication and upon request should also be made available to the labor organization(s) involved. The leaflet "Your Government Conducts an Election for You on the Job" (Spanish edition available) contains significant "Rights of Employees," and should also be enclosed. Parties may reproduce the notice and the leaflet, provided they are not modified in any way.

11008.6 Right to Counsel; Notice of Appearance

The initial letters to the parties should be accompanied by Forms NLRB-4812 and NLRB-4701. Form NLRB-4812 advises participants of the right to be represented by counsel and summarizes the Board's procedures with respect to the petition. Form NLRB-4701, Notice of Appearance, is for the convenience of parties to notify the Agency of the name and address of counsel or other representative on their behalf. The form may be used at any stage of the case.

11008.7 Designation of Representative as Agent for Service of Documents

A party may designate the representative who has entered an appearance on its behalf in a Board proceeding as its agent for the exclusive service of all documents, with certain limited exceptions. Sec. 11006. Form NLRB-4813, the notice that the party must file to make the designation, should also be enclosed with the initial communication to the party. The notice must be signed by the party. When the form is filed, its terms will control the service thereafter. Only decisions directing an election, notice of an election, when so directed, and subpoenas will be served on the party. Copies of such documents served on the party subsequent to the initial petition, subpoenas excepted, will also be served on the representative. All other documents and written communications will be served only on the representative designated as agent. When forms are not filed, service will continue to be made in accordance with Sec. 11006. The designation, once filed, will remain valid until a revocation in writing is filed with the Regional Director. The designation, as well as any subsequent revocation, should be treated as part of the formal file in the same manner as Form NLRB-4701, Notice of Appearance. If the case is no longer under Regional Office control when such a designation or revocation is filed, the Regional Office should immediately notify the division or office in Washington in which the case is pending.

11009 Initial Letter to Employer

Upon the filing of a petition, the Regional Office should send a copy thereof to the employer with a letter. As an initial communication, this letter should be sent by facsimile transmission, if a facsimile number can be obtained.

11009.1 Information Requested

The letter should request the following from the employer:

(a) counsel or representative, if any (Secs. 11008.6 and 11008.7)

(b) a completed commerce questionnaire (enclosed)

(c) copies of correspondence and existing or recently expired collective-bargaining agreements, if any (Sec. 11008.4)

(d) a list, containing the alphabetized full names of the employees encompassed by the petition, together with their job classifications for the payroll period immediately preceding the filing date of the petition. Sec. 11025 discusses the preparation of the payroll list.

(e) the employer's position as to the appropriateness of the unit described in the petition.

11009.2 Information Proffered

The letter should advise the employer of the following:

(a) If the employer requests that a check be made of the showing of interest which has been submitted by the petitioner in support of its petition, the employer should submit a payroll list (Sec. 11009.1(d)). In view of the need to complete the check of the petitioner's showing at an early point in the processing of the case, the list should be submitted promptly. If no list is submitted, the number of employees estimated by the petitioner as comprising the alleged appropriate bargaining unit will be assumed to be accurate, and those designating the union as their bargaining agent will be assumed to be among those employed in the unit. Sec. 11030.2. A late-filed list will be considered untimely and no check of the showing of interest will be conducted against such a list, absent unusual circumstances. Sec. 11020.

(b) The payroll list (Sec. 11009.1(d)) will also be used to resolve possible eligibility and unit issues.

(c) In the event an election is agreed to or directed, the Agency requires that a list of full names and addresses of all the eligible voters be filed by the employer with the Regional Director, who will in turn make it available to all parties to the case. The list must be furnished to the Regional Director within 7 days of the direction of, or approval of an agreement to, an election, and the employer is being advised early of this requirement so that there will be ample time to prepare for the eventuality that such a list may become necessary. (This list is in addition to the payroll list of employees in the proposed unit requested above. Sec. 11009.1(d).)

(d) It has been the Agency's experience that, by the time a petition such as this has been filed, employees may have questions about what is going on and what may happen. While at this point in the handling of the case it is unknown what disposition will be made of the petition, experience demonstrates that an explanation of rights, responsibilities, and Board procedures can be helpful to employees. The Agency believes that employees should have readily available information about their rights and the proper conduct of employee representation elections and that at the same time employers and unions should be apprised of their responsibilities to refrain from conduct that could impede employees' freedom of choice. Accordingly, the Agency requests that the employer post the enclosed Notice to Employees Form NLRB-5492 (Sec. 11008.5) in conspicuous places in areas where the employees described in the enclosed petition work.

(e) If an election should be agreed to or directed, the employer will be required to post an official notice of election for 3 full working days prior to the date of the election. Sec. 103.20, Rules and Regulations.

(f) The name and telephone number of the Board agent to whom the case has been assigned along with an invitation to communicate with that individual if the employer has any questions.

(g) Information as to a conference and the hearing being scheduled in the case, and the Regional Director's intention to conduct the hearing, without postponement, on consecutive days until completed. Secs. 11008, 11012, 11082.3, 11143, 11207, and 11207.1.

11010–11042 PRELIMINARY INVESTIGATION

11010–11016 PROCESSING OF PETITION PRIOR TO HEARING OR ELECTION

11010 Initial Investigation

The techniques used in conducting representation case investigations do not lend themselves to a set of hard and fast rules, except it should be noted that investigation of a petition filed concurrently with an unfair labor practice charge must await a judgment as to the impact of the concurrent charge. Secs. 11730–11734.

When a petition is filed, and prior to any contact by the assigned Board agent, the Regional Director may issue a notice of hearing or a notice of intent to issue a notice of hearing concurrently with or immediately following the docketing of the petition. Secs. 11008 and 11009.2(g). Thereafter, if it appears during the Board agent's initial telephone communications with the parties that an election agreement will be secured in a short period of time, the assigned Board agent should inform the parties that upon the approval of the agreement, a previously issued notice of hearing will be withdrawn. Sec. 11012.

On receipt of the case, the Board agent should review the petition and any accompanying papers and check any prior related cases. With respect to any issues that may be anticipated on the basis of such examination, the Board agent should become familiar with the existing precedents, ensure that there are no fatal defects on the face of the petition, and check that the petitioner has presented a showing of interest that is adequate on the basis of its statement of the number of employees in the unit claimed to be appropriate (Secs. 11020–11034).

The Board agent should make the first telephone call regarding a petition as soon as possible after the filing, mail service and, if possible, facsimile service of the petition, preferably no later than the following day. This prompt followup communication reinforces the goal of expeditious processing expressed in the initial correspondence. The Board agent should use facsimile transmissions for circulating proposed and agreed-upon agreements as to election arrangements, as well as other documents.

11010.1 RC Petition

In RC cases, the first call usually should be made to the employer to secure commerce facts and the employer's information and position on various issues. The petitioner should then be called concerning these issues. Any intervenor is also called for similar information.

If it appears that an election would be the probable result of further processing, the Board agent may initiate efforts to obtain an election agreement. Parties should be told of the importance the Agency places on the expeditious processing of the petition. Further, the holding of an election, if appropriate, will occur as soon as possible, consistent with applicable casehandling guidelines.

11010.2 RM and RD Petitions

In RM and RD cases, usually the interested individuals or labor organizations, as well as the employer, should be called at the outset and the same information, with the necessary alterations, should be sought. As in RC cases, all parties in RM and RD cases should be told of the importance placed by the Agency on the expeditious processing of the petition and should be told that the holding of an election, if appropriate, will occur as soon as possible, consistent with applicable casehandling guidelines.

11011 Administrative Dismissal: No Question Concerning Representation

In order to warrant continued processing, a representation petition must meet the test: is there reasonable cause to believe that a question concerning representation affecting commerce exists? If it is clear that, unless future investigation alters the picture, the Board will not assert jurisdiction, the petitioner has insufficient interest (Secs. 11020–11034), the unit sought is inappropriate, the petition is not timely filed or for any other reason the petition would ultimately be dismissed, the petitioner should be made aware of this. If no further facts are available, a withdrawal request should be solicited and, absent withdrawal, the petition should be dismissed. Sec. 11100.

11012 Further Investigation

Prior to a scheduled hearing, the basic facts with respect to each potential issue should be secured. The Board agent should discuss all of the critical issues with the parties and the likelihood of the parties' positions prevailing. Attempts should be made to arrive at a firm commitment regarding an election agreement. In this regard, it is the Agency's policy to make every effort to secure an election agreement whenever possible to avoid the delay and expense of a hearing. Where possible, these efforts should also be directed toward having the election agreement executed early enough to notify the reporting service of the cancellation of the hearing in order to avoid the expense of late cancellation.

Continued investigation should be based mainly on further telephone contacts and correspondence. Where necessary, other investigative devices may be utilized, including correspondence and field trips, but it is anticipated that these usually will not be required. Information elicited in the investigation should be incorporated into the case file.

If the issues that separate the parties appear to require a hearing, the Board agent should, where appropriate, conduct a joint conference, in person or by phone, for the purpose of further exploring the possibilities of entering into an election agreement or of narrowing the issues to be litigated at a hearing. The conference should be conducted before the actual date of the hearing whenever possible. The Board agent should emphasize to the parties that a conference is in the mutual interest of all the parties, as well as the Agency.

If an in-person conference is to be held, it should normally be conducted in the Regional Office if the parties are located within the greater metropolitan area (75 miles). If deemed appropriate, parties outside this area may also be encouraged to come to the

Regional Office for a conference. There are a number of advantages associated with conducting the conference in the Regional Office. Aside from the savings achieved in travel and time, the Regional Office has caucus space, research resources, ready supervisory guidance, and an opportunity for managerial and supervisory intervention that may not be as readily available elsewhere.

During the conference, the parties and the Board agent can fully explore all potential areas of agreement in order to eliminate or limit, to the extent possible, the significant costs associated with a formal hearing. The parties should be encouraged to share information and documents at the conference. If conducted by telephone, documents may be exchanged by facsimile transmission.

The likelihood of parties' positions prevailing should be candidly discussed. If necessary, the appropriate supervisor or manager should intervene. If agreement is not reached, every effort should be made to narrow the issues that remain for the hearing. Parties should be encouraged to execute written stipulations on the issues that are not in dispute. Sec. 11187.2. The Board agent should also discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited.

If a joint conference is not held before the day of the scheduled hearing, the hearing officer should conduct it prior to opening the hearing. Sec. 11180.

11012.1 Lack of Cooperation

Petitioners will be expected to provide the fullest cooperation and flexibility in connection with the processing of their petitions. Failure of petitioners to make available necessary facts that are in their possession may result in prompt dismissal. Failure of other parties to furnish information on a given point should lead to acceptance of credible information available on that point.

11014 Amendment

The petitioner on its own initiative, irrespective of developments in the pending investigation, may add to or delete from the original or last amended petition.

Assistance to the extent permitted in connection with the filing of the original petition (Secs. 11001.5–11001.8) may be rendered in connection with the filing of such amendments. Petitions may be amended after issuance of notice of hearing. In a petition that goes to hearing, oral amendments of the petition should be permitted during the hearing, as the unit description should conform to that being eventually sought. *Atlantic Richfield Co*., 208 NLRB 142 (1974). Sec. 11204.

A petition is amended by inserting "Amended" (or "Second Amended," "Third Amended," etc.) before the word "Petition" in the regular petition form and by rewriting the contents of the petition to include the desired changes; in this regard, an amendment merely referring to the existing petition and stating what is being added to or dropped from the petition should not be used. When amended petitions are filed, interested parties should be notified of the amendment. An amendment filed after the dismissal of a

petition should be docketed as a new petition, no matter how titled, and assigned a new number.

11016 Priority of Issues

No attempt will be made here to cover the existing law governing representation cases. The following recital of usual issues and avenues of exploration, while not all inclusive, may be used for guidance.

(a) jurisdiction (Secs. 11700–11714)

(b) sufficiency of petitioner's and intervenor's showings of interest (Secs. 11020–11034) or employer's objective considerations (Sec. 11042)

(c) petitioner's and intervenor's status as labor organizations

(d) timeliness of petition: Section 9(c)(3) of the Act; certification year; contract bar; recent valid recognition

(e) bargaining unit issues and eligibility

(f) status of the question concerning representation

11017–11019 NO-RAIDING PROCEDURES AMONG LABOR ORGANIZATIONS

11017 Generally

There is a program established within the AFL–CIO for handling representation disputes (raiding) between and among affiliates of the AFL–CIO. The Executive Secretary coordinates the Agency's contacts with the AFL–CIO regarding no-raiding matters. This program is discussed in Sec. 11018.

For other no-raiding agreements, not involving the AFL–CIO, see Sec. 11019.

Within certain limitations, the Board's procedures accommodate these programs.

11018 AFL–CIO No-Raiding Procedure

This program has two components. The first, contained in Article XX of the AFL–CIO Constitution, applies to an organizational attack by one AFL–CIO union on the established bargaining relationship maintained by another AFL–CIO union. It is described in Sec. 11018.1. The second, contained in Article XXI of the AFL–CIO Constitution, applies to disputes between two or more AFL–CIO unions engaged in competing initial organizing activities among employees who presently are unrepresented or are represented by a labor organization not affiliated with the AFL–CIO. It is described in Sec. 11018.2.

11018.1 Article XX—Preexisting Collective-Bargaining Relationships

In all representation cases in which, among the parties, there are at least two affiliates of the AFL–CIO, one of which has an "established bargaining relationship" (i.e., is recognized by the employer as the collective-bargaining agent for the employees involved) or one of which has a colorable claim to a right to be so recognized, the following procedures will apply:

(a) The Regional Director should immediately notify the president of the AFL–CIO of the filing of the petition in a letter setting forth the parties involved. The Regional Director should also enclose a copy of the petition. Copies of the notification should be sent to: (i) all parties, (ii) the presidents of the parent International unions involved, and (iii) the Executive Secretary. The names and addresses of the president of the AFL–CIO and of the presidents of International unions may be found in the "List of Organizations Affiliated with the AFL–CIO" provided to each Regional Office or may be found in the "Directory of U.S. Labor Organizations," a Bureau of National Affairs publication. Questions regarding a union's affiliation with the AFL–CIO should be directed to the Executive Secretary

(b) The customary initial investigation of the petition should be completed. If the investigation reveals that there is no basis for proceeding on the petition, it should be dismissed, absent withdrawal. Secs. 11100–11104. In such case, the parties and other persons named above should be notified of the action.

(c) In cases in which the *petitioner* is an AFL–CIO affiliate, further action on the petition should be delayed for a 30-day period if necessary, from the date of notification to the persons named above, to permit use of the settlement provisions of Article XX.

In cases in which the petitioner is not an affiliate of the AFL–CIO, action on the petition should ordinarily continue. In the event the non-AFL–CIO-affiliated petitioner indicates its interest in a suspension of processing in order to allow the Article XX mechanism to operate, the Regional Director should obtain the positions of all the remaining parties. The Regional Director should then decide whether to suspend processing.

(d) On occasion, a 30-day letter will not have been sent because, in the opinion of the Regional Director, Article XX was not involved. In such cases, if a complaint is filed with the AFL–CIO under Article XX, if Article XX arguably applies and if the petitioner is an AFL–CIO affiliate, the Regional Director should honor a timely request to suspend processing of the case to permit operation of the no-raiding machinery. The procedures under this Section should thereafter be followed.

(e) If 30 days have elapsed since the issuance of the Regional Director's notification and suspension of processing (Secs. 11018.1(a) and (c)) and the Regional Director has not yet been informed that the no-raiding machinery has been completed, the Regional Director should notify the Executive Secretary. If the no-raiding machinery has been invoked and the matter is being processed, the petition will ordinarily continue to be suspended. If the no-raiding machinery has not been invoked, processing of the petition should be reactivated, absent extraordinary circumstances.

(f) The Agency does not decide whether Article XX applies and it does not enforce decisions made pursuant thereto; however, it is the Agency's policy to allow time for the operation of Article XX procedures, the outcome of which may result in the withdrawal of petitions, thereby avoiding unnecessary case-processing efforts. Sec. 11110.1.

11018.2 Article XXI—Initial Organizing Activities

Disputes between AFL–CIO affiliates engaged in competing initial organizing activities are subject to Article XXI of the AFL–CIO Constitution.

(a) Notification concerning the invocation of Article XXI normally will originate from the president of the AFL-CIO and will be directed to the Executive Secretary. After such notification, the Executive Secretary, if it is appropriate to do so, will inform the Regional Director to suspend processing of the petition for a period not to exceed 40 calendar days or until the Article XXI proceeding is concluded, whichever comes first. The Regional Director should so notify the parties and other persons involved, stating that pursuant to the Board's policy with respect to Article XXI, formal processing of the petition has been suspended for a period not to exceed 40 calendar days, absent further communication from the Regional Office.

(b) The customary initial investigation of the petition should be completed. If the investigation reveals that there is no basis for proceeding on the petition, it should be dismissed absent withdrawal. Secs. 11100–11104. In such case, the parties and other persons involved should be notified of the action.

(c) If an AFL–CIO affiliate which is a party to the representation proceeding requests the Regional Director to suspend formal processing of the petition based on Article XXI, the Regional Director should immediately forward the request to the Executive Secretary. If appropriate, the Executive Secretary will inform the Regional Director to suspend processing of the petition and provide appropriate notification in accord with Sec. 11018.2(a).

(d) When the Executive Secretary is advised of the conclusion of Article XXI proceedings, the Executive Secretary will so inform the Regional Director. Further processing of the petition should then be resumed. If 40 calendar days have elapsed and the Regional Director has not yet received information as to the status of the Article XXI proceedings, the Regional Director should notify the Executive Secretary and obtain guidance regarding further processing of the petition.

11019 Other No-Raiding Agreements

Occasionally, a Regional Director will be requested to suspend processing of a case to permit operation of no-raiding agreements other than those discussed in Section 11018. In such cases, a memorandum should be submitted to the Executive Secretary with a description and, if available, a copy of the no-raiding agreement. It is the Board's policy to follow similar procedures with respect to such agreements as it does with respect to the AFL–CIO no-raiding agreements, in cases where it appears that their

operation holds similar promise of resolving representation disputes among the parties to such agreements.

11020–11042 SHOWING OF INTEREST

These Sections are not applicable to petitions in which expedited 8(b)(7)(C) procedures are warranted. Sec. 101.23, Statements of Procedure.

Also see Sec. 11506.5 regarding the showing of interest in UD petitions.

11020–11023 INITIAL CONSIDERATIONS

11020 Showing of Interest: Purpose

The purpose of the demonstration of an adequate showing of interest on the part of labor organizations and individual petitioners that initiate or seek to participate in a representation case is to determine whether the conduct of an election serves a useful purpose under the statute, i.e., whether there is sufficient employee interest to warrant the expenditure of the Agency's time, effort and resources in conducting an election. This requirement prevents parties with little or no stake in a bargaining unit from abusing the Agency's machinery and interfering with the normal administration of the Act and reasonably assures that a genuine representation question exists. Therefore, it is essential that a check of the adequacy of the showing of interest (Sec. 11030) be performed in every case shortly after the filing of the petition, in order that issues concerning the showing of interest will be resolved before the case progresses beyond the initial stages. A record of the results of that check should be placed in the file. Sec. 11032.

An employer requesting that a payroll list be used for the purpose of checking the showing of interest should submit the list promptly (Sec. 11009.2(a)) in order that the check can be completed early on in the case. If no list is submitted, the number of employees estimated by the petitioner as comprising the alleged appropriate bargaining unit will be assumed to be accurate and those designating the union as their bargaining agent will be assumed to be among those employed in the unit. Sec. 11030.2. A late-filed list is untimely and no check of the showing of interest should be conducted against such a list, absent unusual circumstances. *Community Affairs, Inc*., 326 NLRB 311 (1998).

11021 Administrative Matter

The determination of the extent of interest is a purely administrative matter, wholly within the discretion of the Agency and is not dispositive of whether a representation question exists. While any information offered by a party bearing on the validity and authenticity of the showing should be considered, no party has a right to litigate the subject, either directly or collaterally, including during any representation hearing that may be held. When presented with supporting evidence that gives the Regional Director reasonable cause to believe that the showing of interest may have been

invalidated, the Regional Director should conduct a further administrative investigation. Secs. 11028.3, 11029.4, 11184, and 11184.1; *Perdue Farms, Inc.,* 328 NLRB 909 (1999).

11022 Form of Showing of Interest

The evidence of interest may take one of a number of forms. (Sec. 11027 discusses related issues (validity, designations, dates, ages, and time period) involving the showing of interest.)

11022.1 Union in RC, RM, and RD Petitions

A union will be regarded as satisfying the showing requirement as a petitioner in a RC case or as an intervenor in a RC, RM, or RD case if:

(a) it has submitted authorization cards or a list of signatures designating the union as the signers' agent for collective-bargaining purposes

(b) it has submitted evidence from its records as to the individuals who are members of the union

(c) it is the certified or currently recognized bargaining agent of the employees involved (in this circumstance, a union continues as a party, unless it disclaims interest in representing the employees involved (Sec. 11120))

(d) it is the party to a currently effective or recently expired exclusive collective-bargaining agreement covering the employees involved in whole or in part. In the construction industry, a recently expired 8(f) agreement will suffice as a union's showing of interest for a RC petition. *Stockton Roofing Co.*, 304 NLRB 699 (1991).

11022.2 Petitioner in RD

The showing requirement will be satisfied for a petitioner in a RD case if he/she has submitted cards or a signature list in support of the petition. The showing of interest for a RD petition is clear as to its intent if it indicates that the employees signing the showing no longer wish to be represented by the union. Sec. 11001.7. Signatures authorizing the petitioner to file a decertification petition also are acceptable. Sec. 101.17, Statements of Procedure.

NOTE: The language on a list of signatures to be used as the showing of interest in support of a RD petition may not ordinarily be used as a showing of interest in support of a UD petition, or vice versa.

11022.3 Parties in RM Petition

The employer's showing of interest in a RM case consists of proof of a demand for recognition made by one or more labor organizations or evidence of objective considerations relating to an incumbent labor organization's continued majority status. Secs. 11003.1(b) and 11042. A union or other collective-bargaining representative will be regarded as a claimant in a RM case if it is the representative or one of the representatives on the basis of whose majority claim the employer filed the instant petition.

11022.4 Petitioner in UD

Sec. 11506.5 discusses the showing of interest in a UD case.

11022.5 Person Acting on Behalf of Employees

A person acting on behalf of a substantial number of employees may file a petition or seek to intervene in a petition if the person satisfies the showing of interest requirement. Sec. 101.17, Statements of Procedure.

11023 Degree of Participation

A union will be entitled to the degree of participation warranted by the extent of its showing, as discussed below.

11023.1 Petitioner Interest

A petitioner, in order to justify further proceedings, must demonstrate designation by at least 30 percent of the employees in the unit it claims appropriate. (A RC petition filed with respect to a residual unit of employees must be supported by at least 30 percent of the employees in the residual unit, not the overall unit.)

Sec. 101.18 of the Statements of Procedure indicates that the 30-percent figure may be lowered where there are "special factors." Such situations are exceedingly rare; in the event the Regional Director believes special factors apply, clearance must be obtained from the Executive Secretary prior to any relaxation of the 30-percent rule.

STRIKE SITUATIONS: In a strike situation, the petitioner must make a showing of 30 percent of the normal complement of employees. (The normal complement would ordinarily be the complement employed at the time the strike commenced.) Such showing may be made among the strikers, nonstrikers, replacements, or any combination thereof. Secs. 11008.4 and 11025.1.

11023.2 Cross-Petitioner Interest

A union, in order to urge the adoption of an appropriate unit differing in substance from that claimed appropriate by a petitioner or the employer involved, must demonstrate designation by at least 30 percent of the employees in the unit thus urged. *Forstmann Woolen Co*., 108 NLRB 1439 (1954); *Boeing Airplane Co*., 86 NLRB 368 (1949).

11023.3 Full Intervenor Interest

A union that seeks to intervene on the basis of a showing of designation by at least 10 percent of the employees in any unit claimed appropriate by a petitioner, cross-petitioner, or involved employer may "block" an election agreement in such unit and it may participate fully in any hearing thereon. Cf. *Corn Products Refining Co*., 87 NLRB 187 (1949).

11023.4 Participating Intervenor Interest

A union may intervene on a showing of less than 10 percent. This showing may be only one designation. *Union Carbide & Carbon Corp*., 89 NLRB 460 (1950). A participating intervenor may not "block'' an election agreement in such unit for any reason. Sec. 11088. However, it should be accorded a place on the ballot under the terms agreed on by the other parties. It may participate in a hearing, although it may not "block" stipulations entered into by the other parties at the hearing. Sec. 11194.5.

11023.5 Representative of Employees in Related Units

A union that seeks to intervene based on its status as the representative of other employees of the employer (other than the employees in the petitioned for unit) should be permitted to intervene in the proceeding and should be permitted to participate for the purpose of protecting its interests in the unit it represents. However, such a union should not be placed on the ballot if an election is held, absent demonstration of a showing of interest in the unit in which the election has been directed.

11024–11026 INFORMATION TO BE OBTAINED

11024 Required Information: Petitioner and Intervenor

11024.1 Petitioner Evidence of Interest

As discussed in Sec. 11003.1, in the event the petitioner does not submit evidence of interest upon the filing of the petition, it should supply such evidence with the petition, within 48 hours after filing the petition or within such time as the Regional Director may allow, but in no event later than the last day on which the petition may be timely filed. Sec. 101.17, Statements of Procedure.

Sec. 11026.1 discusses evidence of interest filed late by petitioners. Sec. 11030 discusses whether the petitioner may submit additional evidence of interest in the event a check of the payroll list submitted by the employer (Sec. 11025) reveals that the petitioner's evidence is insufficient.

NOTE: The showing of interest may not be submitted by facsimile transmission. Sec. 102.114, Rules and Regulations.

11024.2 Intervenor Evidence of Interest

An intervenor should submit its evidence of interest at the time of its assertion of interest or within 48 hours. Sec. 11003.1. Sec. 11026.2 discusses intervenors' late-filed submissions and the timeliness of such submissions relative to election agreements and hearings.

11024.3 Date Stamping of Designations by Regional Office

Evidence of designation, whether in the form of authorization cards or lists of signatures, should be date stamped on the reverse side when received by the Regional Office.

See Sec. 11027.3 concerning the dating by employees of authorization cards or lists of signatures.

11025 Requested Information: Employer

11025.1 Preparation of Payroll List

In the Regional Office's initial communication to the employer, it should be advised to submit a payroll list containing the alphabetized full names and classifications of the employees in the unit claimed to be appropriate for purposes of checking the showing of interest, if the employer requests such a check to be conducted, and to assist the Board agent assigned to the case in resolving possible eligibility and unit issues. Secs. 11009.1(d), 11009.2(a), and 11009.2(b). The payroll list submitted by the employer should be used to determine the employees employed in the unit sought by the petition. The payroll list should be of those employees as of a date about the time of or immediately preceding the filing of the petition. This timeframe also applies to seasonal industries and the construction industry. *Pike Co.,* 314 NLRB 691 (1994); Sec. 11027.5. In striker eligibility situations, the payroll list as of the date of the commencement of the strike and as of all other dates on which additional employees joined the strike should be obtained. Secs. 11023.1 and 11314.4.

As the case develops and other unit contentions are made, the employer should be asked for a list of employees in each such unit. Often, of course, the employer need only supplement the original list by submitting the appropriate additional information. Sec. 11030.5.

The procedure for checking the showing of interest against the payroll list is described in Sec. 11030. See Sec. 11020 for the procedures to follow if no list or an untimely list is provided.

11026 Late-Filed Evidence of Interest

As indicated (Secs. 11003.1, 11024.1, and 11024.2), evidence of interest should be filed at the time of filing or intervention (whichever applies) or within the period prescribed by the Region. If the evidence is not received within these timeframes, the procedures set forth in the following Sections should be implemented.

11026.1 Petitioner

If a petitioner's evidence is not timely received, the petition should be dismissed, absent withdrawal. Sec. 11011. If the evidence is received prior to the actual dismissal

and is otherwise timely, it may be accepted. A submission of evidence of interest after dismissal should not be accepted in support of the dismissed petition.

11026.2 Intervenor

Upon failure of a claiming intervenor to submit a showing of interest within 48 hours (Secs. 11008.1 and 11024.2), it should thereupon be regarded as having no interest. If subsequent submissions or additions are made, such late-filed evidence should be given the limited consideration specified below.

11026.2(a) Notice Given to Intervenor, But Evidence Not Submitted Within 48 Hours

If notice was given to the intervenor but evidence of interest was not submitted within 48 hours, two different circumstances may present themselves.

11026.2(a)(1) Evidence Submitted Prior to Approval of Election Agreement or Close of Hearing

If the 48-hour notice has been given and if evidence of an intervenor's showing is submitted after the 48-hour period has expired, but before an election agreement is approved or before a hearing has closed, whichever applies, the submitting union may thereafter be treated as a party to the extent warranted by its interest (Sec. 11023). *North American Aviation, Inc*., 109 NLRB 269 (1954).

11026.2(a)(2) Evidence Submitted After Approval of Election Agreement or Close of Hearing

If the 48-hour notice has been given and if evidence of an intervenor's showing is submitted after the 48-hour period has expired and after an election agreement has been approved or after a hearing has closed, whichever applies, the submitting union will not be permitted to participate in further proceedings. *Lufkin Foundry & Machine Co*., 83 NLRB 768 (1949); *United Boat Service Corp*., 55 NLRB 671 (1944). It may, however, be added to the ballot in an election agreement situation, if the parties to the election agreement stipulate that it may participate without regard to the timeliness of its showing. *Sprague Electric Co*., 81 NLRB 410 (1949).

11026.2(b) Notice Not Previously Given to Intervenor

If no preconsent or prehearing notice was ever given to a union — say, because its interest in the situation was unknown — its intervention should be permitted after approval of an election agreement or after the close of a hearing, only to the extent that its evidence of interest predates the approval of the election agreement or the close of the hearing, whichever applies. If the interest predates the event, the union should be accorded the same treatment as a union that timely submitted the same degree of interest (Sec. 11023), even if it is necessary to revoke approval of an election agreement or reopen a hearing. If the interest postdates the event, the union should not be permitted to intervene; except that it may be added to the ballot in an election agreement, if the signatories to the agreement stipulate to such participation without regard to the timeliness of the union's showing. *Mayfair Industries,* 126 NLRB 223 (1960).

A cross-petition, for purposes of this section, will be treated in the same fashion as a request to intervene.

11026.2(c) Attempts to Intervene in Runoff or Rerun Elections

Intervention for the first time in a runoff or rerun election should not be permitted. *Waste Management of New York*, 326 NLRB 1126 (1999); *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987); *General Motors Corp.*, 17 NLRB 467 (1939).

11027-11029 OTHER CONSIDERATIONS

11027 Validity; Designations; Dates; Age; and Period

Also see Sec. 11022 concerning the form of the showing of interest.

11027.1 Validity

Although authorizations should be examined on their face (to check, for example, for signatures which appear to be in the same handwriting), their validity should be presumed unless called into question by the presentation of objective evidence. W-4 forms or other documents should not be accepted routinely for checking against signatures on the authorizations, absent objective evidence that provides a reasonable basis for challenging the showing of interest. Secs. 11028.1 and 11029.1.

11027.2 Designations

The authorization must run to the party submitting it in support of its interest. While this requirement should be liberally construed — authorizations running to a parent federation should be accepted on behalf of an International, authorizations running to the International should be accepted on behalf of a local of the International, and vice versa — designations in *blank* are not acceptable. Also, where the submitting party has, in the context of a schism within a labor organization, changed its *affiliation* from that appearing on the authorization, it should be rejected, if it was signed before the change in affiliation. A reasonable time may be given for submitting new authorizations. *Mohawk Business Machines Corp.*, 118 NLRB 168 (1957). However, if a change in affiliation has occurred in the context of a merger, new authorizations are not required. *Monmouth Medical Center*, 247 NLRB 508 (1980).

11027.3 Date of Authorization

The date on which the showing of interest signatures were obtained must be established. Signatures that are dated may be used for such purposes. One date for a page of signatures is adequate, although it is preferable that dates be next to each signature. Sec. 11001.7. In the event undated cards or signature lists have been submitted, the party submitting the showing of interest may establish the dates of signing by affidavit. *Dart Container Corp.*, 294 NLRB 798 (1989).

Although the undated showing must be submitted no later than the last day on which the petition may be timely filed (Sec. 11024.1), the affidavit establishing the date

of signing may be submitted beyond such day, although it should be submitted within a reasonable time after the filing of the petition and its undated showing. *Metal Sales Mfg.*, 310 NLRB 597 (1993).

11027.4 Age of Authorization

Although a showing of interest may be resubmitted in the same or another case, the age of the cards will sometimes be material. For example, where a union's disclaimer of interest or withdrawal request in a prior case has resulted in action with 6 months' prejudice to the filing of a new petition by the union (Sec. 11112), it must submit a current interest in support of any petition it files after the period has expired. Sec. 11118.3. Also, when certain related unfair labor practice cases are involved, the petitioner must obtain a showing of interest dated after the expiration of the posting period remedying those unfair labor practices. Sec. 11734.

11027.5 Period for Showing of Interest

In general, a petitioner must have a showing of interest as of the filing of the petition. This requirement applies not only to an employer with a steady workforce, but also to fluctuating or seasonal industries and to the construction industry, where eligibility to vote may be determined by the application of a formula of hours worked over an extended period of time. *Daniel Construction Co.,* 133 NLRB 264 (1961); *Steiny & Co.,* 308 NLRB 1323 (1992). Also see OM 01-24. In such situations, the petitioner may provide a sufficient showing of interest either among all employees eligible to vote or only among the employees working at the time the petition is filed. *Pike Co.,* 314 NLRB 691 (1994); *Hondo Drilling Co. N.S.L.,* 164 NLRB 416 (1967). Sec. 11025.

See Secs. 11008.4, 11023.1, 11025.1, and 11314.4 when strike situations are involved.

11028 Challenge to Showing of Interest

(See Sec. 11029 regarding allegations of *forgery* or fraud involving forgery in the showing of interest.)

11028.1 Allegation of Fraud, Misconduct, or Supervisory Taint

Any party alleging fraud (other than forgery), misconduct or supervisory taint in connection with the showing of interest must take early action on raising such allegations, in a timely manner relative to gaining knowledge of the alleged conduct. *General Dynamics Corp.*, 213 NLRB 851 (1974). When a party raises such allegations, it should be directed, in writing, to present its supporting evidence to the Regional Director within 7 days after raising them. *Globe Iron Foundry*, 112 NLRB 1200 (1955). If the Regional Director is presented with supporting evidence that gives reasonable cause to believe that the showing of interest may have been invalidated, the Regional Director should conduct a further administrative investigation. Sec. 11021; *Perdue Farms, Inc*., 328 NLRB 909 (1999). In the event a party attempts to present such evidence more than 7 days after raising the allegations, the Regional Director may regard the evidence as untimely filed and is not required to consider it, absent unusual circumstances.

If because of challenges the showing of interest has been or may become the subject of litigation, including in unfair labor practice proceedings, the showing of interest should not be returned at the close of the petition case. Sec. 11034.

11028.2 Finding of Merit to Challenge

In the event merit is found to allegations of fraud, misconduct, or supervisory taint, the Regional Director should take appropriate action. If no merit is found, the challenging party should be so notified.

NOTE: In the absence of an unfair labor practice charge, a petition may not be dismissed based upon only *indirect* taint of a showing of interest; where the situation involves taint sufficient to warrant dismissal of the petition (Cf. *Millsboro Nursing & Rehabilitation Center,* 327 NLRB 879 (1999)), the petition may be dismissed, in the absence of an unfair labor practice charge, only if there is *direct* involvement of a party in the taint of the showing. Examples of direct involvement include the employer's supervisors circulating the showing, or threatening individual employees with discharge if they failed to sign the showing. *Canter's Fairfax Restaurant, Inc.*, 309 NLRB 883 (1992). Supervisory solicitation of authorization cards is inherently coercive absent mitigating circumstances. *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004). See Secs. 11730.3(a) and 11733.2(a)(1) for situations in which unfair labor practice charges are also involved.

11028.3 Attempt to Challenge at Hearing

A challenge to the validity or authenticity of the showing of interest may not be litigated at a hearing. Secs. 11021 and 11184.1.

11028.4 Postelection Challenge

After an election has been held, the adequacy of the showing of interest is irrelevant. *Gaylord Bag Co.*, 313 NLRB 306 (1993). Accordingly, challenges to the adequacy of the showing of interest may not be raised after an election has been held. On the other hand, when the petition itself was tainted by unfair labor practices and thus was void ab initio, the petition should be dismissed irrespective of the conduct of an election, which is considered a nullity. *Ron Tirapelli Ford*, 304 NLRB 576 (1991).

11029 Possible and Alleged Forgery

(This Section deals exclusively with an allegation of *forgery* or fraud involving forgery in the showing of interest. Other forms of challenge to the validity of the showing of interest are treated in Sec. 11028.)

11029.1 Investigation

If it appears that signatures are in the same handwriting, or if a party furnishes evidence of forgery, an administrative investigation should be conducted and suitable action should be taken by the Regional Director, in his/her discretion, including possible

referral to other law enforcement agencies. Sec. 11021; *Perdue Farms, Inc.,* 328 NLRB 909 (1999). The parties should be appropriately notified.

If a party alleges forgery in a timely manner relative to gaining knowledge thereof, the party raising such allegations should be directed, in writing, to present its supporting evidence to the Regional Director within seven days after raising them. *Globe Iron Foundry*, 112 NLRB 1200 (1955). If the party furnishes such evidence, then the Regional Director should undertake the investigation and suitable action described above.

The investigation may include, but need not be limited to, attempts to obtain affidavits from the person or persons responsible for securing and submitting the showing, signature comparisons, preferably against the employer's records, and the questioning of persons purported to have been signatories. See also Secs. 11029.2 and 11029.3.

If the showing of interest has been or may become the subject of litigation, including in unfair labor practice proceedings, because of allegations of forgery, it should not be returned at the close of the petition case. Sec. 11034.

11029.2 Impact of Other Investigations

The Regional Director, in his/her discretion, may temporarily or permanently refrain from conducting any investigation, may dispense with any portion or portions of an investigation or may terminate any investigation previously commenced, if one or more of the following circumstances is present:

(a) the Regional Director learns that the same or a related matter has been referred to another law enforcement agency for investigation

(b) another law enforcement agency requests that the Regional Director terminate or postpone all or part of his/her investigation in order to avoid actual or potential interference with any related pending or anticipated investigation by the agency

(c) the Regional Director concludes that his/her investigation is likely to interfere with a related pending or anticipated investigation of the same or a related matter by another law enforcement agency.

11029.3 Subsequent Procedures

In the event merit is found to allegations of forgery after the Regional Director has conducted the appropriate investigation and taken suitable action, including referral to other law enforcement agencies, the following steps should be taken:

(a) If the remaining valid showing falls below the required amount (30 percent, 10 percent, etc.), the petition or intervention based on the showing should be dismissed or denied, as the case may be, in the absence of a withdrawal or disclaimer. The stated ground should be that the evidence of interest submitted "was of questionable authenticity."

(b) If the remaining valid showing satisfies the interest requirement, but if an officer or responsible agent of the petitioner was responsible for or had knowledge of and

condoned submission of the forged showing, casehandling advice should be requested of the Executive Secretary.

(c) A letter should be sent to the party involved (with a copy to its International, if the party is a local union) advising it of the question as to the forging of the showing. The letter will also set forth the provisions of Section 1001, Title 18, of the U.S. Code, which reads as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(d) The questioned showing should not be returned. Sec. 11034.

(e) A memorandum reporting the results of the investigation, including the Regional Director's recommendation, should be submitted to the Division of Operations Management. If the Division of Operations Management agrees as to the merit of the allegations, the matter, including all circumstances, should be reported to the Office of the United States Attorney which has jurisdiction and full cooperation should be rendered that office. Contacts should be made or confirmed in writing and the Division of Operations Management should be kept informed of developments.

(f) The impact of other investigations should continue to be considered. Sec. 11029.2.

11029.4 Attempt to Introduce Evidence of Forgery at Hearing

An allegation of forgery in obtaining the showing of interest may not be litigated at a hearing. Secs. 11021 and 11184.1.

11029.5 Union With History of Forgery

Where a union has in a prior case submitted a showing of interest found to involve forgery, the Regional Director should investigate fully the authenticity of the showing of interest submitted by the union in support of subsequent petitions, even in the absence of a request. The investigation should include, if possible, a check against signatures on file with the employer. If such check reveals evidence of forgery, the steps described in Sec. 11029 should be followed.

11030–11035 CHECK OF SHOWING OF INTEREST

11030 Check of Showing in Petitioned for Unit

11030.1 Check of Showing

The valid evidence of interest of an individual petitioner and of each labor organization should be checked against a payroll list (Sec. 11025.1) if one is timely submitted by the employer. Sec. 11020. If the petitioner's evidence of interest is found to be less than 30 percent of the employees in the unit, following a check of the employer's payroll list, the petitioner may be given a reasonable time to cure the deficiency, where warranted by the circumstances, at the discretion of the Regional Director. However, *in no event* will the time to submit such additional evidence of interest be later than the last day on which the petition may be timely filed. Sec. 101.17, Statements of Procedure.

NOTE: As with all submissions of showings of interest, the additional showing of interest may not be submitted by facsimile transmission. Sec. 102.114, Rules and Regulations.

11030.2 Payroll List Not Timely Submitted by Employer

If no payroll list has been submitted timely by the employer, the estimate made by the affected union should be used as the number of employees involved and each signer of authorization should be considered to be employed within the unit claimed. Secs. 11009.2 (a) and 11020.

11030.3 Full Check

If the payroll list submitted by the employer contains under 300 names, an actual, full check should be made. The name of each "designator" should be checked against each name on the payroll list. In checking, the payroll list should be so marked that there will be a permanent work record of the check. (However, see Sec. 11035 concerning markings on payroll lists which are to be returned to the employer.)

11030.4 Spot Check

With larger lists, spot checks may be made. Spot checks involve checking something less than every name on the union's interest showing (e.g., every 3d, 5th, or 10th one) against the employer's list. The sample checked should be large enough to afford validity; it should involve the *actual* check of at least 300 different names on the employer's list and, in any event, of at least 1 out of every 10 on the employer's list. Also, care must be exercised to ensure that the sample is a *random* one.

11030.5 Separate Check for Each Unit Involved

A check should be made for each claimed bargaining unit involved. Thus, separate checks should be made for a petitioner-sought production and maintenance unit including truckdrivers and factory clerical employees, but excluding lead employees and

other supervisors; and for an employer-claimed production and maintenance unit including lead employees, but excluding truckdrivers, factory clerical employees, and supervisors, even though the two alleged units substantially overlap. Subsequent rechecks should be made if unit positions change. Sec. 11025.1. When such checks indicate that the showing of the petitioner or cross-petitioner is so close to the borderline (30 percent) that an adverse finding by the Regional Director or the Board, however slight, may result in the need for an additional showing of interest, the petitioner or cross-petitioner should be advised of the possibility and should be instructed to submit whatever additional authorizations it may possess.

11031 Check of Showing in Enlarged Unit

11031.1 Showing of Interest in Enlarged Unit

When the Regional Director or the Board issues a decision and direction of election in a unit larger than that requested by the petitioner, and the petitioner or an intervenor has indicated its willingness to participate in such an election, further processing of the petition is conditioned on the petitioner or an intervenor having an adequate showing of interest in the enlarged unit.

If the Regional Director determines that the petitioner's or an intervenor's showing of interest already on file is sufficient in the enlarged unit, such should be noted in the direction of election. Sec. 11312.1(c).

If a sufficient showing of interest is not on file, the direction of election should be conditioned on the petitioner or an intervenor making an adequate showing of interest in the enlarged unit. Sec. 11312.1(d). 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 will be suspended until the Board rules upon the request for review.

11031.2 Additional Showing

The additional evidence of interest submitted by the petitioner or an intervenor may postdate the close of the hearing and the decision. The petitioner or an intervenor may be given a reasonable period of time to secure the additional showing of interest, normally 14 days or such further time as the Regional Director may allow.

NOTE: As with all submissions of showings of interest, the additional showing of interest may not be submitted by facsimile transmission. Sec. 102.114, Rules and Regulations.

11031.3 Check of Additional Showing

If after submitting the additional showing of interest, the petitioner or an intervenor demonstrates a showing of interest among the employees named on the *Excelsior* list of eligible voters submitted by the employer in the enlarged unit (Sec. 11312.1), then the showing of interest requirement has been satisfied.

Alternatively, the showing of interest in an enlarged unit may *also* be calculated by going through the following three steps:

(a) Note the number of authorizations validated when the showing of interest previously submitted by the petitioner or an intervenor was checked against the payroll list submitted by the employer as of a date about the time of or immediately preceding the filing of the petition. Secs. 11025 and 11030. If no list for this payroll period was submitted by the employer, note the number of authorizations previously submitted. Secs. 11020 and 11030.2.

(b) Check the additional showing of interest submitted against the *Excelsior* list of eligible voters (Sec. 11312) submitted by the employer in the enlarged unit. Care should be taken to exclude any authorizations among the additional showing that were already counted in (a) above.

(c) If the total *number* of authorizations validated in (a) and (b) above, when added together, equals 30 percent or more of the *number* of names appearing on the *Excelsior* list of eligible voters in the enlarged unit, the showing of interest requirement has been satisfied.

11032 Report on Check of Showing

Form NLRB-4069 has been devised for use in reporting the results of the investigation of interest. The blanks to be filled in are self-explanatory. Where more than one report is prepared, (e.g., where, because of changing unit contentions, the original report became obsolete), the subsequent report(s) should be labeled "Amended" (or "Second Amended," etc.) or "Revised."

11034 Ultimate Disposition of Showing of Interest

Evidence of interest in all types of petitions should be retained until the case has been closed, at which time it should be returned. It is noted that Regions sometimes find that they need the showing of interest in unfair labor practice cases several months after a representation case has been closed. To avoid the loss or destruction of the SOI that may be of value in subsequent cases, it is suggested that the letter accompanying the returned showing of interest ask that it be retained for a reasonable period (six months to a year) in the event it is needed in future cases. Also see **NOTE** below. Upon request by the labor organization or individual petitioner involved, after photocopies have been made, the evidence of interest may be returned at an earlier point, provided that there is no foreseeable issue involving such evidence and on the condition that it will be resubmitted on request. Any document revealing the names of employees supporting the petition, including any document listing the names of employees as part of an employer's objective considerations in RM cases, should also be returned to the petitioner after the case has closed.

NOTE: Once a Freedom of Information Act (FOIA) request for the showing of interest has been received, it must be retained by the Agency until all litigation under the FOIA has been concluded. Thus, the showing may not be returned to the union at the

close of the petition case if a FOIA request or court action is still pending. The necessity of retaining the showing applies both while the FOIA request is before the Board or the FOIA action is before a district court or subject to appeal from a court ruling. Questions on this matter should be addressed to the Assistant General Counsel for Special Litigation.

Similarly, if the showing has been or may become the subject of litigation because of challenges to it (Secs. 11028 and 11029), including in unfair labor practice proceedings, it should not be returned at the close of the petition case. Secs. 11028.1 and 11029.1.

11035 Ultimate Disposition of Payroll List

Payroll lists submitted in connection with investigations of the showing of interest should be retained in the file, except where an employer has agreed to submit a list only on the condition that it is returned or is destroyed when the case is closed. If the list is returned, it should be so marked that it could not be used to ascertain which employees had designated any labor organization as their bargaining agent.

NOTE: If the payroll list was used to check a showing of interest that has been or may become the subject of litigation because of challenges to it (Secs. 11028 and 11029), including in unfair labor practice proceedings, the payroll list also should not be returned at the close of the petition case.

11042 OBJECTIVE CONSIDERATIONS IN RM PETITION

11042 Objective Considerations in RM Petition: Generally

In petitioning the Board for an election to question the continued majority of an incumbent union, employers must demonstrate a "good-faith reasonable *uncertainty* (rather than *disbelief*) as to unions' continuing majority status." *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001).

The Regional Director should process a RM petition based on a prima facie showing of objective considerations that a union has lost its majority status, provided that there have been no unfair labor practices committed that undermine the employees' support for the union.. The question of objective considerations, like the showing of interest in a RC or RD case, is a matter for the administrative determination of the Regional Director and may not be litigated. Sec. 11021. The following procedures should be applied in all RM cases involving an incumbent union, whether certified or recognized.

11042.1 Evidence Required to Satisfy the Uncertainty Standard

The RM petition must be supported by evidence, viewed in its entirety, which might establish good-faith uncertainty as to the union's continued majority status. The information submitted by the employer must be specific and detailed: for example, names of employees must be listed. The evidence must be objective and reliably indicate that a

majority of the employees oppose the incumbent union, rather than mere speculation. Such evidence would include, but is not limited to, anti union petitions signed by unit employees, firsthand employee statements indicating a desire to no longer be represented by the incumbent union, employees' unverified statements regarding other employees' antiunion sentiments, and employees' statements expressing dissatisfaction with the union's performance as bargaining representative. *Levitz*, supra at 728, 729. Also see GC 02-01 at 9, 10.

The names provided must be kept confidential, as is the case with the showing of interest in a RC or RD case. The specific extent of dissatisfaction is not to be divulged to the union. For example, if the employer submits that certain (named) employees out of "X" number in the unit have advised that they no longer wish the incumbent union to represent them, then the union may be told only that a sufficient number of employees have advised the employer, etc.

11042.2 Supporting Evidence Deficient or Not Submitted With Petition

If no supporting document accompanies the petition, the Board's *Levitz* decision should immediately be called to the employer's attention and the employer should be instructed to submit the evidence that demonstrates a good-faith reasonable uncertainty as to union's continuing majority status within 48 hours. Secs 11003.1(b) and 11024.1. Similarly if the information first submitted by the employer does not establish a good-faith reasonable uncertainty as to the union's majority status, the employer may be given 48 hours from when advised of the deficiency to present the necessary evidence. Reasonable extensions may be granted at the discretion of the Regional Director when warranted by the circumstances.

11042.3 Investigation of Validity of Objective Considerations

No investigation should be made of the validity of the employer's evidence of objective considerations demonstrating good-faith reasonable uncertainty as to the union's continuing majority status, unless, in the judgment of the Regional Director, unusual circumstances warrant a separate, administrative inquiry. If an investigation is conducted, it should be an administrative matter, in accord with the principles of Sec. 11021.

11042.4 *Levitz* Requirements Satisfied

If the Regional Director is administratively satisfied that, on its face, the objective considerations submitted by the employer establishes good-faith reasonable uncertainty as to the union's continuing majority status, the petition should be processed in accordance with normal procedures.

11042.5 *Levitz* Requirements Not Satisfied

If in the judgment of the Regional Director, the employer's evidence of objective considerations does not establish good-faith reasonable uncertainty, the petition should be administratively dismissed, absent withdrawal. Secs. 11100–11104.

11080–11124 REGIONAL DETERMINATION

11080-11082 INITIAL DETERMINATIONS

11080 Regional Determination: Generally

Within a very few days after the receipt of the petition, a regional determination should be made as to the future course of the case. The Board agent and his/her supervisor should determine early on whether an election agreement is likely, whether a hearing will be needed or whether the petition will likely be dismissed or withdrawn.

11080.1 Reports

For most R case actions only a very brief written report is needed. While the file should be complete, the use of forms and checklists is to be encouraged.

Some matters to be considered for coverage in the case file are:

(a) jurisdictional facts1

(b) pertinent labor relations history

(c) pertinent correspondence and agreements

(d) facts with respect to the showing of interest

(e) brief discussion of the parties' unit positions

(f) in a striker eligibility situation under Section 9(c)(3), all pertinent data, including date of commencement of the strike, number of employees, etc.

(g) succinct recital of efforts to secure an election agreement

(h) potential need for foreign language witnesses at a hearing (Sec. 11221)

(i) a telephone log or file memos briefly showing the dates of all contacts with the parties, who made each such contact and the results of the contacts.

11082 Notice of Hearing

A notice of hearing should be issued at the time the petition is filed or shortly thereafter. Secs. 11008 and 11010. Issuance of the notice of hearing does not preclude the parties' entering into an election agreement. Sec. 11082.2.

11082.1 Continuing Efforts to Obtain Election Agreement Prior to Hearing

Accompanying the notice of hearing should be Form NLRB-4338 with the names and addresses of the parties appearing thereon. This form advises the parties that it is still possible to settle the matter by agreement. Throughout the Board agent's contacts with the parties, they should be made to understand that the issuance of a notice of hearing does not foreclose the possibility of an election agreement and that issuance of the notice

of hearing does not preclude the parties' entering into an election agreement. Where possible, Board agent efforts should also be directed toward having the election agreement executed early enough to notify the reporting service of the cancellation of the hearing in order to avoid the expense of late cancellation. Secs. 11008 and 11012.

11082.2 Service of Notice of Hearing

The notice of hearing, to which is attached a copy of the petition, should be served by facsimile transmission and/or mail. One copy of Form NLRB-4669 Statement of Standard Procedures should also be attached to each copy of the notice of hearing served on the parties.

Service should be made on the employer(s) and union(s) involved (and the petitioner if other than the employer or union) and other interested parties. Sec. 11008.1.

The term "interested parties" as here used does not include labor organizations that, upon request, have not presented any evidence of interest.

11082.3 Selection of Hearing Date

The Regional Director should set an early date for the hearing, consistent with the Agency goals of expeditious processing. If the parties agree on a date, their desires may be taken into consideration, but are not controlling. Consultation with the parties is not required, however, and any early date may be selected.

Once the date has been selected, the parties should be advised of the Regional Director's intention to conduct the hearing on that date. In accordance with *Croft Metals, Inc.*, 337 NLRB 688 (2002), the notice of hearing should issue no less than five (5) working days prior to the hearing, absent a clear waiver from the parties. Also see OM 02-87. They should be further advised that requests for postponement of the hearing will be granted only for good cause, consistent with the requirements set forth in Form NLRB-4338, which accompanies the notice of hearing. They should also be advised that the hearing, once commenced, will be conducted on consecutive days, until completed, unless the most compelling circumstances warrant otherwise. Secs. 11008, 11009.2(g), 11143, 11207, and 11207.1.

11082.4 Place of Hearing

The place fixed for hearing will depend upon the circumstances. When possible, subject to the availability of witnesses, hearings should be set to be held in the Regional and Subregional Offices, even though the employer's facility is some distance away.

11082.5 Withdrawal of Notice of Hearing

If at any time after issuance (but prior to the close of a hearing), it appears that a notice of hearing should be withdrawn, the withdrawal should be contained in a letter or order signed by the Regional Director and served on the parties. The forms for consent and stipulated election agreements provide for withdrawal of the notice of hearing upon the Regional Director's approval of the agreement. Sec. 11094.

11084–11098 ELECTION AGREEMENT

11084 Election Agreement: Generally

The ultimate device by the Board in resolving a valid question concerning representation is the election by secret ballot. The voluntary agreement of the parties to hold an election without a hearing is reflected in a Consent Election Agreement (Form NLRB-651) or Stipulated Election Agreement (Form NLRB-652). A third election agreement option is available which provides the parties the opportunity to voluntarily agree to have the Regional Director conduct a hearing and thereafter resolve with finality all pre-election factual and legal disputes. This option, Full Consent Election Agreement (Form NLRB-5509), waives the parties' rights to file a request for review of the Regional Director's decision to the Board. See OM 05-40 Revised.

11084.1 Difference Between Consent Election Agreement, Stipulated Election Agreement and Full Consent Election Agreement

The basic difference between the consent election agreement and the stipulated election agreement is that questions that arise after the election are decided by the Regional Director in a consent election and by the Board in a stipulated election. In either case, disputes arising prior to the issuance of the tally of ballots are resolved by the Regional Director. In a full consent election agreement, the parties voluntarily agree to have the Regional Director conduct a hearing and thereafter resolve with finality all pre-election factual and legal disputes. The parties thereby waive their rights to file a request for review of the Regional Director's decision to the Board. Likewise under the full consent election agreement procedure, all post election disputes — challenges and objections — would be decided by the Regional Director with no right of appeal to the Board.

11084.2 Obtaining Election Agreement

Efforts to dispose of a case by agreement should begin during the first contacts with the parties, and continue at all stages thereafter.

Supervisors and, if necessary, the Assistant to the Regional Director or another member of management should be kept aware of all problems encountered by the Board agent in his/her efforts to secure an election agreement and should be involved in those efforts where appropriate.

An election under terms contrary to the statute should be neither solicited nor approved. Thus, if the Board would not assert jurisdiction, there may be no election agreement; likewise the Region must not conduct an election covering a unit that would be found clearly inappropriate under the Act, notwithstanding the consent of the parties. If the parties desire an election, however, and the Board would arguably assert jurisdiction or find the unit appropriate, the Regional Director may approve the agreement.

11084.3 Details of Election Agreement and Election Arrangements

An agreement that an election will be held is usually worked out with the parties over the telephone, utilizing facsimile transmission of proposed election agreements and other documents, or in an in-person conference. All details must be agreed on. Failure of accord in such details as date, hours, or place of election will serve to send a matter to hearing, although the petitioner's refusal to agree to an early election date may result in the dismissal of the petition. Sec. 11302.1. However, the parties may leave some election details "to be designated by the Regional Director," in which case, although substantially guided by the informally ascertained desires of the parties on such matters, the Regional Director should fix the date, hours, or place.

NOTE: The Regional Director may unilaterally set the date of a rescheduled or cancelled election. *Superior of Missouri, Inc*., 327 NLRB 248 (1998); Secs. 11302.1(b) and 11314.8.

The election agreement should fully describe the agreed upon unit. Where the parties agree that certain classifications of employees (not named individuals) should vote subject to challenge, the election agreement— and thereafter the notice of election— should indicate the classifications that will vote subject to challenge. The election agreement should not state that unresolved bargaining unit issues will be left "to the Regional Director."

In determining whether to recommend approval of an election agreement where a number of challenges based on eligibility may be involved, the following factors may be considered as militating in favor of approval: the potential challenged ballots represent a class situation that could be disposed of as a single issue in a postelection proceeding; questions of eligibility will probably not be resolved in a preelection hearing because of substantial credibility issues; or a strike is in progress or there is a genuine threat of a strike that the parties wish to avoid. As a general rule, the Regional Director should decline to approve an election agreement where it is known that more than 10 percent of the voters will be challenged, but this guideline may be exceeded if the Regional Director deems it advisable to do so.

When a Board agent is obtaining an election agreement in a construction industry case and the election eligibility list is being discussed with the parties, the Board agent should discuss with the parties the eligibility formula appropriate to that case. Unless the parties enter into a separate stipulation to the contrary, the Board agent should inform the parties that the formula to be applied in preparing the election eligibility is the *Daniel/Steiny* eligibility formula. *Daniel Construction Co*., 133 NLRB 264 (1967); *Steiny & Co., Inc.*, 308 NLRB 1323 (1992).

Although the *Daniel/Steiny* formula will be applied to determine voter eligibility in construction industry elections in the absence of a waiver by the parties otherwise, it is the better practice to set forth expressly in the election agreement the election eligibility

formula to be utilized. When the *Daniel/Steiny* formula is being utilized, it should be set forth in the paragraph of the election agreement entitled, "Unit and Eligible Voters". When the *Daniel/Steiny* eligibility formula is not being utilized, a specific waiver statement to that effect should be set forth in the paragraph of the election agreement entitled, "Unit and Eligible Voters". Sample language is provided below:

> The parties agree that, notwithstanding the Employer's engagement in the construction industry, the Board's standard eligibility formula shall apply, rather than the Board's construction industry (*Daniel/Steiny*) eligibility formula.

At the time of execution of the agreement, the Board agent should ascertain whether a strike exists. Election arrangements such as observers (Sec. 11310), the list of eligible voters (Sec. 11312), timely posting of the notice of election (Sec. 11314), foreign languages (Sec. 11315), equipment to be furnished (Sec. 11316), voter identification at the election (Sec. 11312.4) and release schedules for voters (Sec. 11330) should also be discussed. The Election Order Sheet (Form NLRB-700) may be used as a checklist of election arrangements.

11084.4 Agreements Resolving Eligibility Questions

Parties to a representation proceeding are permitted to resolve issues of eligibility prior to an election if they clearly evidence their intent in writing. *Norris-Thermador Corp.*, 119 NLRB 1301 (1958). Agreements resolving all eligibility questions may be solicited but the suggestion that such an agreement be entered into should not be permitted to interfere with obtaining an election agreement where it is clear that a party wishes to preserve its privilege to challenge some voters. While such agreements typically resolve all issues of eligibility, they may also expressly state that certain individuals may vote subject to challenge, thereby resolving most eligibility issues while preserving some issues for resolution in a postelection proceeding, if necessary. Where parties enter into a written and signed agreement which expressly provides that issues of eligibility resolved therein shall be final and binding upon the parties, "such an agreement, and only such an agreement," is considered a final determination of the eligibility issues "unless it is, in part or in whole, contrary to the Act or established Board policy." The *Norris-Thermador* rule has been strictly applied and the Board has permitted one "narrow exception." In *Banner Bedding, Inc.,* 214 NLRB 1013 (1974), the Board announced that it will accept an oral agreement only where all parties agree to its content.

The Board does not deny the right to challenge pursuant to an eligibility agreement as to statutory exclusions, as doing so would contravene statutory policy. To further clarify and demonstrate the parties' understanding of eligibility issues resolved through a *Norris-Thermador* list, language may be incorporated into the list acknowledging that certain identified employees do or do not possess Section 2(11) authority. See *Laymon Candy Co.,* 199 NLRB 547 (1972). Such agreements should include specific facts for the individuals involved as to the lack or possession of 2(11) authorities.

11086 Preparation of Document

The blank spaces to be completed on the election agreement are generally self-explanatory.

11086.1 Correct and Complete Name of Labor Organization

If the petitioner is a labor organization, its correct and complete name should be inserted above the petitioner's signature line. If more than one organization is involved, their full names should be inserted in the paragraph headed "Wording on the Ballot." The full names of each labor organization should be spelled out, including the full names of all parent bodies, except that AFL–CIO may be abbreviated. If a shortened name is requested, it must be shown in addition to the full name and must be in parentheses. Sec. 11306.3.

11086.2 Commerce Facts

Sufficient commerce facts on which the Board may make a jurisdictional finding must be included in the agreement. Where gross volume of business is the test for asserting jurisdiction, commerce data regarding inflow, outflow, franchise, etc., sufficient to establish de minimis statutory jurisdiction must also be included.

11086.3 Place on Ballot; Payroll Period; Time and Place; Unit

Places on the ballot should be based on agreement, if there is agreement; on chance, if there is no agreement. In elections involving two or more labor organizations, the choice against representation should be "neither" or "none," *not* "no union." Sec. 11306.4.

The payroll period for eligibility should be designated as "the period ending," etc. Normally, it should be the last period ending before the Regional Director's approval of the agreement. An issue as to an unusual eligibility date should be resolved. Sec. 11312.1.

The time and place of election should be inserted or should be expressly left to the Regional Director. (For an extended discussion of time (including date and hours) and place, see Secs. 11302 through 11302.3. Further related election details are discussed in Secs. 11300 through 11350, especially Secs. 11310, 11312, 11314–11316, 11318, 11330, 11332, and 11334. If a large or complex election is involved, see Sec. 11312.4 regarding the utilization of identifying information for voters.)

The unit should be accurately described. If an eligibility formula is used, the period should be made explicit, e.g., "including all employees who worked an average of "x" hours per week during the "y" weeks ending on [date]."

11088 Parties

Necessary parties to an election agreement are the employer and any union (or person acting as a bargaining representative) that has submitted evidence of an interest in

accordance with Secs. 11022 and 11023. In a RD case, the petitioner is also a necessary party.

A union that has submitted evidence of less than a 10-percent interest in the unit involved may not "block" an election agreement. It may, however, be a party to the agreement and participate in the election if it wishes to do so. Sec. 11023.4. A union that has disclaimed interest (Sec. 11120) is no longer a party to the case and may neither block nor be a party to an election agreement.

11090 Variation Not Permitted

Unless there are exceptional circumstances, the language of the printed agreement constitutes the only terms under which agreed upon elections may be held.

11091 Self-Determination Election

In agreed-upon self-determination elections, whether on a craft, department, or other basis, the wording in the agreement should be made to conform to Board practices in directed elections.

11091.1 Election Involving Professional Employees

Elections involving professional employees involve a voting procedure developed to protect their voting rights. *Pratt & Whitney,* 327 NLRB 1213 (1999); *Sonotone Corp*., 90 NLRB 1236 (1950). In elections to ascertain the desires of *professional* employees as to their inclusion in a unit with nonprofessional employees, pursuant to Section 9(b)(1) of the Act, paragraph 9 of the election agreement, which describes the wording of choices on the ballot, should be altered to conform to the following:

Two questions shall appear on the ballot:

1. Do you wish to be included with nonprofessional employees in a unit for the purposes of collective bargaining?

To which the choice of answers will be "Yes" or "No."

2. Do you wish to be represented for purposes of collective bargaining by [union]?

To which the choice of answers will be "Yes" or "No."

OR

By which union, if any, do you wish to be represented for purposes of collective bargaining?

To which the choice of answers will be the choices on the ballot in the same form as for multi-choice single-unit elections. Sec. 11306.4.

NOTE: In question 1, it is not necessary to set out the description of the unit of nonprofessional employees.

EXCEPTION: When only a single professional employee is entitled to a self-determination election with respect to inclusion in a unit with nonprofessionals, the professional employee shall be furnished two ballots: one on inclusion and the other on representation. The ballots of the professional shall be addressed in the following manner: if, on the first ballot, the vote is for inclusion, the second ballot is to be mixed, unopened, with the regular ballots; if the vote is against inclusion, the second ballot shall be destroyed without being opened.

11091.2 Residual Election

In a partially organized plant, a group of unrepresented employees is referred to as a "fringe" or "residual" group of employees. The language to be added to agreements will vary from case to case depending on the number of unions involved and whether or not elections will be conducted in more than one voting group. Some, but not all, of the numerous possibilities are as follows:

(a) One voting group — one union: This is an election in which the incumbent representative of employees in a partially organized plant seeks to add a group of unrepresented employees to its existing unit, commonly referred to as an *Armour-Globe* election. *Armour & Co*., 40 NLRB 1332 (1942); *Globe Machine & Stamping Co*., 3 NLRB 294 (1937). In such event, the following language should be added to the agreement:

> If a majority of valid ballots are cast for [the incumbent union], they will be taken to have indicated the employees' desire to be included in the existing [fill in description] unit currently represented by [the incumbent union]. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

(b) One voting group—two unions: This is a combination *Armour-Globe* and residual unit election. The single voting group consists of the unrepresented employees in a partially organized plant. One union, the incumbent, seeks to add the group of unrepresented employees to its existing unit and a second union seeks to represent the unrepresented group as a separate residual unit. The employees have alternative choices and the following language should therefore be added to the agreement:

> If a majority of valid ballots are cast for [the incumbent union], they will be taken to have indicated the employees' desire to be included in the existing [fill in description] unit currently represented by [the incumbent union]. If a majority of valid ballots are cast for [the union seeking to represent them separately], they will be taken to have indicated the employees' desire to be represented in a separate unit. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

(c) Two voting groups -- two unions: In a partially organized plant, where an incumbent union seeks an election only in the existing unit and where a second union seeks an overall unit consisting of employees in the existing unit plus a residual group of

unrepresented employees, two voting groups should be established and the following language should be added to the agreement:

> If a majority of valid ballots in the existing unit are cast for [the incumbent union], separate units are appropriate. If a majority of the employees in the existing unit do not select [the incumbent union], then the two voting groups shall be combined in a single overall unit and their votes shall be pooled.

If the votes are pooled, they are to be tallied in the following manner (*Penn-Keystone Realty Corp*., 191 NLRB 800 (1971)): the votes for the incumbent union shall be counted as valid votes, but neither for nor against the second union that is seeking the more comprehensive unit. All other votes are to be accorded their face value, whether for representation by the second union or for no union. In the event that the results show that a majority of the valid ballots have not been cast either for the union that is seeking the more comprehensive unit or against representation, the election will be deemed to be inconclusive and a second election will be conducted among the employees in the broader unit in which they will vote as to whether or not they desire to be represented by the union seeking that unit.

11091.3 Severance Election

In an organized plant, where a union seeks to *sever* part of an established unit, the procedure will depend, to an extent, on whether, simultaneously, the existing (production/maintenance) group is also voting. *Mallinckrodt Chemical Workers*, 162 NLRB 387 (1967). If both elections are being held simultaneously, the following wording is appropriate:

> If the employees in Group B [the severance group] cast a majority of valid ballots for [name the union seeking severance], they will be taken to have indicated their desire to constitute a separate bargaining unit; if they do not cast a majority of valid ballots for [any such union], they shall remain a part of the existing unit and their ballots shall be pooled with and counted among the employees in Group A [the existing production/maintenance unit].

Where only the severance group is being balloted, the wording of the agreement depends on whether or not the production/maintenance union appears on the ballot. If so:

> If a majority cast valid ballots for [union seeking severance; if more than one, name them in the disjunctive], they will be taken to have indicated their desire to constitute a separate bargaining unit and a certification of representative will be issued with respect to such unit. If not, these employees shall remain a part of the existing unit and a certification of results of election to such effect will be issued.

In providing for choices on the ballot, only the names of the competing unions should appear. "Neither" and "none" should not appear.

If only the union or unions desiring severance are on the ballot, because the production/maintenance union does not wish a place on the ballot, the following wording is appropriate:

> If a majority cast valid ballots for ["Yes," if there is only one union on the ballot; substitute names of severance-seeking unions if there are more than one], they will be taken to have indicated their desire to constitute a separate bargaining unit and a certification of representative will be issued with respect to such unit. If not, these employees shall remain a part of the existing unit and a certification of results of election to such effect will be issued.

On the ballot, the choices should be "Yes" or "No," if only one union is on the ballot. Otherwise, only the names of competing unions should appear; "neither" and "none" should not appear.

11094 Approval of Election Agreement

Approval of the election agreement should be recommended on the face of the instrument by the Board agent who secured it. An election agreement is not effective until it is approved by the Regional Director. Parties should be notified of the approval and sent a conformed copy of the agreement.

If an election eligibility list has not already been submitted by the employer, its submission should be directed in the letter approving the agreement. Sec 11312.1(a). The letter approving the election agreement should also 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 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.

11095 Revocation of Election Agreement Approval

The Regional Director retains authority to revoke his/her approval of an election agreement for cause at any time before the election. For example, if after review of the *Excelsior* list of eligible voters (Sec. 11312.1), the number or nature of potential challenges raised is so extensive as to cause serious questions concerning the intent or understanding of the parties, such challenges may be the basis for revoking approval.

11097 Request to Withdraw From Election Agreement

This Section deals with a party's attempt to withdraw from an election agreement, where the petition remains on file. See Sec. 11098.1 for withdrawal from the ballot; Secs. 11110–11118 for withdrawal of the petition; and Secs. 11120–11124 for disclaimer of interest.

Until an election agreement has been approved by the Regional Director (Sec. 11094), any party may withdraw from or insist upon changes in the agreement. However, once an election agreement has been approved, a request to withdraw

therefrom, absent the agreement of all parties, should be approved only upon an affirmative showing of unusual circumstances. *Sunnyvale Medical Clinic*, 241 NLRB 1156 (1979). Normally, all parties should be held to their agreement to hold an election. Should any party seek to withdraw from an election agreement, for the purpose of entering into a new agreement on different terms or going to hearing, the request should be considered in the light of the cause shown, the position of the other parties and the timeliness of the request. As a general policy, discretion should be exercised in the direction of effectuation of the approved election agreement.

11098 Request to Withdraw From Ballot After Election Agreement

In a multiple-union situation, the election agreement provides that:

> "If more than one union is to appear on the ballot, any union may have its name removed from the ballot by the approval of the Regional Director of a timely request, in writing, to that effect."

Thus, in a multiunion situation, if any of the unions wishes to withdraw from the ballot and allow the election to go forward, such a request may be freely approved if time permits. If the petitioner requests withdrawal, an intervenor must have or obtain within a reasonable period of time a petitioner's showing of interest. Sec. 11112.1(b). If time does not permit making the necessary changes in the ballot and the posting of a correct notice of election for the full three days required by Sec. 103.20 of the Rules and Regulations and the intervenor has or obtains a petitioner's showing of interest, the election should be held as scheduled with the petitioner on the ballot. Whether or not time permits making the necessary changes, if the intervenor does not have or cannot obtain within a reasonable period of time a petitioner's showing of interest, the petitioner's request should be treated as a request to withdraw its petition. Secs. 11110 and 11112.1(a).

Should an intervening union (with or without a blocking interest – Secs. 11023.3 and 11023.4) that has entered into an election agreement thereafter seek to withdraw from the ballot, the request (which should contain a disclaimer of interest) should be granted unless time constraints make it impossible to change the ballots and notice of election.

11100-11124 DISMISSAL; WITHDRAWAL; DISCLAIMER

11100–11104 DISMISSAL

11100 Dismissal: Generally

Where, from the investigation, it clearly appears that an election would not be directed, a withdrawal request should be solicited from the petitioner. Thus, a case

should not proceed to an election agreement or to hearing if the Board would not assert jurisdiction, if the unit involved is inappropriate, etc.

A reasonably short period should be given for requesting withdrawal, in the absence of which, at the end of the period, the petition should be dismissed.

11100.1 Basis for Dismissal

Dismissals and refusals to institute formal proceedings should be based on specific grounds.

11100.2 Notification to Parties

The petitioner should be notified in writing of the dismissal and the reason therefor. Sec 102.71, Rules and Regulations; Sec. 101.18(c), Statements of Procedure. The letter should instruct how and when a request for review of the action can be filed with the Board. Form NLRB-4916 Instructions for Filing Request for Review of Administrative Dismissal of Representation Petition may be enclosed with the dismissal letter; otherwise, the instructions should be set forth in the body of the letter.

Copies of the dismissal letter should be sent to all other interested parties.

11100.3 Regional Director Authority During Review Period

During the 14-day review filing period or after a request for review is filed, the Regional Director may revoke the dismissal.

If a withdrawal request is received after the dismissal or if the Regional Director decides to reconsider the action taken during the period in which a request for review of the dismissal is being considered by the Board, the Regional Director may revoke the dismissal and approve the withdrawal request or treat the request for review as a motion for reconsideration. In such cases, the Regional Director should promptly advise the Executive Secretary and the Office of Representation Appeals that he/she is reconsidering the matter. The parties should also be similarly advised as soon as possible.

If the Board has granted review, the Regional Director lacks jurisdiction to vacate the dismissal. *North Jersey Newspapers Co.*, 322 NLRB 394 (1996).

11102 Pattern Dismissal Letter

Petitioner (or Designated Representative, if applicable)

Re: Case Name
Case Number

Salutation:

The above-captioned case, petitioning for an investigation and determination of representative under Section 9(c) of the National Labor Relations Act, has been carefully investigated and considered.

As a result of the investigation, I find that further proceedings are unwarranted. The investigation disclosed that (reason for dismissal). Accordingly, I am dismissing the petition in this matter.

(Note: If a causal nexus exists between an unfair labor complaint and the petition, the reasons for dismissal of the petition should include a statement that the petition is subject to reinstatement after final disposition of the charge.)

Pursuant to the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570. A copy of such request must be served on the Regional Director and each of the other parties to the proceeding. This request for review must contain a complete statement setting forth the facts and reasons on which it is based. The request for review (eight copies) must be received by the Executive Secretary of the Board in Washington, DC by close of business on [date 14 calendar days from issuance of the letter], at 5 p.m. (ET). You should be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, however, the Board may grant special permission for a longer period within which to file.

A request for review may also be submitted by electronic filing. See the attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency's website at www.nlrb.gov for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. Guidance can also be found under *E-Gov* on the Board's website. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, either by mail or by electronic filing. The request for extension of time should be submitted to the Executive Secretary of the Board in Washington, DC, and a copy of any such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. The request for review and any extension of time for filing must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding, and a copy must be served in the same or faster manner as that utilized in filing the request with the board. When filing with the Board is accomplished by personal service, however, the other parties shall be promptly notified of such action by telephone, followed by service of a copy by mail.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible

documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-Filing can also be found on the National Labor Relations Board website at www.nlrb.gov. On the home page of the website, click on E-File Documents. Detailed E-Filing instructions explaining how to file the documents electronically will be displayed.

The request for review and any request for extension of time must include a statement that a copy has been served on this office and on each of the other parties to this proceeding in the same or a faster manner as that utilized in filing the request with the Board.

Very truly yours,
/s/
Regional Director

cc: Office of the Executive Secretary
Petitioner (or Designated Representative, if applicable)
All Other Parties

11104 Regional Office Action on Request for Review

Upon receipt of a copy of the request for review, the file should be forwarded promptly to the Office of Representation Appeals.

11104.1 Regional Director Transmittal Memorandum

Any points raised in connection with the request for review should be given consideration. The Regional Director's transmittal memorandum should give an appraisal of the points made—unless the file reflects that they have already been fully considered.

During the period in which the file is being reviewed, the Region should transmit to the Office of Representation Appeals any new information, developments or recommendations.

11104.2 Request for Review Sustained

A sustaining of the request for review restores the status of the case as it existed prior to the dismissal. A notice of hearing should be issued or other appropriate action taken.

11110–11118 WITHDRAWAL

11110 Generally

When a withdrawal request is submitted at the suggestion of a Board agent to whom the case is assigned (which suggestion is motivated by the fact that further proceedings are unwarranted — in other words, where absent a withdrawal, the petition will be dismissed), approval of the request should be recommended by the Board agent, with the notation that the withdrawal was solicited.

In addition to withdrawal requests that may be solicited by the Region, there may be those that the petitioner, on its own volition, may submit. The reason, if not given in the request, should be sought. The Regional Director will take such action as is appropriate; the Regional Director's general policy should favor the effectuation of a petitioner's genuine voluntary desire to terminate the proceeding, inasmuch as the Act contains adequate machinery for use by other parties if the moving party does not wish to proceed.

EXCEPTION: Should the petitioner's withdrawal request be accompanied by other action with which it is inconsistent, for example, should there be a strike or picketing for recognition by a union-petitioner, the withdrawal request should be denied, and the petition should be processed. *Waumbec Dyeing & Finishing Co*., 101 NLRB 1069 (1952). However, a union's statement or other conduct which indicates that it might continue its organizing efforts or resume them sometime in the future is not necessarily a sufficient basis for refusing to approve a withdrawal request.

In addition, if the Regional Director believes that approval of the withdrawal request would result in a situation that would run counter to the purposes of the Act, he/she should withhold approval.

If the withdrawal request is approved, the parties should be notified. If any party raises objections to the approval of the withdrawal, such objections should be addressed by the Regional Director in the notification of approval.

11110.1 Oral Withdrawal Requests

Regional Directors are authorized to approve oral withdrawal requests from any petitioner. However, if the Regional Office has concerns about whether the oral withdrawal request should be relied upon, the Regional Office may require that the request be in writing. Absent such concerns, an oral withdrawal request should be processed in the same manner as a written request.

11111 Before Election: Before Approval of Election Agreement or Close of Hearing (Without Prejudice)

Where a request is received prior to close of a hearing or before the approval of an election agreement, the request should be granted *without prejudice* to the subsequent filing of a new petition by the petitioner.

11112 Before Election: After Approval of Election Agreement or Close of Hearing (Prejudice Possible)

A variety of circumstances may arise when a request for withdrawal of a petition is received after the close of a hearing or approval of an election agreement.

11112.1 RC Petition

11112.1(a) Petitioner Sole Union Involved

Where, after the approval of an election agreement or the close of a hearing, but before the holding of the election, the petitioning union, the sole union involved, requests timely withdrawal of its petition, the request should be approved (Sec. 11110) with 6 months prejudice (Sec. 11118) and the election should be canceled. This should be done whether or not the employer opposes the action. *Sears, Roebuck & Co*., 107 NLRB 716 (1954). The fact that the parties have expended resources, including in anticipation of a scheduled election, is not a basis for refusing to approve a withdrawal request, even very shortly before the election.

EXCEPTION: See Sec. 11110 regarding a union's request which is accompanied by inconsistent action. In situations where merit has been found or prima facia evidence submitted in support of ULP allegations related to the organizing campaign, the Region should approve a timely submitted withdrawal request without prejudice.

11112.1(b) Intervenor Desires Election

Where a petitioning union seeks to withdraw the petition after approval of an election agreement or close of hearing, and there is an intervening union that desires the election be held or an appropriate decision be issued, the latter must submit a petitioner's showing of interest in the unit involved. The 30-percent interest showing need not predate the approval of the agreement or the close of the hearing and a reasonable period for procuring and submitting the interest may be given. Upon proper submission by the intervenor, the petitioner may be dropped from the ballot (but see Sec. 11098), with prejudice applied (Sec. 11118) and the election, with the intervenor alone on the ballot, should be held in accordance with the agreement or an appropriate decision should issue.

In the event the intervenor subsequently requests to withdraw, the election should be canceled and the request should be approved with 6 months prejudice (Sec. 11118). This should be done whether or not the employer opposes the action. The fact that the parties have expended resources, including in anticipation of a scheduled election, is not a basis for refusing to approve a withdrawal request, even very shortly before the election. Sec. 11112.1(a).

EXCEPTION: See Sec. 11110 regarding a union's request which is accompanied by inconsistent action.

11112.2 RM Petition

A timely withdrawal request filed by the employer-petitioner after the approval of an election agreement or close of hearing, but prior to the election, should be approved and granted without prejudice unless any union involved (other than a certified

incumbent union) opposes the withdrawal. If opposition is expressed by such a union, the election should be held as scheduled or decision issue, regardless of whether the union opposed to withdrawal has a petitioner's showing of interest. *Siemons Mailing Service*, 124 NLRB 594, 595 (1959); *International Aluminum Corp.*, 117 NLRB 1221 (1957).

11112.3 RD Petition

A timely withdrawal request filed by the RD petitioner after the approval of an election agreement or close of hearing should be approved and granted without prejudice.

If an intervenor (other than a certified or recognized incumbent union) desires an election, and has, or can obtain within a reasonable period, a petitioner's showing of interest, the election should be held as scheduled or a decision should issue.

11113 Before Election: After Direction of Election in Substantially Different Unit

A withdrawal request should generally be approved *without prejudice* if the petitioner seeks to withdraw after the Regional Director or the Board has directed an election in a unit substantially different from that sought by the petitioner. Secs. 11312.1(c) and (d). However, a withdrawal request should be approved *with prejudice* if (1) the petitioner had indicated that it wished to proceed to an election in a unit different than the petitioned-for unit, (2) it had submitted a sufficient additional showing of interest for the different unit, and (3) it had been provided the eligibility list of voters. If one or more of these three conditions is missing, the Regional Director has the discretion to approve the withdrawal without prejudice. *Stock Building Supply*, 337 NLRB 440 (2002).

The prejudice period is discussed in Secs. 11118–11118.3.

11116 After Election

11116.1 Generally

A withdrawal request submitted subsequent to a valid election may be ruled on by the Regional Director whether the election was conducted by agreement of the parties or was directed by the Board or the Regional Director. Normally, the withdrawal request should not be approved if it appears that the intent of the withdrawal is to circumvent the intent of Section 9(c)(3). *Garden Manor Farms*, Inc., 341 NLRB 192 (2004), and *Transportation Maintenance Services*, *L.L.C.,* 328 NLRB 691 (1999).

11116.2 Challenges Pending

A withdrawal request may ordinarily be approved with 6 months prejudice (Sec. 11118) after an election which is inconclusive because of determinative challenged ballots. If the petition is withdrawn more than 6 months after the election, prejudice need be levied only to a date 1 year after the election. If all parties agree, a withdrawal request may be approved without prejudice.

11116.3 Objections Pending

A request to withdraw the petition, submitted while objections are pending, should normally not be approved. Sec. 11116.1. However, the Regional Director has the discretion to approve a request to withdraw the petition while objections are pending when no party objects or if the petitioner agrees, in writing, that it will not file a petition seeking an election to be held less than a year after the first election. The Regional Director should ordinarily approve a request to withdraw *objections* if, because of the passage of time, the petitioner seeks to allow the election results to become final. This action is without prejudice to the filing of a timely petition under Section 9(c)(3) based on a new showing of interest.

11116.4 Election Set Aside

A withdrawal request submitted after an election has been set aside on the basis of the petitioner's objections should, absent extraordinary circumstances, be approved by the Regional Director without prejudice.

11118 Prejudice Period; Good Cause

A withdrawal with prejudice will carry the condition that it is granted with prejudice to the filing of a new petition encompassing the same or substantially the same unit of employees involved for a period of 6 months, unless good cause is shown why the Board should entertain a new petition filed prior to the expiration date of such period. Sec. 11118.1. Inadvertent omission of this language from the letter approving withdrawal does not stay its application.

The purpose of levying prejudice is to conserve the Agency's resources by discouraging repetitive and duplicative filings. No investigation, evaluation, or opinion as to what might constitute the good cause referred to above should be made at the time of the withdrawal. Such assessments should be made on the filing of a new petition by the affected union.

The initial determination whether there is good cause to entertain the new petition rests with the Regional Director. If the Regional Director determines that good cause does exist and further proceedings are warranted in all other respects, he/she should issue a notice of hearing and the issue may be one of those to be placed in the record at a hearing; if the Regional Director determines that it does not exist, he/she should dismiss (absent a withdrawal) and the petitioner may test the issue, if it wishes, by means of a request for review to the Board.

Prejudice runs only to the petitioner and does not preclude petitions filed by other unions, including other locals of the same International, or by a joint petitioner that includes the original organization. Intervention by the petitioner during the prejudice period is discussed in Sec. 11118.2.

11118.1 Good Cause: Application When Petition Filed Within Prejudice Period

What constitutes sufficient good cause to warrant entertaining a new petition filed prior to the expiration of the 6-month prejudice period may not be stated

comprehensively; it depends on each individual case. The following circumstances illustrate what the Board considers good cause: where the original disclaimer or withdrawal was made because of contraction or expansion of the unit; or because of a pending charge on which a complaint has issued. In the latter case, concurrent petition and unfair labor practice charge principles should be applied. Secs. 11730–11734.

Another good cause for entertaining a petition is the voluntary agreement of the employer to an election in the new proceeding. The initiative in seeking and obtaining such agreement should be taken by the petitioner and not by the Regional Director. Thus, if upon the filing of the new petition the petitioner informs the Regional Director that the employer is willing to consent to an election, this should be confirmed with the employer; on confirmation, the Regional Director may approve an election agreement.

11118.2 Intervention During Prejudice Period

Even though a union may be prevented from filing a petition during a given period in the absence of good cause, it may nevertheless intervene during such period in any R case filed by another and may participate to the extent of its showing of interest (Sec. 11023). *California Furniture Shops, Ltd*., 115 NLRB 1399 (1956).

11118.3 Showing of Interest After Prejudice Period

If a new petition is filed after the close of the prejudice period, a current showing of interest is required as evidence of interest. Sec. 11027.4.

11120–11124 DISCLAIMER

11120 Disclaimer: Generally

As indicated earlier (Sec. 11020), a union normally achieves status as an interested party in a representation case only by affirmative action — the submission of proof of interest. In certain situations, however, affirmative action on the part of a union is necessary in order to establish that it is *not* a party in interest.

If a union with an outstanding certification or with a still effective contract covering all or some of the employees involved in a RC case seeks to *avoid* participation in the instant case (i.e., disclaims any present interest in the affected employees), it does so by filing a *disclaimer of interest*.

There is no special form for a disclaimer. In general, it should state that the disclaiming union waives and disclaims any right to represent (described) employees (or "employees involved in Case . . .").

On request, conformed copies of a disclaimer may be furnished other parties in the case.

11122 Effect Upon RC Petition

Whenever possible, the disclaimer should be procured in writing. Furthermore, a disclaimer must not be accompanied by action that is inconsistent therewith, such as simultaneously striking or picketing for recognition or seeking to process grievances.

EXCEPTION: where such grievance processing efforts involve predisclaimer matters, the efforts may not be inconsistent with a disclaimer. *Government Employees, Local 888 (Bayley-Seton Hospital),*323 NLRB 717 (1997). With respect to the existence of such inconsistent action, other parties should be contacted.

A union's statement or other conduct which indicates that it may continue its organizing efforts or resume them sometime in the future is not necessarily inconsistent with a disclaimer of any current interest in representing the employees involved.

If the disclaimer is in writing and there is no inconsistent action, the union may thereafter be disregarded as a party; if appropriate, a withdrawal may then be solicited from the petitioner. If either of these elements is missing, a notice of hearing, if a hearing is to be held, should be sent to the union; but an election agreement may be consummated without the participation or acquiescence of the disclaiming union.

If the disclaimer of interest is by a previously certified union, the dismissal or approval of withdrawal should contain a revocation of the prior certification.

11124 Dismissal of RM and RD Petitions

This Section deals with procedures for dismissing RM and RD cases, if the filing party does not withdraw the petition after a disclaimer is filed.

11124.1 RM Petition

Where the union on the basis of whose claim the petition was filed submits a disclaimer of interest, the petition should be dismissed. The ground stated for dismissal should be ". . . the union on the basis of whose claim the petition was filed has filed a disclaimer of interest in the affected employees. . . ." If the disclaimer of interest is by a previously certified union, the dismissal should contain a revocation of the prior certification.

The disclaimer must not be accompanied by action that is inconsistent therewith. Thus, if the union is simultaneously striking or picketing for recognition, the disclaimer should not serve as a basis for dismissal. A union's statement or other conduct which indicates that it might continue its organizing efforts or resume them sometime in the future is not necessarily inconsistent with a disclaimer of any current interest in representing the employees involved. The other parties should be contacted before any dismissal action is taken, with respect to the existence of such potential inconsistent action.

A disclaimer filed prior to the execution and approval of an election agreement or the opening of a hearing should result in a dismissal without prejudice to any of the parties. If a notice of hearing has issued, the dismissal and withdrawal of notice should be consolidated. If the hearing has opened and a disclaimer is filed during the hearing,

the hearing officer should communicate with the Regional Director. If it is decided, on the above principles, that the case should be dismissed, the hearing should be adjourned indefinitely; the subsequent dismissal should contain a withdrawal of the notice of hearing.

If the disclaimer is filed after the execution and approval of an election agreement or the close of the hearing, the dismissal will be accompanied by the following statement:

> Any petition filed by [the disclaiming union] within 6 months from this date will not be entertained unless good cause is shown to the contrary. Moreover, in the event [the disclaiming union] makes a claim for recognition upon the employer within 6 months from this date involving the same or substantially the same unit, a motion by [the employer] requesting reinstatement of this petition will be entertained. *Campos Dairy Products, Ltd.,* 107 NLRB 715 (1954).

11124.2 RD Petition

Similarly, in a RD case, a disclaimer unaccompanied by inconsistent action should result in a dismissal. As in a RM case, the dismissal resulting from a disclaimer filed prior to approval of an election agreement or close of hearing should be unqualified. A dismissal based on a disclaimer filed after the execution and approval of an election agreement or after the close of hearing will be qualified as follows:

> Any petition filed by [the disclaiming union] within 6 months from this date will not be entertained unless good cause is shown to the contrary. Moreover, in the event the union makes a claim for recognition upon [the employer] within 6 months from this date involving the same or substantially the same unit, a motion by the petitioner herein requesting reinstatement of this petition will be entertained. *Little Rock Road Machinery Co*., 107 NLRB 715 (1954).

Where the Regional Director dismisses a RD case or approves a withdrawal request on the basis of a disclaimer by the union involved (at whatever stage), the dismissal (or the order approving withdrawal) should contain a revocation of any prior certification.

11124.3 Good Cause

No investigation of the good cause referred to in the several statements quoted above should be made at the time of the disclaimer. Such investigation, if at all, should be made on the filing of a new petition by the affected union. (For a discussion of what constitutes good cause, see Sec. 11118.1.)

11124.4 Intervenor Desires Election

If a disclaimer is filed in any situation after the close of hearing or approval of an election agreement and an intervenor wants an election held or appropriate decision issued, it must submit a petitioner's showing of interest. This showing need not predate

the approval of the agreement or the close of the hearing and a reasonable period for securing and submitting the interest may be given. Upon proper submission by the intervenor, the disclaiming union may be dropped from the ballot (but see Secs. 11098 and 11122) or the proceeding and the election, with the intervenor alone on the ballot, should be held in accordance with the agreement or an appropriate decision should issue.

In the event no election is held as the result of a subsequent withdrawal on the part of the intervenor, the rule of 6 months prejudice to the filing of a new petition, unless good cause is shown, should be applied to both the disclaiming union and the intervenor.

11140-11148 PREHEARING

11140 Prehearing: Generally

Prior to the opening of a hearing, the Regional Director retains full authority with regard to a notice of hearing that has issued and may amend a notice of hearing, if need be, at any time prior to the opening of the hearing.

He/she may change the date, place, or hour of hearing or consolidate for hearing the instant case and another case, whether or not notice of hearing has issued in that case. The Regional Director also retains the authority to withdraw the notice of hearing and, if appropriate, to dismiss the petition. The Regional Director may act on his/her own initiative or on motion or request by a party.

11140.1 Ongoing Efforts to Obtain Election Agreement Prior to Hearing

Secs. 11012, 11082, and 11180 discuss the Board agent's ongoing efforts to obtain an election agreement. Where possible, Board agent efforts should also be directed toward having the election agreement executed early enough to notify the reporting service of the cancellation of the hearing in order to avoid the expense of late cancellation.

11141 Motions

Prehearing motions should be filed with the Regional Director in writing. A copy should be served simultaneously on each of the other parties to the proceeding. Motions should briefly state the relief sought and the grounds therefor.

The Regional Director may rule on prehearing motions filed by the parties, or may refer them to the hearing officer for ruling at the hearing. Motions to dismiss petitions and similar motions involving amendment of the notice of hearing are normally ruled on by the Regional Director; other motions are normally referred to the hearing officer.

The Regional Director should advise the parties in writing of the ruling on the motion.

11142 Subpoenas

Upon application of a party, the Regional Director has the authority and the obligation to issue subpoenas returnable at a hearing. Pursuant to Section 11(1) of the Act, such issuance is automatic, upon request.

The case name and number should be filled in before the subpoena is issued. With respect to the date for the hearing, insert the scheduled date and add "or any adjourned or rescheduled date."

Regions are expected to provide subpoenas sufficiently in advance of the start of the 5-day period before the hearing, in order to provide the full time period to file a petition to revoke. Accordingly, Regions are authorized to provide requested subpoenas immediately after informing the parties of the proposed hearing date even if the formal notice of hearing has not yet issued and/or the designated place of the hearing has not been established. See OM 02-56 (Revised).

In the event a large number of subpoenas is provided to a party upon its request, the Board agent should contact the parties to ensure that:

(a) the requestor's intention to subpoena a large number of witnesses does not conflict with the need for a concise as well as complete record (Sec. 11188.1);

(b) the scheduling of necessary witnesses reasonably accommodates the need of the employer to avoid disruption of its operations.

If a party appears to be engaging in en masse subpoenaing of witnesses as a harassment device, the affected party should bring this concern to the attention of the Regional Director and request appropriate relief. *Rolligon Corp*., 254 NLRB 22 (1981).

With regard to petitions to revoke subpoenas (Secs. 11212 and 11782), the Regional Director may rule thereon or refer them to the hearing officer.

11143 Postponement Requests

The general policy of the Regional Director should be that cases set for hearing will be heard on the day set, and once commenced, will continue on consecutive days until completed, unless the most compelling circumstances warrant otherwise. Sec. 11082.3. A postponement request will not be routinely granted, but only when good cause is shown. Every effort should be made to acquaint parties in the Region and, particularly, parties in a given case of this fact and of the procedure to be followed in seeking a postponement. The correspondence sent to the parties upon the filing of the petition serves these purposes. Sec. 11008. Form NLRB-4338 (Sec. 11082.1) further communicates the Agency's policy in this regard. It accompanies each notice of hearing, and contains the names and addresses of the parties, as well as instructions for requesting postponements.

11143.1 Generally

A party seeking postponement of the opening date of a hearing must first ascertain and set forth in the request the positions of all other parties. The party must also propose a specific date for the postponement. The request to the Regional Director should be in writing, with copies served on each of the other parties. The request should contain detailed cause (i.e., not merely "prior commitments"). As set forth in Form NLRB-4338 (Secs. 11082.1 and 11082.3), except in emergency situations, the request should have been filed at least three days before the date then set for hearing.

11143.2 Ruling on Request

The Regional Director should rule on the request for postponement, taking into account the positions, if any, expressed by the other parties, and should serve a copy of the ruling on the parties. Postponements, if granted, should be to a date certain. The ruling should note that no further postponements will be granted and that the hearing, once commenced, will continue on consecutive days until completed.

11148 Review of Prehearing Determinations

Prehearing rulings by the Regional Director (other than dismissals of petitions) may not be appealed directly to the Board but may be considered by the Board in connection with a request for review of the Regional Director's decision. Sec. 102.63(b), Rules and Regulations. If appropriate exception is taken by a party to a prehearing determination, it will be considered by the Regional Director or the Board, as the case may be, when the record is reviewed. Therefore, the notice of hearing, amendments thereto, orders postponing or denying requests to postpone the hearing, motions, and rulings thereon, should become a part of the record at the hearing. Rulings on petitions to revoke subpoenas (Sec. 11140.3) will become part of the record, on request of the aggrieved party.

11180-11248 PREELECTION HEARINGS

11180-11189 ISSUES PRELIMINARY TO HEARING

11180 Final Efforts to Obtain Election Agreement Prior to Opening of Hearing and During Hearing

In advance of the date of hearing, every effort should be made to secure an election agreement. Secs. 11012, 11082.1, and 11084.1. If the parties indicate willingness to enter into a stipulated or consent election agreement, the opening of the hearing should be delayed until after the possibility has been adequately explored. If an agreement is thereafter executed, the hearing should not be opened; the subsequent approval of the agreement will serve as a withdrawal of the notice of hearing. In the event a hearing becomes necessary, fully explore the parties' willingness to enter into a full consent election agreement.

The agent, in discussing the full consent election agreement option, may discuss the following advantages that this procedure provides:

- A quicker resolution of the representation dispute with finality
- Access to secret ballot Board election using tested election procedures without delays
- Ability to litigate significant issues without delays
- Substantial savings in legal expenses for all parties since there will be no proceedings before the Board
- No uncertainties related to delayed business decisions, including desired changes in business operations, while awaiting the final disposition of the representation issue before the Board
- Expertise in determining questions that arise when a representation dispute is present, e.g., unit placement, unit scope, eligibility of employees, etc.
- The benefits of Board certification
- Regional Director decisions are reliable and are overturned by the Board on review in only a very small percentage of cases

If the parties agree to this procedure, they should execute Form NLRB-5509, Full Consent Election Agreement.

If the possibility of a stipulated, consent, or full consent election agreement arises during the hearing, the hearing should be recessed for its consideration. Should agreement be reached, the hearing should be adjourned indefinitely. It is unnecessary to insert the agreement in the record. The subsequent approval of the agreement will serve as a withdrawal of the notice of hearing.

11181 Nature and Objective of Hearing

The R case hearing is a formal proceeding the purpose of which is to adduce record evidence on the basis of which the Board may discharge its duties under Section 9 of the Act. As such, it is investigatory, intended to make a full record and nonadversarial.

11182 Formality of Hearing

As a formal proceeding, a R case hearing should be conducted at a place conducive to the maintenance of a judicial atmosphere. If it cannot be held in a Regional Office hearing room, it should be held, if possible, in a courtroom. If the space secured proves inadequate or accommodations are poor, the Board agent should take remedial action, if possible.

At the hearing, the conduct of the parties should be dignified, both on and off the record. Smoking is prohibited.

11182.1 Misconduct at Hearing

Misconduct before the hearing officer shall be ground for summary exclusion from the hearing. Sec. 102.66 (d)(1), Rules and Regulations. Misconduct of an aggravated character engaged in by an attorney or other representative of a party shall be ground for suspension or disbarment by the Board from further practice before it, after notice and hearing. Sec. 102.66 (d)(2), Rules and Regulations.

In the event such misconduct occurs, a full report thereof should be prepared by the hearing officer and submitted by the Regional Director to the Division of Operations Management.

11183 Payroll List Submitted at Hearing

If a payroll list is submitted by an employer at a hearing, the considerations discussed in Secs. 11020 and 11025 should be applied.

11184 Attempt to Litigate Showing of Interest at Hearing

The determination of the extent of interest of each union seeking participation in a representation case is a purely administrative matter, wholly within the discretion of the Agency. Sec. 11021. This should be made clear to any party at a hearing that seeks to attack the interest showing of any involved union, whether petitioner or intervenor. Argument at the hearing on the adequacy of the interest is not permitted. Although the hearing officer's rulings at the hearing on interest issues may be based on the investigation of interest previously made or on the investigation that may be made by the hearing officer during the hearing, the results of either investigation are administrative matters not subject to attack by the parties; in answer to arguments to the contrary, the hearing officer should explain this principle. Evidence of interest (or of revocation) should never be introduced or received in evidence.

11184.1 Allegation of Improper Conduct in Obtaining Showing of Interest

If a party seeks at the hearing to introduce evidence of alleged fraud, misconduct, supervisory taint, or forgery in obtaining the showing of interest, the line of questioning should not be permitted. The party desiring to present such evidence should be advised on the record to bring it administratively to the attention of the Regional Director within 7 days. Secs. 11028.1 and 11029.1. The hearing should not be interrupted.

11185 Hearing Officer

The R case hearing is conducted by a hearing officer who is normally a Board agent from the Region in which the hearing is held. The hearing officer's role is to guide, direct, and control the presentation of evidence at the hearing. Secs. 11187–11188.

The hearing officer does not make any recommendations or participate in any phase of the decisional process. He/she may or may not be the same agent who has handled earlier or who may handle later phases of the same case.

11186 Hearing Materials

Typical materials for a hearing are set forth below.

11186.1 General

A hearing kit applicable to all cases should contain the following:

(a) Board's Rules and Regulations

(b) Hearing Officer's Manual

(c) Representation Case Manual

(d) Subpoenas (Ad Testificandum and Duces Tecum)

(e) Appearance Sheet (Form NLRB-1801)

(f) Election Agreement Forms (Forms NLRB-651 and NLRB-652)

(g) Withdrawal Request (Form NLRB-601)

(h) Request to Proceed (Form NLRB-4551)

(i) Report on Investigation of Interest (Form NLRB-4069)

(j) Copies of Form NLRB-4669, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board Pursuant to Petitions Filed Under Section 9 of the National Labor Relations Act, as Amended.

11186.2 Specific

With respect to any given case, the following should be added to the hearing kit:

(a) Case file

(b) All payroll lists and the showing of interest

(c) Formal papers, ready for introduction as exhibits (Sec. 11192)

(d) Original and copy of completed appearance sheet (Form NLRB-1801)

(e) Prepared stipulations on uncontested issues (Sec. 11187.2)

(f) Close of R Case Hearing Form (NLRB-856) — two copies, with copy of petition or last amended petition attached to original.

11187 Hearing Officer Prehearing Responsibilities

11187.1 Preparation

In advance of the hearing, the hearing officer must be aware of all issues in a given case and of the types of information generally bearing on such issues, in order to prepare properly to conduct the hearing. The hearing officer should have a meeting with the appropriate Regional management and/or supervisory personnel in advance of the hearing to discuss the issues that may be raised and develop a plan for the conduct of the hearing.

11187.2 Prehearing Preparation of Stipulations

Prior to the hearing, the hearing officer should prepare a *written* stipulation, for signature by the parties at the hearing, that covers all of the generally uncontested issues for hearings, i.e., the correct names of the parties, labor organization status, commerce information, etc., as well as any other issues that are known not to be in dispute, such as contract bar, bargaining history, demand for and refusal of recognition, etc. Preparation of a written stipulation prior to the hearing can save reporting costs and provides accurate information, while avoiding typographical and other errors that the transcript may contain as to details. Such a stipulation, once signed by the parties, should become a Board exhibit, usually Board Exhibit 2, and should be entered into evidence after the introduction of the formal papers (Board Exhibit 1; Sec. 11192).

Sample Stipulation: A sample stipulation form that may be prepared by the hearing officer prior to the hearing appears on the next two pages:

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION __

Correct Name of Employer:
Case No.
Correct Name of Petitioner:
Correct Name of Intervenor:

STIPULATION

We stipulate and agree that:

1. We have been informed of the procedures at formal hearings before the National Labor Relations Board by service of the Statement of Standard Procedures with the Notice of Hearing. The Hearing Officer has offered to us additional copies of the Statement of Procedures.

2. To the extent the formal documents in this proceeding do not correctly reflect the names of the parties, the formal documents are amended to correctly reflect the names as set forth above.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act. The Intervenor is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

4. The Petitioner claims to represent the employees in the unit described in the Petition herein and the Employer declines to recognize the Petitioner.

5. There is no collective-bargaining agreement covering any of the employees in the unit sought in the Petition herein and there is no contract bar to this proceeding.

6. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

Commerce facts:

7. The following unit is an appropriate unit within the meaning of Section 9(b) of the Act:

Included:

Excluded:

Upon receipt of this Stipulation by the Hearing Officer it may be admitted, without objection, as a Board exhibit in this proceeding.

_____
For the Employer

_____
For the Petitioner

_____
For the Intervenor

RECEIVED:

_____
Hearing Officer

Date: _____

Board Exhibit No. _____

Contents of Stipulations: Care should be taken that the contents of stipulations are not so conclusionary that the Regional Director or the Board might hesitate or be unable to adopt and follow them without "primary" foundation. For example, a stipulation that the Agency has jurisdiction over the parties is of no use without a recital of supporting commerce facts.

Joinder of Parties: All parties should join in each stipulation. If one party "has no knowledge" (e.g., if a union has no knowledge of commerce facts), it should be asked for an affirmative or negative answer to the question of whether it will join in the stipulation. In the absence of joinder of all parties, the stipulation cannot be received and competent testimony must be received, except that a participating intervenor, i.e., one which has submitted less than a 10 percent showing, may not "block" stipulations entered into by the other parties. Sec. 11023.4.

11187.3 Foreign Language Witnesses

The hearing officer should be aware of the potential need for foreign language witnesses and should ensure that appropriate arrangements are made in order to avoid unnecessary expense or delay. Sec. 11221.

11188 Hearing Officer Responsibilities During Hearing

11188.1 Complete and Concise Record

In addition to being aware of and prepared for the issues in a given case, it is the duty of the hearing officer to see that a full record is developed. It is also the duty of the hearing officer to keep the record as short as is commensurate with its being complete. This also minimizes the significant costs associated with a hearing.

In the performance of these duties, the hearing officer should discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited. The hearing officer should take an active role in exploring all potential areas of agreement and narrowing the issues that remain to be litigated. The hearing officer should guide, direct, and control the hearing, excluding irrelevant and cumulative material and not allowing the record to be cluttered with evidence submitted "for what it's worth." Cf. Sec. 11217. In addition, the hearing officer should solicit stipulations and utilize offers of proof in order to achieve an uncluttered record. Secs. 11187.2, 11189(f) and 11226. The hearing officer may cross-examine and call and examine witnesses. The hearing officer may call for and introduce all appropriate documentary evidence, being limited only by the relevance of the evidence to the issues. Whenever the hearing officer's technical assistance is required by any party, it should be given.

When necessary to ensure the development of a record that is complete, concise, and cogent, it may become necessary for the hearing officer to interrupt the presentation of a party and conduct some or all of the questioning of a witness or witnesses. However, it should be recognized that the hearing officer's responsibility for the development of a complete yet concise record may on occasion lead to an appearance of undue assistance to a party that does not itself introduce evidence in support of its positions or of undue

interference with a party seeking to introduce immaterial, irrelevant, or cumulative evidence. In discharging his/her obligation to develop a full yet concise record, the hearing officer must also keep constantly in mind that to the parties he/she is the Board's representative and that the parties expect him/her to be objective and considerate in the conduct of the hearing. Thus, the hearing officer, while meeting his/her primary responsibility to develop a full yet concise record, should also exercise self-restraint, should give the parties prior opportunity to develop points, and should refrain from needlessly taking over.

11188.2 Rulings

11188.2(a) Rulings to be Made During Hearing; Review of Rulings

The hearing officer should rule on all appropriate motions, objections, and other matters after asking all parties for their positions. The hearing officer should give a justification for each ruling. The ruling should be stated orally on the record and, if requested, the basis should be given in as brief or as detailed a manner as the circumstances warrant. If an immediate ruling cannot be made, the hearing officer should make the ruling before the close of the hearing.

NOTE: The hearing officer must always rule to exclude from the hearing evidence concerning the showing of interest, unfair labor practice matters, and alleged violations of other statutes. Secs. 11184 and 11228. If a motion to disqualify the hearing officer is made, the hearing officer should make a ruling on such terms as he/she deems appropriate. Sec. 11188.2(b) below discusses rulings that should be referred to the Regional Director.

Review of Hearing Officer Rulings: The parties have an automatic exception to all unfavorable rulings made by the hearing officer. Thus, those rulings are subject to review at such time as the entire record is considered by the Regional Director or the Board, as the case may be. Sec. 102.65(c), Rules and Regulations. Sec. 11203 discusses attempts during the hearing to appeal from rulings by the hearing officer.

11188.2(b) Rulings to be Referred to Regional Director

The hearing officer should refer to the Regional Director all requests for withdrawal of the petition, motions to dismiss the petition, and to transfer the case to the Board, as well as motions for oral argument before the Regional Director or the Board. Such referrals should be made on the record.

11189 Checklist

This Section is intended to describe the outline of a typical hearing. It does not purport to cover all situations nor is the order given necessarily the best in every case. As adapted by the hearing officer in any given case, it or something like it should be used both in the preparation for and during the hearing. A more detailed discussion of many of the matters outlined in this checklist appears above in Secs. 11187–11188 and below in Secs. 11190–11248.

(a) Appearance sheets are filled in by the hearing officer or by the parties. Each person likely to speak is made known to the others, including the reporter. The hearing officer ensures that the parties are ready.

(b) The hearing is called to order. The opening statement is read, including the parties' record statements of appearance. Sec. 11190.1. Representatives who may subsequently speak should be identified on the record.

(c) Formal papers and stipulations should be identified and received (Secs. 11187.2 and 11192), as should prehearing motions and rulings/referrals, where appropriate (Sec. 11141).

(d) Motions for intervention should be called for and, if made, should be ruled on. Sec. 11194.

(e) Correct names of parties should be ascertained. Sec. 11198. Appropriate corrective motions for amendment of the petition, if made, should be ruled on. Secs. 11014 and 11204.

(f) Off the record, possibilities of stipulations not already obtained as to commerce, labor organization, question concerning representation, bargaining history, composition of the bargaining unit, contract bar, seasonality, etc., and any other issues that may not be in serious dispute should be further explored. If attained, factual agreements should be incorporated into stipulations and put on the record; it is unnecessary to receive, as exhibits, copies of correspondence or records if a factual stipulation gives all necessary information. Sec. 11187.2 discusses the care that should be taken with regard to the contents of stipulations and the joinder thereto of parties.

(g) With regard to issues on which stipulations were not obtained, a summary of the off-the-record discussion should be made on the record. This may take the form either of each party summarizing its position on each issue or of the hearing officer's doing so, with recorded acquiescence by the parties.

(h) The order of presentation should be decided off the record. Sec. 11218.

(i) The parties should be required to state their positions on the record as to the matters being heard and the record should be developed to reflect the exact positions of the parties. Sec. 11217. The record should contain facts concerning job duties of employees or employee classifications in dispute to enable the Regional Director or the Board to determine their eligibility and proper unit placement. If there is an issue as to an unusual eligibility date (Sec. 11312.1), all relevant facts and parties' positions should go into the record. The number of employees in each classification should be elicited.

(j) Evidence should be received, either in the form of sworn testimony or stipulations. Secs. 11216–11228. Opportunity for cross-examination should be accorded to the parties. Where appropriate, testimony of a given witness may be interrupted, for purposes of cross-examination, redirect, etc., into segments (e.g., the witness' knowledge as to the status of, say, leadpersons might be thoroughly explored before proceeding to the status of the next job category).

(k) Each party should be permitted to introduce any relevant testimony. Attempts to present irrelevant or cumulative testimony should be rejected. Sec. 11188.1. As appropriate, an offer of proof may be used. Sec. 11226.

(l) The hearing officer should conduct whatever necessary examination has been omitted by the parties. The hearing officer may call witnesses to fill in gaps in the evidence. Sec. 11188.1.

(m) The parties should be asked whether, in the light of the testimony received, they wish to make any changes in their respective positions on the issues.

(n) Oral argument on the record, in lieu of the filing of briefs, should be encouraged for any party desiring it. Sec. 11242.

(o) When the parties have indicated that they have nothing further, the hearing officer should read his/her closing statement and declare the hearing closed. Sec. 11246.1.

11190-11248 CONDUCT OF HEARING

11190-11209 INITIAL ISSUES AT HEARING

11190 Opening of Hearing

Prior to the opening of the hearing, the hearing officer should fill out or have the parties fill out an appearance sheet (Form NLRB-1801) and remind them of the requirement that any request for review be served on each party, as well as on counsel or representative for each party and on the Regional Director.

At this time the parties should also be shown the formal papers prepared for Board Exhibit 1 and given a copy of the index and description of the entire exhibit. Written stipulations that have been prepared in advance (Sec. 11187.2) should be shown to the parties at this time also and the signatures of the parties solicited. The hearing should open at the place, date, and hour scheduled. If there is a deviation that has not been noted by an appropriate order, the change, the reason, and the positions of the parties should be put into the record at an early opportunity.

11190.1 Hearing Officer Opening Statement

On the opening of the hearing, the hearing officer should read into the record the following statement:

> This is a formal hearing in the matter of _____, Case _____, before the National Labor Relations Board. The hearing officer appearing for the National Labor Relations Board is _____.
>
> All parties have been informed of the procedures at formal hearings before the Board by service of Form NLRB-4669 Statement of Standard Procedures with the notice of hearing. I have additional copies of this statement for distribution if

> any party wishes more. Will counsel please state their appearances for the record? For the Petitioner? . . . For the Employer? . . . For the Intervenor? . . .
>
> Are there any other appearances? Let the record show no (further) response.
>
> Are there any other persons, parties, or organizations in the hearing room at this time who claim an interest in this proceeding? . . . Let the record show no (further) response.

During these introductory remarks, the hearing officer should also indicate on the record that a party which plans to order a transcript for purposes of preparing a brief should make arrangements with the reporting service contractor to obtain it on an expedited basis by pick up, delivery, or overnight mail. The hearing officer should also advise the parties that a party's request for an extension of time to file briefs based upon a delay in receipt or nonreceipt of a transcript will normally be denied, in the event such arrangements for expedited delivery were not made by the party.

11192 Introduction of Formal Papers

The formal papers consist of the petition and any amended petitions; the notice of hearing and any amendments thereto; any motions on which prehearing rulings have been made which bear on the issues to be resolved by the hearing (Sec. 11141); and affidavits of service pertaining to any of the above.

In advance of the hearing, the formal papers should have been placed in chronological order from the bottom upward and marked as Board Exhibit 1(a), 1(b), 1(c), etc., the top document, bearing the last number of the series, being an index and description of the formal documents. After the hearing officer has made an opening statement, he/she should say (as example):

> I now propose to receive [instead of offer] the formal papers. They have been marked for identification as Board's Exhibits 1(a) through 1( ), inclusive, Exhibit 1( ) being an index and description of the entire exhibit. This exhibit has already been shown to all parties. Are there any objections?

Objections or lack thereof should be affirmatively placed in the record. Objections may be voiced, but normally they will be withdrawn upon the explanation that the papers in question constitute a routine introduction of the hearing; that admission of the documents does not irrevocably establish the truth of any allegations therein; that any relevant evidence may be introduced irrespective of such allegations; and that, in any event, the Regional Director or the Board will pass on the validity of this and any other evidence.

Written stipulations prepared in advance and obtained from the parties (Secs. 11187.2 and 11190) should next be entered into the record as Board exhibits.

11194 Motions to Intervene

At this point, the hearing officer should affirmatively raise issues involving intervention. In addition to calling attention to any prehearing motions to intervene that may have been referred to the hearing officer, he/she should ask those present whether there are any current motions to intervene. The hearing officer should make certain that the full and precise name of any intervenor is adduced on the record and that the record is clear as to whether the intervenor is the local, the International, or both. Motions to intervene, whether made prior to or at the hearing and whether written or oral, should contain the grounds relied on. Secs. 11194.1–11194.3.

Before ruling on such motions, the hearing officer should ask all other parties for their positions.

11194.1 Based on Existing or Recently Expired Contract

Where the motion is based on an existing or recently expired contract (Sec. 11022.1(b)), a copy of the contract should be put into the record. For purposes of seeking to introduce a contract into evidence, see Sec. 11224.1; the union in question may have all the rights of a party even though the motion to intervene has not yet been ruled on.

11194.2 Based on Evidence of Interest

Where the motion is based on evidence of interest earlier presented to the Regional Office or now presented to the hearing officer, that fact should be noted on the record. The evidence of interest itself *must not* be introduced or received in evidence. Argument on the interest or its adequacy is also not permitted. Secs. 11021 and 11184.

11194.3 Check of Intervenor Showing

Evidence of interest presented by the intervenor at the hearing ordinarily should, but need not always, be checked on the spot. If it appears to be sufficient on its face (Sec. 11194.4), the motion to intervene may be granted "subject to a subsequent check of the sufficiency of interest," and the check may be made at a break or between sessions. Thereafter, the hearing officer should announce a final ruling as to whether the union seeking intervention has demonstrated a showing sufficient to entitle it to intervention, as well as the degree of participation to be permitted. Secs. 11022.3(c) and (d).

The hearing officer's report (Sec. 11250) and the amended report on investigation of interest, Form NLRB-4069, should administratively advise the Regional Director or the Board of the results of the check.

11194.4 Tests for Granting or Denying Intervention

Should the union seeking intervention meet any of the tests described in Secs. 11022, et seq., the motion for intervention should be granted.

Motions to intervene made by employees or employee committees not purporting to be labor organizations should be denied. Motions to intervene made on the basis of interest in the unit by labor organizations representing employees in other parts of the plant, for example, or other plants of the employer, should be granted. Sec. 11023.5. At

some subsequent point, however, such intervenor should be asked to make clear its position as to participation in any election ordered.

A motion to intervene made by an organization that has been ordered disestablished by a final Board order should be denied. Objections to a motion to intervene based on an allegation that the union seeking intervention is illegally dominated or assisted should be rejected, in the absence of a Board order to such effect.

11194.5 Levels of Intervention Permitted

A union must present a cross-petitioner's evidence of interest, i.e., designation by at least 30 percent of the employees in the unit (Sec. 11023.2), in order to take a position or offer evidence with respect to the appropriateness of any substantially different bargaining unit from that sought by the petitioner. However, any party, including a full or a participating intervenor, may introduce evidence as to the *scope* of the unit (i.e., the inclusion or exclusion of a plant, craft, or department) sought by the petitioner, as well as the *composition* of the unit (i.e., the inclusion or exclusion of specific job classifications). Secs. 11023.3 and 11023.4. Although all parties permitted intervention may thereafter participate fully, a *participating* intervenor, i.e., one which has submitted less than a 10-percent showing, may not "block" stipulations entered into by the other parties. Sec. 11023.4.

11198 Correct and Complete Name of Labor Organization

Hearing officers are responsible for establishing on the record the correct and complete name of any labor organization appearing in a representation case hearing. The name of the labor organization should be the same as that set forth in its constitution, bylaws, or other documents; the name should be spelled out—initials are not acceptable; and any affiliation with a national, International, and/or parent federation must be clearly spelled out. The sole exception is that AFL–CIO need not be spelled out.

It is not necessary to introduce copies of constitutions, bylaws, or other documents to establish the correct name of a labor organization. The statement of the representative or of counsel for the organization involved to the effect that the name is the true and correct name should suffice. Whether more evidence is required beyond this is a matter for the hearing officer to determine.

In the event of any reluctance to cooperate on the part of a labor organization or in those cases where a labor organization's refusal to cooperate is deliberately designed to delay a proceeding such as a RM or RD case, the hearing officer should assume the burden of establishing the correct name on the record.

11198.1 Shortened Name Requested

If a request to use a shortened name is made at the hearing, the hearing officer should explain that the Board requires that the correct and complete name appear on the ballot together with any initialed or shortened name. If the request to add a shortened name might confuse the employees, the hearing officer should develop the record fully on

this point and let the Regional Director make the determination in the decision. Secs. 11272 and 11306.3 discuss similar posthearing and nonhearing requests, respectively.

11198.2 Amendment of Petition to Reflect Correct Name

When it is developed on the record that the correct and complete name of a labor organization is different from that appearing on the petition, motion(s) should be made on the record amending the petition to reflect the correct name(s). This will permit the use of the proper name in the case caption in the decision and other papers.

11198.3 Single or Joint Parties

To eliminate the possibility of confusion with respect to single versus joint parties, the hearing officer should ensure that the record clearly indicates that a petitioner or intervenor is single or joint. For example, if a local and an International are jointly appearing as a petitioner or intervenor, the name of the International would appear twice; first, identifying the affiliation of the local, and second, the name of the International appearing for itself.

11203 Attempt to Appeal During Hearing From Ruling by Hearing Officer

During a hearing, a party may not directly appeal rulings made by the hearing officer (Sec. 11188.2(a)), except by special permission of the Regional Director. Rather, the parties have an automatic exception to all unfavorable rulings, thus making them subject to review at such time as the entire record is considered by the Regional Director or the Board, as the case may be, after the close of the hearing. Sec. 102.65(c), Rules and Regulations.

If during a hearing, a party wishes to appeal a hearing officer's ruling, it must file a request for special permission to do so with the Regional Director. Such a request should be made promptly, in writing, with a copy served on the hearing officer and the other parties. The request should succinctly state the ruling, the surrounding circumstances, and the grounds urged for reversal. The hearing officer should not file an opposition to the request.

In the event a party requests an adjournment for the purpose of preparing its request for special permission to appeal a hearing officer's ruling, the hearing officer may grant the adjournment for the minimum length of time required to prepare and transmit the request. The hearing should then be resumed, pending a ruling by the Regional Director on the request. Alternatively, the hearing officer may decline to adjourn the hearing, in which event he/she should instruct the party to prepare and file the request during a break in the hearing.

11204 Amendment to Petition

During the course of the hearing, a petitioner may seek to amend its petition. This should be done by means of a request or motion to amend; a supporting statement should be made by the requestor or moving party. Sec. 11014.

The hearing officer, after soliciting the positions of the other parties and after argument, should grant or deny the request as appropriate. The usual problem is not whether or not the request should be granted: as a practical matter, the initiator of the proceedings should ordinarily be permitted to proceed in his/her direction or in none at all. *Atlantic Richfield Co*., 208 NLRB 142 (1974). The more serious problem caused by the midhearing change is that it may call for a reappraisal of the basis for the hearing and may have an impact upon the rights of the other parties to present their evidence. Although amendments to petitions do not automatically require postponements, the possible consequence may be that other parties may request additional time to prepare their cases. It may be necessary to reexamine the showings of interest as well as the appropriateness of the unit. It is the responsibility of the hearing officer to determine whether these issues are presented and, if so, to solve them by investigation and appropriate recommendations or actions. These determinations by the hearing officer should be guided by the normal considerations of expeditious processing and a full and concise record.

11207 Postponement Requests

A party may request a postponement (continuance, adjournment, or recess) at some point during the hearing. Authority to grant such a request rests with the hearing officer. However, since the parties were advised prior to the hearing that it would continue on consecutive days until completion (Secs. 11008, 11009.2(g), 11082.3, and 11143), such a request should rarely be granted and only under the most compelling circumstances. Therefore, when faced with a postponement request, the hearing officer should grant the request only on a showing of exceptional need. The hearing officer should reconcile two important policies — the prompt processing of R cases under the Act (Secs. 11000 and 11740) and the need for a complete and concise record (Sec. 11188.1). In some cases, a request for a postponement may be withdrawn after the hearing has proceeded in those aspects on which progress is possible.

11207.1 Ground—Lack of Counsel

If the ground given for postponement is the lack of counsel or the recent entry of counsel, the hearing officer should note that all parties were notified of the date of the hearing at the time that the petition was filed, precisely to allow them to make the necessary arrangements, including obtaining counsel, to be prepared for that date. Secs. 11008, 11008.6, 11009.1(a), 11009.2(g), 11082.3, and 11143. For this reason, a postponement due to lack of availability of counsel should ordinarily be unnecessary. Where warranted by extraordinary circumstances, only a minimal continuance should be granted, rarely more than a few days.

11207.2 Ground—To Submit Additional Information

If the ground given is the necessity for time to submit additional, relevant information, the hearing officer should explore every avenue by which the information may be elicited promptly (e.g., stipulation, adjournment to a more convenient place, etc.). If the information is necessary, an adjournment may be avoided by arranging for a

closing of the hearing subject to the later introduction of an exhibit, although this procedure is ordinarily to be avoided. Sec. 11224.6. Delays necessitated by such matters as requests to the Regional Director for special permission to appeal rulings by the hearing officer (Sec. 11203), subpoena enforcement proceedings (Sec. 11214), etc., should be kept to the minimum necessary. If a hearing is adjourned because additional necessary evidence is not immediately available, the hearing officer should make clear to the parties what information is desired for introduction at the resumed hearing.

11208 Adjournment

An adjournment of the hearing should be to a date certain, with provision for the hearing to continue thereafter on consecutive days until completed. With respect to indefinite adjournments in connection with an election agreement, a withdrawal request and subpoena enforcement, see Secs. 11180, 11208, and 11214, respectively.

11209 Withdrawal Request

A withdrawal request submitted to the hearing officer should be referred to the Regional Director (Sec. 11188.2(b)), who will consider it in light of the principles discussed in detail in Sec. 11110.

If it appears that the request will be granted, the hearing should not be opened; if the hearing has already been opened, the request should be made part of the record and the hearing should be adjourned indefinitely, pending the Regional Director's approval. The eventual approval should contain a withdrawal of notice of hearing. The Regional Director retains authority to withdraw a notice of hearing until the close of the hearing. Sec. 11140.

11210–11214 SUBPOENAS

11210 Issuance

The hearing officer should have available a supply of subpoenas, both ad testificandum and duces tecum. Sec. 11186.1(d).

Upon application for subpoena by a party, the hearing officer should enter the case name and number, as well as the date of the hearing and the phrase "or any adjourned or rescheduled date," on the subpoena and deliver the subpoena to the requesting party. Sec. 11(1) of the Act. In the event a large number of subpoenas is provided to a party upon its request, the hearing officer should ensure that:

(a) the requesting party's intention to subpoena a large number of witnesses does not conflict with the need for a concise as well as complete record (Secs. 11181 and 11188.1); and

(b) the scheduling of witnesses necessary to the hearing reasonably accommodates the need of the employer to avoid disruption of its operations.

If a party appears to be engaging in en masse subpoenaing of witnesses as a harassment device, the hearing officer, in addition to considering the factors in (a) and (b) above, should bring this concern to the attention of the Regional Director for provision of appropriate relief. *Rolligon Corp*., 254 NLRB 22 (1981). Sec. 11142.

A subpoena application must be in writing; it need not name the person whose testimony is sought or describe the documents whose production is sought; it may be made during a recess period off the record.

The hearing officer should not *serve* subpoenas on behalf of parties. The hearing officer may, in the interest of making a full record, subpoena witnesses himself/herself. In such cases, the hearing officer should issue and serve subpoenas.

For more extensive discussion of issuance and service of hearing subpoenas, see Secs. 11770–11780.

11212 Petition to Revoke

The hearing officer should rule on a petition to revoke subpoenas that is referred to him/her (Sec. 11142) or that is filed directly with him/her.

For extended discussion of form, service, and validity of a petition to revoke, see Sec. 11782.

With respect to a subpoena ad testificandum, the 5-day period discussed in Sec. 11782 is a maximum, not a minimum. A problem may arise during a hearing when a subpoena duces tecum is returnable less than 5 days from date of service, and thus less than the five 5 allowed for filing a petition to revoke. Sec. 11782.4. Should a continuance for the remainder of the 5-day period be requested, the better procedure, if it is possible, is to discuss the entire matter off the record — the nature of the evidence sought, possible substitutes, the possibilities of stipulation, the grounds for the anticipated petition to revoke, and the prejudice, if any, that would result should the postponement request be denied. Frequently, the situation can be resolved by turning to other matters temporarily, returning to the disputed subpoena afterwards. Usually, the matter can be "worked out" without the necessity for passing on the postponement request. If not, the hearing officer's granting or denial of the request should depend on the prejudice, if any, that would result to any party as a result of that decision.

The subpoenas, petitions to revoke, and rulings are not part of the record, except by specific request of the aggrieved party.

11214 Delay for Enforcement

If the hearing officer is faced with a request for adjournment in order to serve a subpoena or to enforce a subpoena not complied with, he/she must reconcile, as best as possible, the concepts that speed is of the essence in resolving representation questions

and that the Regional Director or the Board should be fully apprised of the facts. The hearing officer should ask the party seeking the delay (and himself/herself, in the event a witness who he/she has called or documents he/she has sought is involved) what the testimony of the witness or production of the documents would add, whether it is necessary and whether there are any satisfactory substitutes. If, after consideration, the hearing officer concludes that the testimony sought is relevant and necessary, he/she should adjourn the hearing.

For a discussion of subpoena enforcement, see Secs. 11790–11806; for a discussion of postponements generally, see Secs. 11143 and 11207.

11216–11228 PRESENTATION OF EVIDENCE

11216 Presentation of Evidence: Generally

Information is introduced into the record as it is in C case hearings, but, unlike those hearings, the rules of evidence prevailing in courts of law and equity are not controlling. However, they should be followed whenever possible. The overwhelming considerations are relevance, completeness, and brevity. Specific items are treated below.

11216.1 Introduction of Material Contained in Regional Office File

Permission and consent under Sec. 102.118, Rules and Regulations are hereby given to Agency personnel by the General Counsel with respect to documents under his/her supervision or control for the use, in R case hearings, of disclosable file material for the purpose of developing a full and complete record, including, where necessary, display of the materials to all parties and their introduction into evidence. Where use of materials is sought by parties other than Board personnel or by anyone in a matter other than a Board hearing, express consent must be sought in accordance with the above-mentioned Sec. 102.118 of the Rules and Regulations.

With respect to subpoenas directed to Board personnel in any proceeding, see Secs. 11820–11828.

11217 Statement of Parties' Positions on Record

Prior to the presentation of evidence or witnesses, parties to the hearing should succinctly state on the record their positions as to the issues to be heard. If a party refuses to state its position on an issue and no controversy exists, the party should be advised that it may be foreclosed from presenting evidence on that issue. *Mariah, Inc*., 322 NLRB 586 (1996); *Bennett Industries*, 313 NLRB 1363 (1994). Further, if the unit sought by petitioner is presumptively appropriate, then only limited evidence may be allowed where a party *takes a position* as to alternative units and such evidence may be

precluded in certain circumstances. *Laurel Associates, Inc.,* 325 NLRB 603 (1998). The party should be offered an opportunity to make an offer of proof. Sec. 11226.

After all such testimony and evidence has been received into the record, the party should state its position again.

11218 Order of Presentation

There is no set order of presentation applicable to all R cases. In most cases, the employer should proceed first, inasmuch as it can provide an overview of its operations that may be helpful to the parties and the hearing officer. This is usually the most efficient way to develop the record. If the parties are unable to agree on the order of presentation, the hearing officer should direct the order of testimony. If necessary, he/she should call and examine witnesses. Sec. 11188.1. Subject to considerations of materiality and cumulativeness, parties should be permitted to reopen their cases to present additional facts. The completeness of the record should not be sacrificed solely to comply with technicalities.

11220 Witnesses

Prior to testifying, each person called as a witness should be sworn in by the hearing officer. The hearing officer should receive from the witness, who is standing with right hand upraised, an affirmative answer to the question: "Do you solemnly swear that the testimony you are about to give shall be the truth, the whole truth and nothing but the truth, so help you God?" (Affirmation may be used where requested.)

Each witness is subject to cross-examination by the other parties. On recall in the course of a case, a witness need not be resworn, but should be asked to signify, on the record, that the witness understands that he/she is still under oath.

The hearing officer should rule on objections to questions, including objections to his/her own questions, as they are raised. Sec. 11188.2. The refusal of a witness at a hearing to answer any question that has been ruled to be proper shall, in the hearing officer's discretion, be ground for striking all testimony previously given by the witness on related matters. All motions to strike, whether on the grounds just stated or on other grounds, must be ruled on by the hearing officer.

11221 Foreign Language Witnesses

In the event foreign language witnesses are required, the Regional Office will secure and pay for interpreter services. Unnecessary expense and delay in this regard should be avoided. *Solar International Shipping Agency,* 327 NLRB 369 (1999). To assist Board agents in their role as hearing officer involving interpreters, please refer to the Guide for Hearing Officers, Foreign Language Witnesses, Section II, D, page 26; OM 06-49, Interpreters at Hearings (Guidelines for Interpreters); and OM 06-75, Non-English Speaking Witnesses in Representation Cases. Specifically, a hearing officer should be

familiar with and provide the interpreter a copy of the Guidelines for Interpreters, addressed in OM 06-49.

11222 Stipulations During Hearing

In addition to the prehearing and early hearing stipulations discussed in Secs. 11187.2 and 11189(c) and (f), the hearing officer should endeavor during the hearing to secure stipulations, wherever possible, in order to narrow the issues and to shorten the record. Sec. 11187.2 discusses the care that should be taken with regard to the contents of stipulations and the joinder thereto of parties.

11222.1 Off the Record Efforts at Stipulations

A suggested method of securing, constructing, and receiving stipulations follows: whenever it appears to the hearing officer that a stipulation could or should be secured, he/she may go off the record to explore the possibilities and assist in fashioning and recording the stipulation. Finally, on the record, the hearing officer should recite the stipulation and receive the verbal acquiescence of all parties.

11224 Exhibits

Documents and records, if relevant, are received in evidence as exhibits. Unlike in a C case hearing, they need not be submitted in duplicate, although such should be encouraged.

11224.1 Identification and Authentication; Voir Dire

A document intended to be introduced into evidence should be marked for identification; for example, Board's Exhibit 2, Petitioner's Exhibits 4(a) and (b), Employer's Exhibit 3, etc. The original should then be handed to the witness through whom it is being offered and, through questions and answers by the party offering the exhibit, should be identified, authenticated, and "connected." It is then offered into evidence. At this point, an objection being made, the authenticity and relevance of the exhibit may be argued.

Voir Dire: If necessary, the parties should be given the opportunity to clarify their positions on the admissibility of an exhibit by asking *voir dire* questions bearing on its admissibility.

11224.2 Relevant Portion Specified

A primary aim of the hearing is to develop a record that is complete and concise. Sec. 11188.1. Exhibits are not admissible unless relevant and material, even though no party objects to their receipt. The burden of making lengthy examinations and analyses of voluminous and unexplained exhibits should not be shifted to the Regional Director. Parties are expected to perform these tasks in preparation for the hearing. Lengthy documents should not be admitted into evidence unless a full description is given and pertinent portions are cited. Before ruling on admissibility, the hearing officer should

request parties to analyze, preferably on the record, any payrolls, cards, statistics, and correspondence offered; often, thereafter, there is no need to admit the documents. With respect to those documents that are admitted, the hearing officer should require parties to specify what they believe to be relevant portions, unless the relevance is obvious.

11224.3 Withdrawal of Original Copy

On motion, the hearing officer may grant leave to an offering party to withdraw its original exhibit and substitute a copy.

11224.4 Rejected

If an exhibit has been refused admission, the offering party may, on request, have it included in the Rejected Exhibits File that becomes part of the record.

11224.5 Custody

On receipt into evidence, the reporter should take custody of exhibits and hold the exhibits during sessions, recesses, and adjournments to a specified date. During periods of indefinite adjournments, the reporter forwards the exhibits to the Regional Office. When/if the hearing is resumed, the exhibits will be returned to the reporter. After the hearing is closed the exhibits are delivered to the Regional Office.

11224.6 Exhibits Outstanding; Provision for Receipt

Having exhibits outstanding at the close of hearing should be avoided to the maximum extent possible, because of the inherent delay involved. Where it advances and is useful to the processing of the case and is unavoidable, the hearing may be adjourned for a minimal period, of no more than 2 to 3 days, which should also be the firm deadline for the submission of the exhibit.

Provision for the exhibit's receipt should be made, by either stipulation or hearing officer's ruling. An exhibit number should be reserved, with adequate provision for inspection and (written) comment by the other parties. Thereafter, the hearing officer should issue an order closing the hearing and setting a due date for briefs. Alternatively, the hearing may be closed, contingent upon receipt of the exhibit, and a date set for submission of briefs.

11225 Motion Made at Hearing

A motion made at the hearing may be either in writing or stated orally on the record. If in writing, an original and two copies should be filed and a copy served on each party. A motion should briefly state the order or relief sought and the grounds for the motion. With regard to hearing officer rulings thereon, see Secs. 11188.2(a) and (b) in general and particularly regarding motions to disqualify the hearing officer, to dismiss, to transfer the case to the Board or for oral argument before the Regional Director or the Board.

11226 Offer of Proof

When the hearing officer rejects proffered testimony or refuses to allow a line of testimony, it may be appropriate to suggest that the party adversely affected make an offer of proof. If after reviewing the offer of proof, the hearing officer continues to reject

the testimony or line of inquiry, a brief record of the rejected material is present in the record for later review.

The offer, in essence, is a statement that, if the named witness were permitted to testify on the matters excluded, he/she would testify to specified facts. The facts should be set forth in detail; an offer in summary form or consisting of conclusions is insufficient.

An offer of proof may take the form of an oral statement on the record, a written statement to be included in the record (copies and service as with motions, Sec. 11225) or in the unusual situation, with permission of the hearing officer, specific questions of and answers by the witness. The latter often lengthens the record unnecessarily and should be avoided.

(For extended discussion of offers of proof, see Sec. 10396.)

11228 Special Admissibility Problems (Jurisdiction; Unfair Labor Practices; Alleged Violations of Other Statutes by Labor Organizations; Election Arrangements; Limitations on Intervenors' Participation in the Hearing)

In addition to the normal considerations bearing on admissibility of evidence — relevance, form, etc. — there are a number of admissibility problems unique to the representation hearing.

Jurisdiction: Jurisdiction is an area where departure from the rules of evidence may be required. In the absence of cooperation from the employer, subpoenas or written requests for information should be issued for the necessary information and ingenuity should be exercised by the hearing officer. *Tropicana Products*, 122 NLRB 121 (1959).

Employee witnesses, or suppliers', or customers' representatives may testify. Since the employer possesses the best evidence, any objections by the employer should be considered in this light. If letters from suppliers and customers are available (but not their representatives who can authenticate them), such letters should be introduced. In such cases, it is well to receive, as "foundation" material, the Region's inquiries to which the letters respond.

Unfair Labor Practices: Evidence of unfair labor practices, as such, is not admissible in a representation hearing. However, evidence may be taken as to the supervisory status of, for example, a RD petitioner or an individual whose eligibility is in issue but who may also be otherwise involved in an unfair labor practice case.

Alleged Violations of Other Statutes by Labor Organizations: Evidence relating to alleged violations of statutes other than the National Labor Relations Act is inadmissible.

Election Arrangements: There is no requirement that parties be permitted to litigate the election arrangements, including election or eligibility dates or whether to provide manual or mail balloting, in a hearing. *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions,* 108 NLRB 1366 (1954). If an election is to be conducted, arrangements as to the type of election may be resolved administratively and the parties will be so notified by letter separate from the decision and direction of election. Secs. 11301.4 and .5.

Limitations on Intervenors' Participation in the Hearing: Secs. 11023.4 and 11194.5 discuss the limitations on the participation of different kinds of intervenors in the hearing, including restrictions upon the unit positions they may take and the evidence they may submit.

11240–11248 CLOSE OF HEARING

11240 Close of Hearing: Generally

The hearing should be closed only after all parties have been asked if they desire to add anything further and the hearing officer is satisfied that the record contains all available information bearing on the issues. Without regard for who last came forward with testimony and whose turn it now is, all parties should be asked, on the record, whether they have anything further to add. If exhibits are outstanding, provision for their receipt should be made. Sec. 11224.6

The hearing officer should inquire of the reporter as to the estimated length of the transcript.

11242 Oral Argument at Hearing

Before the close of the hearing, the hearing officer should encourage the parties to argue orally on the record rather than to file briefs. If oral argument is chosen, there is no specific procedure to be applied. If the parties are unable to agree on the order of presentation of argument, the hearing officer should suggest that the petitioner proceed first, then the other parties; but any party should be allowed to supplement its original presentation. There should be no formal time limits, but the hearing officer should not feel constrained from interrupting if the argument wanders.

11244 Briefs

11244.1 Filing of Briefs

Instructions regarding the time for filing briefs, place for filing, number of copies, etc., are contained in Form NLRB-4669 Statement of Standard Procedures, copies of which were previously provided to the parties with the notice of hearing and which the

hearing officer also offered to the parties in his/her opening remarks. Secs. 11082.2, 11186.1(j) and 11190.1.

11244.2 Request for Extension of Time to File Brief

(This Section relates to requests for extensions directed to the hearing officer prior to the close of the hearing.)

Sec. 102.67 (a) of the Rules and Regulations, provides that parties automatically have 7 days within which to file briefs. In addition, the hearing officer, in his/her discretion, may grant an extension of time not to exceed 14 days, which, added to the automatic 7 days, makes a total of 21 days from close of the hearing.

A request for an extension of time should not be invited by the hearing officer. If requests are made, extensions should ordinarily not be granted, in view of the need for expeditious processing of representation matters. Rather, a request should be granted only for good cause, and should be considered in light of various factors, including:

(a) the reasons offered by the requesting party

(b) the length of the transcript

(c) the complexity of the issues

(d) the date for delivery of the transcript

(e) the length of time the parties have had to prepare since the initiation of the proceeding

(f) previous delays or postponements, if any, granted to the requesting party.

The authority to grant extensions of time to file briefs is discretionary with the hearing officer. If the parties do not show cause, the request should be denied. It is imperative that the hearing officer exercise his/her own judgment, subject only to the above limitations as to the maximum permissible extension. All parties should understand that rulings on requests for extensions made at the hearing are solely within the discretion of the hearing officer.

If the parties object to the hearing officer's ruling, they may still request a further extension from the Regional Director after the hearing.

The ruling and reasons for the extension should be stated in the hearing officer's report for the Regional Director's information in the event of a posthearing request for extension of time.

11246 Closing Statement

11246.1 Hearing Completed

When the hearing has been completed, the hearing officer should state:

If there is nothing further, the hearing will be closed. (This is the time for requests for extensions of time to file briefs not already made. Sec. 11244.2.)

THE HEARING IS NOW CLOSED.

Where the hearing is being closed except for the subsequent receipt of any exhibit — Sec. 11224.6 — the "closing" statement should be appropriately revised.

11246.2 Hearing Adjourned

If the hearing has not been completed but is being adjourned, the hearing officer should state:

If there is nothing further, the hearing will be adjourned (to _____).

11246.3 AC, UC, and UD Petitions

When use of Form NLRB-4669 is appropriate in AC, UC, and UD cases, the hearing officer should follow its procedures. Secs. 11186.1(j), 11190.1, and 11244.1.

11248 Closing Checklist

(a) Be certain reporter has all exhibits.

(b) Get estimate of number of pages of transcript from reporter and complete obligation document; mail or deliver to Regional Office.

(c) Make sure appearance sheet (Form NLRB-1801) is correct and legible.

(d) Fill out Close of R Case Hearing Form NLRB-856 in duplicate and forward the original to Washington with copy of petition or last amended petition attached.

(e) Unless there have been prior arrangements to the contrary, make sure that furniture is rearranged to its original state, windows are closed, lights are out, and doors are locked. Where possible, notify the custodian of the premises that the hearing has closed and convey or have conveyed an appropriate expression of appreciation.

11250-11284 POSTHEARING

11250-11272 PREDECISION MATTERS

11250-11252 HEARING OFFICER REPORT

11250 Hearing Officer Report: Generally

As soon as possible after the close of a hearing, the hearing officer should prepare the hearing officer report (Sec. 11252) and submit the required number of copies to the Regional Director. This report should be submitted not later than 48 hours after close of hearing. This report is not served on the parties (or counsel/representatives of record) Sec. 102.66(f), Rules and Regulations.

The report should be prepared from notes taken at the hearing. The purpose of the report is to give a brief description of the issues presented and of all unusual or important procedural questions. No recommendations may be included. Sec. 101.21(b), Statements of Procedure. A copy of the report on investigation of interest Form NLRB-4069 and any amendment or revision thereof should be attached to the hearing officer's report.

If a RM case presents the *Levitz* issue (Sec. 11042), the document(s) setting forth the employer's objective considerations should be attached to the original hearing officer's report.

Reference to requests to proceed (Sec. 11731.1) should be made in the report and copies of these documents need not be attached.

11252 Format of Hearing Officer Report

The format and contents of the hearing officer's report is within the discretion of the Regional Director. He/she may use a checklist form, a fuller report, or no report at all; except that in cases transferred to the Board (Sec. 11273) a fuller report should be utilized.

Examples of a full report and of a checklist report are included below; the Regional Director should prescribe the Regional Office format, while ensuring that no recommendations are made therein by the hearing officer.

11252.1 Full Report

An example of an outline of a fuller type hearing officer report, such as that used in cases transferred to the Board (Sec. 11273), is as follows:

(a) Pleadings:

1. Petition filed on _____ (date)
2. Hearing on _____ (date) at _____ (place)

3. Parties:

Employer:

Petitioner:

Intervenor:

(b) Issues: If there are no issues state "None." If the issue is jurisdiction, contract bar, schism, expanding unit, etc., the insertion of the word "Jurisdiction," "Contract Bar," "Schism," etc., normally will suffice, since the summary of facts under the appropriate heading will permit ready determination of the issue for purposes of assignment. If, however, the unit is in issue, it does not suffice to merely indicate that the issue is "appropriateness of unit." The unit issue should be stated more informatively such as "severance of electricians from an existing P and M unit," "carving out single-plant unit from multiple unit," "disagreement over inclusion of following categories in P and M unit," "supervisory status of six group leaders," etc. In short, the wording of the unit issue should briefly indicate the nature of the unit problem. This is not the place to state the contentions of the parties respecting the issues; this should be discussed under the appropriate subject heading.

Whenever an issue is raised with respect to any one of the subject headings, give the positions of the parties and a brief summary of the facts as developed at the hearing.

(c) *Procedure*: Were any rulings made as to which the hearing officer is in doubt?

Yes _____ No _____

(If "Yes," describe briefly below.)

List only those rulings on important or unusual questions as to which the hearing officer is in doubt, such as rejections of offers of proof, revocations of subpoenas duces tecum, motions to intervene where showing of interest was not made, etc. It is not usually necessary to list rulings on simple motions to correct names, places, minor amendments of petition, denials of motions to dismiss on grounds of insufficient evidence of interest, or procedural matters clearly governed by Board precedent.

(d) *Labor organizations*: Was status contested?

Yes _____ No _____

(If "Yes," state facts briefly.)

If the parties stipulate or there is uncontested testimony in the record that the unions involved are labor organizations within the meaning of the Act, merely check "No." If such status is contested, however, check "Yes" and briefly state facts including positions of the parties.

(e) *Jurisdiction*: Contested?

Yes _____ No _____

(Briefly state jurisdictional facts.)

If jurisdiction is stipulated, conceded, or not contested, check "No." However, whether or not jurisdiction is stipulated, conceded, or contested, it is necessary to briefly

state or summarize the jurisdictional facts. Where gross volume of business is the sole test for asserting jurisdiction, include commerce data on inflow, outflow, etc., sufficient to establish de minimis statutory jurisdiction.

(f) Questions concerning representation: In issue?

Yes _____ No _____

(If "Yes," state facts.)

If the question concerning representation is not in issue, merely check "No." If the employer merely refused to recognize petitioner until certified by the Board, this does not make the QCR an issue in the sense of this report, so it is not necessary to recite that the petitioner on a given date by letter or telephone claimed recognition and the employer by mail or phone declined or made no reply. Nor is it necessary to recite that no claim was made on the employer prior to the filing of the petition if no real issue is involved. For all cases of this kind, a check of "No" will suffice.

If, however, the QCR is in issue by reason of an alleged contract bar, expanding or contracting unit, schism, etc., give the position of the parties and a brief summary of the facts.

(g) *Appropriate unit*: Is unit stipulated?

Yes _____ No _____

If the unit is fully stipulated, check "Yes" and set forth the unit as stipulated. Where the unit is substantially stipulated but certain classifications or fringe categories are in issue, recite the stipulated unit in the report and give the positions of the parties and a summary of the facts concerning the classifications in dispute. Likewise, if the unit is in issue, give the positions of the parties and a summary of the facts. Always describe the bargaining history, if any.

(h) Other issues or problems:

Yes _____ No _____

(If "Yes," state facts.)

Briefly summarize the facts of other issues or problems, if any, not appropriately covered under the above paragraphs, such as eligibility questions, petitions pending in other Regions, etc.

(i) Name union desires to be designated as: (Secs. 11198 and 11198.1)

(j) Briefs:

1. Will briefs be filed?
2. Was extension of time requested? By whom? Ruling and reason therefor.
3. Briefs due date _____.

(k) Reporter's estimate of transcript pages: (_____ pages)

11252.2 Checklist

An example of a checklist hearing officer's report is on the following pages:

HEARING OFFICER'S REPORT

CASE NAME _____ CASE NO. _____

PETITION FILED _____ HEARING _____ LOCATION _____

PETITIONER _____

INTERVENOR #1 _____

INTERVENOR #2 _____

ISSUES: _____ No _____ Yes

JURISDICTION: _____ No Issue _____ In Issue

PROCEDURAL PROBLEMS:

_____ None _____ Continuance _____ Motions _____ Subpoenas

_____ Service _____ Stipulations _____ Other (Specify) _____

_____

List Motions Referred to RD for Ruling: _____

_____

LABOR ORGANIZATION:

Petitioner: _____ No Issue _____ In Issue

Intervenor #1: _____ No Issue _____ In Issue

Intervenor #2: _____ No Issue _____ In Issue

REPRESENTATION SHOWING: _____ No Issue _____ Issue Raised

QUESTION CONCERNING REPRESENTATION:

_____ No Issue _____ Election Year Bar _____ Certification Year Bar

_____ Expanding/ Contracting Unit _____ Contract Bar

_____ Extent of Organization _____ (Coverage

_____ Accretion to Existing Unit _____ Timeliness

_____ Defunctness _____ Unlawful Clause)

_____ Other (Specify) _____

_____

FORMAT OF HEARING OFFICER REPORT

UNIT SCOPE:

_____ No Issue _____ Single Plant _____ Multi Plant

_____ Multi-Employer _____ Area (District, Regional, National, etc.)

_____ Other (Specify) _____

UNIT SOUGHT

_____ Craft* _____ Multi-Craft* _____ Residual

_____ Departmental* _____ Office Clerical _____ Technical

_____ Guard _____ Plant Clerical _____ Truck Driver

_____ Lithographic _____ P & M _____ Warehouse

_____ Maintenance _____ Professional _____ Other (Specify)

Alternate Unit Positions Taken: _____ Yes _____ No

*If Severance Involved, Check Here _____

CLASSIFICATIONS AND EMPLOYEES IN ISSUE:

_____ Agricultural Laborers

_____ Apprentices

_____ Cafeteria

_____ City Pickup and Delivery Drivers

_____ Confidential

_____ Dispatchers

_____ Employees Allied With Management (Stock-Holders, etc.)

_____ Employees on Leave of Absence

_____ Independent Contractors

_____ Leadmen (Working Foremen)

_____ Laboratory

_____ Managerial

_____ Office Clericals

_____ Over-the-Road Truck Drivers

_____ Plant Clericals

_____ Part-Time or Temporary Super-Visory employees

_____ Plant Protection

_____ Professionals

_____ Quality Control Inspectors

_____ Relatives of Management

_____ Salesmen (Inside, Outside, Route)

_____ Supervisors

_____ Technicals

_____ Timekeepers

_____ Trainees

_____ Warehouse

_____ Workers Perform-ing Dual Functions

_____ Other (Specify) _____

ELIGIBILITY:

_____ Casual Employees	_____ Replaced Economic Strikers	_____ Students
_____ Probationary Employees	_____ Replacements for Economic Strikers	_____ Temporary Employees
_____ Regular Part-time Employees	_____ Seasonal Employees	_____ Temporarily Laid-Off Employees

_____ Other (Specify) _____

BRIEFS DUE _____ EXTENSIONS REQUESTED BY _____

RULING AND REASON THEREFOR _____

_____

ESTIMATED TRANSCRIPT PAGES _____ DELIVERY _____ DAYS _____

CONCURRENT C CASE _____ Yes _____ No REQUEST TO PROCEED: _____ Yes ____ No

_____ Date

_____ Hearing Officer

Attachment: Form NLRB-4069

11258-11272 OTHER PREDECISION MATTERS

11258 Correcting Transcript

Any necessary corrections in the transcript should be made by stipulation or by motion (this is the order of preference) inserted in the record if the hearing is still in session or submitted to the Regional Director if the hearing has closed.

The purpose of correcting the transcript, however, is not to correct mistakes made at the hearing, but to ensure that the testimony of witnesses and the statements of the parties and the hearing officer are accurately reflected in all material respects.

11262 Motion

A motion filed after the close of the hearing by any party should be filed directly with the Regional Director and should briefly state the order of relief sought and the grounds therefor. A copy of each motion should be served immediately on each of the other parties.

11264 Answers to Motions

Any party may file a response or opposition to a motion. These answers should be promptly filed, the form and service being the same as those applicable to motions.

11268 Withdrawal Request

See Sec. 11112 for the procedure to be followed if a withdrawal request is filed after the close of hearing.

11272 Request for Use of Shortened Name

If a labor organization makes a posthearing request to use a shortened name on the ballot, in addition to its full and correct name and that request occurs in a factual situation that might confuse the employees, the labor organization should be advised to make its request to the Regional Director in the form of a regular motion (Sec. 11262). Secs. 11198.1 and 11306.3 discusses similar hearing and non-hearing requests, respectively.

The Regional Director will then decide whether to grant the motion, remand the case for additional evidence or take other action.

11273-11284 DECISION

11273-11275 REGIONAL DIRECTOR DECISION

11273 Regional Director Decision: Generally

The Regional Director may transfer a case to the Board for decision pursuant to Sec. 102.67(h) of the Rules and Regulations. Ordinarily, however, the Regional Director should decide a case, rather than transfer it to the Board, even in cases of first impression or involving novel issues. A Regional Director's decision in such a case provides the Board with the benefit of the Regional Director's analysis of the questions raised. Further, when the Regional Director issues a decision, the parties will be better informed as to the questions presented by the matter. As a result, the issues that remain in dispute for the parties' requests for review may be reduced and the remaining issues may be presented more clearly to the Board.

If a Regional Director concludes that a case may be suitable for transfer to the Board for decision, he/she should consult with the Executive Secretary before doing so.

11273.1 Contents of Regional Directors Decision

All Regional Director's decisions should include the following:

(a) a brief description of the nature of the employer's business

(b) the number of employees in the appropriate unit or units involved

(c) the approximate number of employees in any disputed categories

(d) if an election is directed, the requirement that the employer must post an official notice of election for 3 full working days prior to the date of the election (Sec. 11314.7(a); Sec. 103.20, Rules and Regulations)

(e) if an election is directed, the eligibility list requirement (Sec. 11312)

(f) the date by which a request for review must be received by the Board in Washington, D.C.

11273.2 Direction of Election

If the decision contains a direction of election, efforts to arrange election details should be initiated immediately. Secs. 11300–11350. If an enlarged unit is found, these arrangements are contingent upon an adequate showing of interest. Sec. 11031. Election arrangements should be made, if feasible, by telephone or correspondence, i.e., without an in-person joint conference. If an in-person joint conference is to be held, it should take place in the Regional Office. In a directed election, as contrasted with an election by agreement, there is a degree of discretion reposed with the Regional Director, which serves to eliminate the need for a face-to-face resolution of each detail. Sec. 11300. Telephone contacts, followed by a confirming letter comprehensively setting forth

arrangements, should serve to finalize arrangements. The Election Order Sheet Form NLRB-700 may be used as a checklist of election arrangements.

11274 Request for Review of Regional Director Decision

If the parties to a case have previously voluntarily agreed to the full consent election agreement procedure through execution of Form NLRB-5509, they have waived their rights to file a request for review of the Regional Director's decision to the Board.

The filing of a request for review shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the Regional Director, including the direction or conduct of an election, except that the Regional Director, in the absence of a waiver, may not open and count any ballots that may be challenged until the Board has ruled on any request for review that may be filed. Nor will the granting of review stay the Regional Director's decision or the directed election unless ordered by the Board.

NOTE: If the Board has not ruled upon or has granted a request for review, it will be necessary to impound all of the ballots. Also, it may be necessary to challenge/segregate the ballots of certain voters before impounding as the validity of such ballots might be affected by a final Board determination. Secs. 11280.3, 11302.1(a), 11338.1, 11338.2(b), and 11338.8; Sec. 102.67(b), Rules and Regulations.

When a request for review has been filed with the Board, the Office of Representation Appeals should be advised by electronic mail of the date of the election (Sec. 11302.1) as soon as it has been set.

The Regional Director may decide to treat a request for review filed with the Board as a motion for reconsideration of his/her decision. Sec. 102.65(e)(1), Rules and Regulations. In such cases the Regional Director should promptly advise the Office of Representation Appeals and the Executive Secretary that he/she is reconsidering the matter and may reopen the record or issue a second decision. The parties should also be similarly advised as soon as possible.

If the Board has granted review, the Regional Director lacks jurisdiction to reopen the record or to vacate the decision. *North Jersey Newspapers Co.,* 322 NLRB 394 (1996).

Whenever the validity of a showing of interest (or the sufficiency of the objective considerations in a RM case) is raised in a request for review of a Regional Director's decision, the Office of Representation Appeals should be advised of all the circumstances.

11275 Transmission of Regional Director Decision to Washington

The decision should be forwarded to Washington by electronic submission pursuant to Memoranda OM 99-7, OM 04-39 and 06-69. All Regional Director decisions and direction of election, decisions and orders, or postelection R case decisions should be

posted to the D&DE Mailbox in Word copy (.doc), Adobe copy (.pdf) and Web copy (.html).

11280–11284 BOARD DECISION

11280 Board Decision: Generally

On issuance of a Decision by the Board, responsibility for action, if any, reverts to the Region without further notice.

11280.1 Dismissal

If the petition is dismissed, only the clerical steps involved in closing the case records need be performed. Regional Office notification to the parties is not necessary.

11280.2 Remand

On remand by the Board, an appropriate notice of hearing on remand should be issued. The hearing on remand should be conducted within the bounds set by the order of remand; otherwise, it should be conducted in the same fashion as original representation hearings.

11280.3 Direction of Election

If the decision contains a direction of election, efforts to arrange election details should be initiated immediately. Secs. 11300–11350. If the Board has not ruled upon or has granted a request for review, it will be necessary to impound all of the ballots. Also, it may be necessary to challenge/segregate the ballots of certain voters before impounding as the validity of such ballots might be affected by a final Board determination. Secs. 11280.3, 11302.1(a), 11338.1, 11338.2(b), and 11338.8; Sec. 102.67(b), Rules and Regulations. Arrangements should be made to distinguish such voters on the eligibility list used at the election.

Election arrangements should be made, if feasible, by telephone or correspondence, i.e., without an in-person joint conference. If an in-person joint conference is to be held, it should take place in the Regional Office. In a directed election, as contrasted with an election by agreement, there is a degree of discretion reposed with the Regional Director, which serves to eliminate the need for a face-to-face resolution of each detail. Sec. 11300. Telephone contacts, followed by a confirming letter comprehensively setting forth arrangements, should serve to finalize arrangements. The Election Order Sheet Form NLRB-700 may be used as a checklist of election arrangements.

11282 Motion for Reconsideration of Board Decision

Neither the filing of a motion for reconsideration of a Board Decision and Direction of Election nor the announced intention of filing such a motion should cause a delay in making election arrangements. The Office of Representation Appeals should be

advised by electronic mail of the date of election as soon as it has been set if a motion for reconsideration has been or is to be filed with the Board regarding its Decision.

11284 Extension of Time for Holding Election

Although it is anticipated that a Board-directed election will be held within the time provided in the direction, there are situations when additional time may be necessary. Examples of reasons would include: unusual delay from close of hearing to direction of election; concurrent charges filed (Secs. 11730–11734); employer's slack or closedown period; necessity for prolonged election, etc.

The Regional Director should decide whether it is necessary to provide additional time, after considering the positions of the parties.

11300-11350 ELECTIONS

11300-11301 PRELIMINARY CONSIDERATIONS

11300 Elections: 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 1143 (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 33 (1998); *San Diego Gas & Electric*, 325 NLRB 1143 (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 or has granted review before the election, the Regional Director should proceed to conduct the election, segregating the ballots that might be affected by a final Board determination, and then impounding all 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 248 (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 1143 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 835 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 that 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 and 6 Form NLRB-722SP (Spanish)

(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 704 (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. One 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 and NLRB-722SP (Spanish) 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.,* 314 NLRB 245 (1994). An alleged discriminatee is eligible to serve as an observer. A union official should not serve as an observer unless he/she is also an employee of the employer. However, the Board has specifically ruled that nonemployee union officials cannot serve as election observers in decertification proceedings. See *Butera Finer Foods*, 334 NLRB 43 (2001).

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 observors 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. However, the list should not be provided to the parties prior to the Region's approval of an election agreement or its issuance of a decision directing an election, absent written authorization by the Employer. 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 transmitted 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 and Rescheduled Election

Generally, the employer will not be required to furnish a second list of names and addresses in runoff and rescheduled elections (Secs. 11350 and 11351). 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

a. Once the list is received by all parties and prior to the pre-election conference, 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 pre-election conference. Sec. 11318.

b. At the pre-election conference 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. Changes to the list at this time should not be permitted unless agreed to and initialed by all parties. Finally, the original list—each page—should be initialed as "inspected". If time allows, an agreement as to eligibility should be reduced to writing and provide that the resolution is final and binding. The agreement must not be in contravention of the Act or established Board policy. Where statutory issues are involved, e.g., supervisors, the agreement should include the necessary facts as to the Sec. 2(11) authority or lack thereof of the individuals involved. See also Sec. 11084.4 concerning Norris-Thermador agreements. After inspection, the Board agent is to retain custody of the original eligibility list for use in the election.

c. Observers may bring to the election lists of employees they intend to challenge; alternatively, the parties may note on the eligibility list, at the pre-

election 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*, 180 F.3d 633 (5th Cir. 1999) .

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.

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 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(a) 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, do not report to a physicial facility to view the posted notice, or where the employer does not control the facility to allow for the physical posting. Please note that mailing the notice to eligible voters may not fulfill the posting requirement as the requirement is not fulfilled by alternative means of compliance. Mailing notices to eligible voters does not eliminate a Regional Office's responsibility to timely furnish an employer with election notices or the employer's obligation to timely post such notices. See *Terrace Gardens Plaza, Inc.,* 313 NLRB 571, 572 (1993).

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, Canceled, or Rescheduled Elections

In the event a scheduled election is postponed or canceled after the notice of election has been posted, the parties should be immediately advised. In the event that the Regional Office or the Board is responsible for the failure to conduct a scheduled election after the notice of election has been posted, the Regional Office should contact all the parties to the election immediately upon notification that the election will not be held. Thereafter, written notification should be provided in an expeditious manner, such as by facsimile transmission or electronic mail. The employer should be requested to post the Regional Office's written notification next to the notice of election previously posted. Such written notification should be consistent with the foreign language requirement of the original notice of election, if any.

The Regional Director may unilaterally set the date of a rescheduled or canceled election. *Superior of Missouri, Inc*., 327 NLRB 248 (1998); Secs. 11084.3 and 11302.1(b).

See Sec. 11351 concerning changes that should be made in the notice of election when rescheduled elections are being conducted. *Builders Insulation, Inc.*, 338 NLRB 793 (2003).

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'' newcoming 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 and, when appropriate, NLRB 722SP (Spanish) 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. However, an exception to this rule is elections conducted under the provisos of *Norris-Thermador Corp.*, 119 NLRB 1301 (1958), where the parties definitely resolve issues of eligibility by constructing a list of eligible voters. In this circumstance, Regions may continue to accept stipulations to close the polls early if the parties stipulate that all eligible voters on the *Norris-Thermador* list have voted. See OM 03-103.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 315 (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

_____

_____

_____

_____

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) appropriate circumstances are present (Sec. 11335.2) involving "scattered" or geographically distant employees;

(b) employees are involved in a strike, lockout or picketing. Sec. 11301.2;

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

(d) a significant number of employees cannot vote in person because of an assignment that makes it impossible or impractical for them to be present at the polls.

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

11335.2 Determination

A mixed manual-mail election should be limited to situations where the group of employees which will vote manually and the group which will vote by mail are clearly distinguishable by classifications or work locations and can be easily identified by the

parties. One example is where a large number of employees work at a central facility but the remainder are "scattered" in distant locations. In this situation having a partial mail ballot for the employees at the scattered locations conserves agency resources, while the bulk of employees at the main facility benefit from a manual vote, which remains the Board's standard voting procedure. Other circumstances that are appropriate for a mixed manual-mail ballot election include nonworking seasonal employees included in the unit, and striking or locked out employees who may have difficulty participating in the election at the facility.

A partial mail ballot should generally not be considered where all the voters normally work at or report to one location. Varied work schedules, or duties away from the facility are best accommodated by extended voting hours, including conducting the election over a 2-day period.

The election agreement should specify which portion of the unit will vote by mail and which portion through a manual 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: With regard to the mail ballots, timely notification should be sent to the parties as described in Sec. 11336.2(b).

One critical issue in a mixed manual/mail election is when to send out the mail ballots. Mail ballots can be mailed out early enough so that they will be returned by the date of the manual election which would allow all the ballots to be comingled and counted immediately after the manual election. However, parties may object to this sequence as they may be restricted in their ability to campaign under the *Peerless Plywood* rule once the mail ballots are issued. See *Shop Rite Foods, Inc.,* 195 NLRB 133 (1972). Further, allowing some employees to receive their ballots before the manual election can lead to complications such as employees bringing their ballot to the manual voting site which could result in suspicions of "chain voting." Accordingly, the preferred method is to mail out the ballots on the day of the manual election, and to impound the manual ballots pending the return of the mail ballots. Secs. 11314.2 and 11336.3. In either circumstance all ballots should be counted together. 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. Notices should specify which portion of the unit will vote by mail and which portion through a manual election. Sec. 11335.2.

11336 MAIL BALLOT ELECTION

11336 Mail Ballot Election: 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. Please note that mailing the notice to eligible voters may not fulfill the posting requirement as the requirement is not fulfilled by

alternative means of compliance. Mailing notices to eligible voters does not eliminate a Regional Office's responsibility to timely furnish an employer with election notices or the employer's obligation to timely post such notices. See *Terrace Gardens Plaza, Inc.*, 313 NLRB 571, 572 (1993).

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).

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 of 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 Thompson Roofing, Inc*., 291 NLRB 742 (1988). With regard to a question about whether a name on an envelope is printed, should there be no agreement among the parties and if the Board agent determines that the name is printed, the Board agent should declare the ballot as void. However, a party may contest the Board agent's determination and if that occurs the Board agent should treat the ballot as a challenged ballot.

11338 CHALLENGED BALLOTS

11338 Challenged Ballots: 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 will be necessary to impound the ballots. Also, it may be necessary to challenge and/or to segregate the ballots of certain voters before impounding. Secs. 11274, 11280.3, 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 precount 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. *Osram Sylvania, Inc*., 325 NLRB 758 (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 _____ .....
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 _____

SAMPLE

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 _____

☆U.S.G.P.O.: 1994 - 384-162

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 secured and preserved in a physical folder that is labeled with the case name and number. Copies of the front of each challenged or voided ballot envelope should be uploaded into the electronic case 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 electronic case file. The envelope(s) must then be stored in the office safe.

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 electronic representation case file.

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 with the seal unbroken, they are to be preserved inside a folder. The ballots are to be maintained in a folder, labeled with the case name and number, and not to be destroyed until or unless the case file is destroyed pursuant to Agency and GSA regulations. A memorandum should be placed in the electronic case file noting that the ballots were removed from the safe and retained in a folder. 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 1126 (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.

11351 RESCHEDULED ELECTIONS

11351 Rescheduled Elections

When an election is not conducted as originally scheduled, the rescheduled election should be conducted, when appropriate, in an expedited manner, but not less than three days after the original election date. When selecting the date for the rescheduled election, the Regional Director has the authority to set the date for the election, but the agreement of the parties and minimum delay between the original election date and the direction of the rescheduled election should be taken into consideration. See *Superior of Missouri, Inc.,* 327 NLRB 248 (1998).

The hours, location and general conditions of the rescheduled election may be set in accord with the principles applied to the originally scheduled election.

11351.1 Notice of Election for Rescheduled Elections

In accordance with the Board's decision in *Builders Insulation, Inc.,* 338 NLRB 793 (2003), when the originally scheduled election did not occur through no fault of the parties, the standard notice of election shall be modified to include a statement that the election is being rescheduled for administrative reasons beyond the control of the employer or the union (or the petitioner as appropriate.)

11351.1(a) Pattern Statement to be Included in Notice of Election

NOTICE TO ALL VOTERS

> The election scheduled for _____ (date) has been rescheduled for administrative reasons beyond the control of the (Employer, Petitioner, or the Union, as the circumstances dictate). Therefore, a new election will be held in accordance with the terms of this notice of election.

11351.2 Voting Procedures

The voting procedures of a rescheduled election are the same as those of an original election.

11351.3 Objections

Objections to a rescheduled election are due within 7 days after the tally of ballots of the rescheduled election has been made available to the parties. Section 102.69(a), Rules and Regulations.

11360-11438 POSTELECTION CHALLENGES AND OBJECTIONS

Postelection situations in which challenges and/or objections and related unfair labor practice charges are being processed are discussed in Secs. 11407 and 11420.1.

11360–11367 RESOLUTION OF DETERMINATIVE CHALLENGES

11360-11363 INITIAL CONSIDERATIONS

11360 Challenges

11360.1 Context

Conducting an election is the decisive point in the processing of a representation case. By the time employees vote in an election, the issues necessary to scheduling the election have been resolved and the employees, the parties, and the Agency have expended significant energy and resources. In some cases, however, certification of the employees' choice in the election is delayed by challenges and/or objections. In this context, the prompt resolution of challenges and/or objections should be given priority attention.

11360.2 Treatment

The postelection portion of the Manual contains Sections first on challenges, 11360 through 11367, and then on objections, 11390 through 11397. Although the different Sections on challenges and objections parallel each other in certain respects, they are treated separately, since either challenges or objections may arise without the other. Notwithstanding this separate treatment, it should be recognized that when both challenges and objections are involved in the same case, they should be regarded as two aspects of one overall matter.

11360.3 Processing of Challenges With Objections

If challenges and objections arise in the same matter, they ordinarily will be processed simultaneously. However, under appropriate circumstances they may be treated separately. For example, the resolution of some or all challenges may make moot the objections of one party. Clearly meritorious cross-objections or objections based on third-party or Board agent conduct may indicate that the election will be set aside regardless of the outcome of determinative challenges, making the challenges moot. Thus, if it appears that the overall more expeditious resolution of the entire matter would result from holding objections in abeyance, while challenges are being processed, or the reverse, that is the course that should be followed.

11361 Methods of Resolution

11361.1 Administrative Investigation or Hearing

Under Section 102.69(d) of the Rules and Regulations, a Regional Director is authorized to process challenges through either an administrative investigation or a hearing. Thus, at the outset of the processing of challenges, the Regional Director should give consideration to the choice between an administrative investigation (Sec. 11364) and a hearing (Sec. 11365). Also to be considered is whether a portion of the challenges may be suitable for processing by administrative investigation and the balance, simultaneously, by hearing.

The foremost consideration in making these determinations is expeditious processing through all levels of the Agency's deliberations. Although the process of scheduling and holding a hearing and thereafter preparing a hearing officer's report may be time consuming, an administrative investigation may also involve complex scheduling of numerous witnesses and the review of extensive evidence. Further, a hearing may ultimately be necessary even after the administrative investigation has been conducted. Sec. 11365.1. These factors should be carefully reviewed at the outset to determine whether to follow the administrative investigation route, the hearing route, or a combination of both, with the goal of obtaining the most expeditious overall resolution of the matter.

Also see Sec. 11367, Bifurcated Proceedings, for a discussion of related considerations that may arise during processing.

11361.2 Voluntary Resolution

Possibilities of voluntary adjustment may arise while challenges are being processed.

A challenger may wish to withdraw a challenge. The Regional Director may approve such withdrawal, notwithstanding the objection of any other party. *Fred Wilkinson Associates,* 297 NLRB 737 fn. 2 (1990). The Regional Director should thereafter open and count the challenged ballots at an announced time and place and issue a revised tally.

The party/ies other than the challenging party may wish to agree to the ineligibility of a challenged voter. Written agreement of the other party/ies to such disposition should be secured. It is not necessary to state the basis thereof in the agreement; merely the result is sufficient. Written agreement of the challenging party is not required. In the agreement, the party/ies other than the challenger should waive its/their rights under the Board's Rules to a Regional Director's report or supplemental decision, to file exceptions to a Regional Director's report or a request for review of a supplemental decision and to any right to a hearing in the matter or to a Board decision. The agreement should provide that upon its approval by the Regional Director, he/she may proceed to issue a revised tally and when appropriate a certification.

The Regional Director should not approve any withdrawal or agreement which is clearly contrary to the facts independently known by the Regional Office.

11361.3 Partial Resolution of Challenges

In addition to voluntary resolutions, there may be other circumstances in which a sufficient number of challenges may be readily resolvable, thereby making it unnecessary to resolve the remainder. For example, challenged ballots of late arriving employees (Sec. 11324.1) or "not on the list" challenged ballots (Sec. 11338.2(b)) may be more easily resolved than other challenges made by the parties; the readily resolvable challenges may be of sufficient number to render other challenges nondeterminative. The tally of ballots and the list of challenges should be carefully examined at the beginning of processing to discover if any such partial resolutions are possible.

11361.4 Opening Challenged Ballots Prior to Resolution

If challenged voters are also alleged discriminatees in an unfair labor practice case, then under the following circumstances challenged ballots may be opened and counted prior to a determination of the voters' eligibility: the voters have clearly waived their right to secrecy and requested that their ballots be opened; and the tally of ballots reveals that, if some or all of the challenged ballots have been cast for the union, the union will receive a majority regardless of how the challenges are ultimately determined. *Ladies Garment Workers Union*, 137 NLRB 1681 (1962).

11362 Initial Consideration of Challenges

11362.1 Generally

To warrant consideration, challenges to voters must have been made before the questioned ballots were dropped into the ballot box. Sec. 11338.3. Furthermore, challenges must have been sufficient in number to affect the results of the election. Sec. 11340.8.

The merits of postelection challenges, whether filed as such or in the guise of objections, should not be considered. Sec. 11392.5.

11362.2 Nature and Scope of Processing

The processing of challenges is nonadversarial, insofar as the Agency is concerned, since it is part of the resolution of a representation question. The role of the Board agent is completely nonpartisan; he/she is responsible for bringing to the Regional Director all the available facts.

Although the challenging party has the initial burden of supporting its challenges, thereafter the Regional Director must be independently satisfied that all the available facts have been obtained. A party may raise and litigate an alternative ground for properly challenged ballot during the administrative investigation or the hearing. *Anchor-Harvey Components*, *LLC,* 352 NLRB 1219 (2008).

In the reconciliation of these principles (to the extent that they may appear to conflict), the Board agent must place the primary burden of sustaining their contentions on the parties themselves, directing his/her efforts toward "filling in" the picture.

In situations in which the Board in its ruling on a request for review has directed that challenges be made at the election, and these challenges are among the determinative challenges under consideration, express consideration should be given during processing of these challenges to the contentions made in the request for review of the Regional Director's Decision and Direction of Election.

11363 Procedures Applicable to Challenges

Initial procedures are the same whether for a consent, stipulated or directed election.

Consideration of challenges should be initiated while awaiting the expiration of the period for filing objections. Within a few days of receipt of the evidence and/or statements of position submitted with respect to the challenges, a determination should be made as to whether a hearing or an investigation is appropriate. Sec. 11361.1. Objections, if any, and evidence regarding such should also be considered during this determination. Potential ways in which the issues could be resolved should be discussed. For example, the resolution of certain challenges either by agreement or otherwise may eliminate the need to resolve others (Sec. 11361.3) and/or render objections moot (Sec. 11360.3). All such avenues should be thoroughly explored.

Where these initial efforts to resolve the issues are not successful and the parties' submissions appear on their face to raise substantial and material factual or legal issues requiring a hearing (Sec. 11365.1), no further investigation should be conducted and a notice of hearing should issue as expeditiously as possible setting the challenges for hearing. Sec. 11365.2.

11364 Administrative Investigation

11364 Administrative Investigation: Generally

As described in Sec. 11361.1, the Regional Director must decide at the outset whether to resolve challenges by administrative investigation, by hearing, or by a combination of both. Sec. 11365 discusses the hearing route. This Section discusses the administrative investigation route.

11364.1 Investigation Methods

All challenges ordinarily should be investigated. However, under appropriate circumstances some may be left unresolved if it appears that the resolution of some of the challenges will render unnecessary the resolution of the rest. Sec. 11361.3.

The position of each party on each challenge, the supporting arguments and precedents, suggestions for avenues of exploration and names of witnesses should be

secured in writing. The party making the challenge should be charged with the responsibility of offering full cooperation and whatever evidence is in its possession. Its failure to produce any evidence may cause the Regional Director to decide the matter based on the evidence already available. Sec. 11362.2.

Witnesses should be interviewed and, if applicable, records should be examined. Interviews should be reduced to affidavit form, if possible, and the results of record examination and other lines of investigation should be recorded for the file.

Requests by a party that counsel or a representative be present during the interview of witnesses whose statements or actions would bind the party should be handled in accordance with the procedures employed in unfair labor practice investigations. Sec. 10056.1. See Sec. 10056.6 for procedures to be used in interviewing current or former agents or supervisors of a party. Witness requests for counsel or other representative should be treated in accordance with Sec 10056.2.

11364.2 Conclusion of Investigation; Informing Parties

At the conclusion of the investigation, the Regional Director should issue either a report or a supplemental decision. Sec. 11364.4 discusses the circumstances that prescribe which document should issue.

Where objections have also been the subject of investigation, the report or supplemental decision on challenges should normally be combined with that on objections.

Informing Parties: Prior to the issuance of a report or supplemental decision, the parties may be informed of the conclusions reached in order to facilitate voluntary resolution of the challenges either by withdrawal or by stipulation. Sec. 11361.2.

11364.3 Evidence to Support Report or Supplemental Decision

The report or supplemental decision should be supported by affidavits, memoranda or correspondence in the files. The evidence on which the Regional Director has based his/her findings should be fully set forth. Statements of witnesses may be quoted freely, although their names should not be revealed. Except in unusual cases, affidavits of witnesses should not be appended. If an affidavit is appended, it should be redacted to the maximum extent possible to protect the anonymity of the witness.

The report or supplemental decision should be as specific and complete as to facts and conclusions as possible, thereby eliciting a more precise set of exceptions or request for review. The report or supplemental decision should set forth the facts and the rationale; this will also minimize the argument that a party was not given a full opportunity to know and address the issues. Further, a specific, comprehensive report or supplemental decision presents all the facts to the Board and provides a basis for its decision.

The Regional Director should clearly set forth in the report or supplemental decision the objective factors demonstrating that the challenges should be resolved in the manner described. Where the Regional Director, having obtained the facts alleged by the parties, concludes that there are no disputed facts or that as a matter of law the challenges

can be determined without the need to resolve disputed facts, a report or supplemental decision should issue and no hearing is required. Also, where the Regional Director determines that challenges can be resolved solely on the basis of organizational charts, job descriptions, etc., or other documents, no hearing is necessary where the finding rests on the face of the documents without regard to any surrounding circumstances. Credibility resolutions should be made where possible, i.e., if credibility conflicts can be resolved on the basis of objective factors, the Regional Director should do so and a hearing is not required. The basis for the resolution should be set forth. But if there are factual contradictions raising substantial and material issues that could best be resolved by a hearing, the Regional Director should so proceed. Sec. 11365.1.

11364.4 Type of Document Issued

The document issued at the conclusion of the investigation is determined by the type of election that was conducted, i.e., whether the election was after a consent election agreement, after a stipulated election agreement or after a decision and direction of election by the Regional Director or by the Board.

Consent Election Agreement or Full Consent Election Agreement: A report is used where the election was held pursuant to either of these agreements. See Rules and Regulation Sec. 102.62(a) for guidance relating to consent election agreement or Sec. 102.62(c) for guidance relating to a full consent election agreement. The report issued under either option should contain the Regional Director's determination, which is final.

Stipulated Election Agreement: A report is used where the election was held pursuant to a stipulated election agreement. Secs. 102.69(c)(2) and (4), Rules and Regulations. The report should contain the Regional Director's recommendations to the Board.

Directed Election: Either a report or a supplemental decision is used where the election was directed, whether by the Regional Director or the Board. Secs. 102.69(c)(3) and (4), Rules and Regulations. The report may be used where the Regional Director prefers to transfer the case to the Board for decision; if a report is issued, it should contain the Regional Director's recommendations to the Board. If a supplemental decision is issued, it should contain the Regional Director's determination, which is final unless the Board grants a request for review submitted by a party.

11364.5 Contents of Report or Supplemental Decision

Introduction: The opening paragraphs should contain the following:

(a) basis for the election (consent, stipulated, Regional Director, or Board directed) and description of the unit
(b) date of the election
(c) tally of ballots
(d) recitation of all other post election documents that have issued in the case
(e) issues (e.g., the eligibility status of named individuals) and the reason for each challenge, including in the case of a determinative Board directed challenge, the reason advanced by the party for requesting review of the ruling that resulted in such Board directed challenge.

Case-Treatment Section: The case-treatment section should give, by individual or category, the positions of the parties and the facts found. Names of employee witnesses should not be included, but the evidence provided should be fully described. Sec. 11364.3.

Summary of Conclusions: The factual and legal conclusions with respect to the status of individuals or categories may be set forth at the close of each "Case-Treatment" section, but they should nevertheless reappear in the "Summary of Conclusions'' section. In this section, the Regional Director should set forth the final determinations (consent election agreement), the recommendations (stipulated election agreement or directed election), or the determinations (directed election), which should be as follows:

(a) that [named] employees are eligible to vote and that the challenges to their ballots are [should be] overruled
(b) that [named] employees are not eligible to vote and that the challenges to their ballots are [should be] sustained
(c) (if necessary) that a hearing will [should] be held with respect to [named] challenges
(d) (if necessary) that the remaining [named] unresolved challenges are not determinative and need not be resolved and that no final determination is being made with respect to these challenges. (If appropriate, a certification should also reflect this lack of determination. Sec. 11474.)

The determinations or recommendations should account for all challenges.

Attachments: Copies of pertinent documents referred to in the report or supplemental decision, such as organizational charts, job descriptions, etc., may be attached to and made a part of the report or supplemental decision.

Right to File Exceptions or Request for Review: A report pursuant to a consent election or full consent election agreement agreement is final; there is no right of appeal. A report pursuant to a stipulated election agreement or a directed election should include a statement of the right to file exceptions. A supplemental decision should include a statement of the right to request review. The time by which such exceptions or request for review must be received by the Board in Washington, D.C. (14 days) should be stated. A statement should be included concerning the composition of the record. Accordingly, use the following patterns:

(a) Report Pursuant to Stipulated Election Agreement or Directed Election:

Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, D.C. by [date]. Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

(b) Supplemental Decision:

Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. The request for review must be received by the Board in Washington, D.C. by [date]. Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the request for review or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

11364.6 Service

Copies should be served on all parties by regular mail.

11364.7 Board Review

11364.7(a) Obtaining Review

Where a report pursuant to a stipulated election agreement or a directed election has issued, review is obtained by the filing of exceptions with the Board. In the absence of exceptions, the Board may decide the matter on the record or may make other disposition of the case.

Where a supplemental decision pursuant to a directed election has issued, the Regional Director's determination is final, unless the Board grants a request for review submitted by a party.

11364.7(b) Board Decision on Review

The Board will review a Regional Director's report; if it grants a request for review, it will also review a Regional Director's supplemental decision. In either event, the Board will take such action as the circumstances call for.

11364.8 Treating Exceptions or Request for Review as Motion for Reconsideration

The Regional Director may decide to treat exceptions or a request for review filed with the Board as a motion for reconsideration of the report or supplemental decision. Sec.102.65(e)(1), Rules and Regulations. In such cases, the Regional Director should promptly advise the Executive Secretary that he/she is reconsidering the matter and may issue a second report or supplemental decision. The parties should also be similarly advised as soon as possible.

If the Board has granted the exceptions or review, the Regional Director lacks jurisdiction to vacate the report or supplemental decision. *North Jersey Newspapers Co.*, 322 NLRB 394 (1996).

11364.9 Scheduling Opening of Challenged Ballots

In a consent election agreement situation, the report may conclude with notice that the ballots of those who may have been determined to be eligible will be opened and counted at a given time and place.

In a stipulated election agreement situation, ballots may not be opened until the exceptions period has expired and the Board has issued an order to do so.

In a directed election situation, if a report has issued, ballots may not be opened until the exceptions period has expired and the Board has issued an order to do so. If a supplemental decision has issued, the Regional Director may direct in the supplemental decision that the challenged ballots be opened and counted at a time and place subsequently to be determined "by the undersigned." The ballots should not thereafter be counted until the request for review period has expired, and if a request for review is filed, until after the Board has ruled on such.

11365-11366 PROCESSING BY HEARING

11365 Processing by Hearing: Generally

As described in Sec. 11361.1, the Regional Director must decide at the outset whether to process challenges by investigation, by hearing, or by a combination of both. Sec. 11364 discusses the administrative investigation route. This Section discusses the hearing route.

11365.1 Circumstances Warranting Hearing

Since there is no statutory requirement for a hearing on challenges, the primary concern of a Regional Director is to afford due process to the parties. A hearing is required with respect to those challenges which the Regional Director concludes raise substantial and material factual issues. Sec. 102.69(d), Rules and Regulations. Under this standard, substantial credibility issues concerning material facts are to be resolved at a hearing and not on the basis of an evaluation of the results of an administrative investigation. Thus, a hearing should be held if a party has established that it could produce at a hearing evidence which, if credited, would put in material dispute some issue necessary to a challenge determination. However, if credibility conflicts can be resolved on the basis of objective factors or challenges can be determined without the need to resolve disputed facts, if any, the Regional Director should do so and a hearing is not required. Sec. 11364.3.

11365.2 Issuance of Notice of Hearing

If a notice of hearing is being issued by the Regional Director, then no further investigation should be conducted and the facts may be set forth in summary form.

Alternatively, the Regional Director may conclude that it would be useful for the hearing if he/she set forth any evidence already offered as well as the contentions of the parties, thereby setting the framework for the hearing and putting the other party/parties on notice of the evidence it/they should be prepared to address at the hearing.

11365.3 Date of Hearing

Since postelection matters are to be resolved with the utmost dispatch, the notice of hearing should issue as expeditiously as possible and the hearing should be scheduled at the earliest practical date. Postponements of postelection hearings should not be granted, absent good cause, and such hearings should be held on consecutive days until completed. Postponement requests should be subject to the requirements set forth in Form NLRB-4338 and the notice of hearing sent to the parties should reflect these requirements. Sec. 11427.

11366 Notice of Hearing Procedures

11366.1 Notice of Hearing

11366.1(a) Contents of Notice of Hearing

The contents of the notice of hearing are determined by the type of election that was conducted, i.e., whether the election was after a consent election agreement, after a stipulated election agreement, or after a decision and direction of election by the Regional Director or by the Board.

11366.1(b) Authority to Conduct Hearing

Where the election was held pursuant to a consent election agreement or a direction of election, the Regional Director has the authority to direct a hearing.

Where the election was held pursuant to a stipulated election agreement, Section 102.69(d) of the Rules and Regulations permits the Regional Director to direct a hearing. This discretion is subject to special permission to appeal. Sec. 102.69(i)(1), Rules and Regulations. This preserves the right of any party to object. It is anticipated that special permission to appeal will be requested "promptly," as stated in the proviso to Sec. 102.65(c) of the Rules and Regulations.

11366.2 Directions to Hearing Officer

Consent Election Agreement and Full Consent Election Agreement: In the notice of hearing, the Regional Director should direct the hearing officer to prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Regional Director; the hearing officer's report should provide for exceptions to be filed as follows:

> Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Regional Director either by mail, hand-delivery or electronically. Exceptions must be received by

> the Regional Director at the Regional Office by (14 calendar days from date the report issued). See the Attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency's website at www.nlrb.gov, for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. Guidance can also be found under *E-Gov* on the Board's website. This request may *not* be filed by facsimile.

The Regional Director must thereafter rule in a report upon the hearing officer's report and such exceptions as may be filed. The Regional Director's report is not subject to appeal.

Stipulated Election Agreement: In the notice of hearing, the Regional Director should direct the hearing officer to prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board; the hearing officer's report should provide for exceptions to be filed as follows:

> Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. A request for review may also be submitted by electronic filing. See the Attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency's website at www.nlrb.gov, for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. Guidance can also be found under *E-Gov* on the Board's website. This request must be received by the Board in Washington D.C. by 5:00 p.m. (ET) on [14 calendars days from date decision issued]. This request may *not* be filed by facsimile.

Directed Election: In the notice of hearing, the Regional Director should direct the hearing officer to prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Regional Director or to the Board, whichever the Regional Director decides is appropriate.

If the Regional Director directs that the hearing officer's recommendations be made to the Regional Director, then exceptions to the hearing officer's report will be filed with him/her. The hearing officer's report should provide for exceptions to be filed as follows:

> Under the provisions of Section 102.67 and 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Regional Director either by mail, hand-delivery or electronically. See the Attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency's website at www.nlrb.gov, for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. Guidance can also be found under *E-Gov* on the Board's website. This request must be received by the Board in Washington, D.C. by 5:00 p.m. (ET) on [14

> calendars days from date decision issued]. This request may *not* be filed by facsimile.

The Regional Director must thereafter rule in a supplemental decision upon the hearing officer's report and such exceptions as may be filed. The Regional Director's supplemental decision is subject to a request for review to the Board.

If the Regional Director directs that the hearing officer's recommendations be made to the Board, the hearing officer's report should provide for exceptions to be filed as follows:

> Under the provisions of Sections 102.67 and 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. A request for review may also be submitted by electronic filing. See Attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency's website at www.nlrb.gov, for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. Guidance can also be found under *E-Gov* on the Board's website. This request must be received by the Board in Washington by 5:00 p.m. (ET) on [14 calendars days from date decision issued]. This request may *not* be filed by facsimile.

11366.3 Conclusion

The notice of hearing should conclude with notice that a hearing on the named challenges will be held at a given time and place before a duly designated hearing officer.

11366.4 Procedures at Hearing

The procedures to be followed at hearing are set forth at Secs. 11420–11430.

11367 BIFURCATED PROCEEDINGS—CHALLENGES

11367 Bifurcated Proceedings—Challenges: Generally

When it is determined that some challenges can be resolved by administrative determination (Sec. 11364.3) and others, which continue to be determinative, raise substantial and material factual or legal issues requiring a hearing (Sec. 11365.1), the Regional Director may issue a report or supplemental decision on those challenges which can be administratively determined and issue a notice of hearing on the challenges which raise substantial and material issues. The hearing may be conducted notwithstanding the pendency of exceptions or a request for review with regard to a report or supplemental decision. Alternatively, the Regional Director may issue a notice of hearing on those challenges which raise substantial and material issues and note therein that the challenges which are not being noticed for hearing are being retained for further appropriate processing, i.e., a forthcoming report or supplemental decision.

There may also be situations in which some challenges can be resolved administratively and others, which warrant hearing, would thereupon appear to no longer be determinative. In these circumstances, the Regional Director may issue a report or supplemental decision on those challenges which can be administratively resolved and hold in abeyance the hearing on those challenges which raise substantial and material factual or legal issues.

If a report or supplemental decision has issued with respect to some challenges and a notice of hearing with respect to other challenges, the Regional Director should keep the Executive Secretary apprised of the progress of the hearing. In that way, the Executive Secretary can coordinate the Board's processing of any exceptions or requests for review that may be filed with regard to a report, a supplemental decision, or a hearing officer's report. Any notice of hearing, report, supplemental decision, or hearing officer's report should refer to any prior postelection document issued in the case. A report or supplemental decision which deals with challenges that did not require a hearing should issue, at the very latest, by the time the hearing officer's report issues.

11378 COUNT OF OVERRULED CHALLENGED BALLOTS

11378 Count

The counting of ballots, challenges to which have been overruled, should take place as soon as possible at a time and place previously determined or to be determined by the Regional Director.

Ordinarily the count of the ballots of overruled challenges will take place at the Regional Office. In unusual circumstances, the Regional Director may approve the request of one or more of the parties to count the ballots where the original count took place.

At the count, parties may be represented by observers; normally, one per party is adequate, but the count should not be postponed because of the absence of representatives.

The challenged envelope of each voter whose ballot is to be counted should be displayed to the observers. A further challenge of the same voter should not be accepted. The stub should be torn off each envelope (and preserved in the file) and the ballot, still folded, should be dropped from the envelope. After the ballots thus taken from the challenged envelopes are thoroughly mixed with each other, they should be unfolded and counted.

11378.1 Revised Tally of Ballots

A revised tally of ballots (Form NLRB-4168) should be prepared and signed by the Board agent and by a witnessing representative of each party.

A copy of the revised tally should be made available to each party.

11390–11397 RESOLUTION OF OBJECTIONS TO ELECTION

11390-11393 INITIAL CONSIDERATIONS

11390 Objections

11390.1 Context

Conducting an election is the decisive point in the processing of a representation case. By the time employees vote in an election, the issues necessary to scheduling the election have been resolved and the employees, the parties and the Agency have expended significant energy and resources. In some cases, however, certification of the employees' choice in the election is delayed by challenges and/or objections. In this context, the prompt resolution of challenges and/or objections should be given priority attention.

11390.2 Treatment

The postelection portion of the Manual contains Sections first on challenges, 11360 through 11367, and then on objections, 11390 through 11397. Although the different Sections on challenges and objections parallel each other in certain respects, they are treated separately, since either challenges or objections may arise without the other. Notwithstanding this separate treatment, it should be recognized that when both challenges and objections are involved in the same case, they should be regarded as two aspects of one overall matter.

11390.3 Processing of Objections With Challenges

If challenges and objections arise in the same matter, they ordinarily will be processed simultaneously. However, under appropriate circumstances they may be treated separately. For example, the resolution of some or all challenges may make moot the objections of one party. Clearly meritorious cross-objections or objections based on third-party or Board agent conduct may indicate that the election will be set aside regardless of the outcome of determinative challenges, making the challenges moot. Thus, if it appears that the overall more expeditious resolution of the entire matter would result from holding objections in abeyance, while challenges are being processed, or the reverse, that is the course that should be followed.

11391 Methods of Resolution

11391.1 Administrative Investigation or Hearing

Under Section 102.69(d) of the Rules and Regulations, a Regional Director is authorized to process objections through either an administrative investigation or a hearing. Thus, at the outset of the processing of objections, the Regional Director should give consideration to the choice between an administrative investigation (Sec. 11394) and a hearing (Sec. 11395). Also to be considered is whether a portion of the objections may be suitable for processing by administrative investigation and the balance, simultaneously, by hearing.

An important consideration in making these determinations is expeditious processing through all levels of the Agency's deliberations. Although the process of scheduling and holding a hearing and thereafter preparing a hearing officer's report may be time consuming, an administrative investigation may also involve complex scheduling of numerous witnesses and the review of extensive evidence, and a hearing may ultimately be necessary even after the administrative investigation has been conducted. Sec. 11395.1. Accordingly, Regions should avoid administrative investigations where they are likely to be lengthy or where it appears that the administrative investigation is not going to resolve all issues. Further, in light of refusals by circuit courts to enforce certifications when no evidentiary hearing was conducted with regard to the objections, it is preferable to err on the side of proceeding to hearing rather than be told by a circuit court years later that it was inappropriate to resolve the issues administratively (see OM 04-26).

Also see Sec. 11397, Bifurcated Proceedings, for a discussion of related considerations that may arise during processing.

11391.2 Voluntary Resolution

Possibilities of voluntary resolution may arise while objections are being processed.

An objecting party may wish to withdraw its objections. The withdrawal need not be in writing, but may be oral. When objections are withdrawn, the Regional Director may issue the appropriate certification. The certification should include a statement that objections were filed and withdrawn with the Regional Director's approval.

The party/ies other than the objecting party may wish to agree that the election be set aside and a new one be conducted. Written agreement of the other party/ies to set aside the election should be secured. Written agreement of the objecting party is not required. In the agreement, the party/ies other than the objecting party should waive its/their rights under the Board's Rules to a Regional Director's report or supplemental decision, to file exceptions to a Regional Director's report or a request for review of a supplemental decision and to any right to a hearing in the matter or to a Board decision. The agreement should provide that on its approval by the Regional Director, he/she may set the election aside and make arrangements for and conduct a rerun election.

11391.3 Partial Resolution of Objections

In addition to voluntary resolutions, there may be other circumstances in which a determination to set aside an election based upon one or more of the objections may be readily reached, thereby making it unnecessary to resolve the remaining objections. For example, an objection based on a written document that is clearly objectionable on its face would cause the election to be set aside without consideration of the other objections. Undisputed conduct may have occurred. Any objections filed should be carefully examined at the beginning of processing to discover if any such partial resolutions are possible.

11392 Initial Consideration of Objections

11392.1 Generally

By filing objections to the conduct of an election or to conduct affecting the results of an election, a party may question the validity of an election. Objections may have the effect of invalidating an election, a result that has twofold significance: (a) the election may be rerun and (b) the "1-year" rule of Section 9(c)(3) will not run against the invalidated election.

11392.1(a) Objections to Interpretation or Validity of Ballots

If objections are filed that concern the interpretation or the validity of ballots, including voided ballots, then during the investigation of the objections those ballots should be stored in a similar manner as questioned interpretation ballots. Secs. 11340.8(b)(1) and 11344.

11392.2 Objections Period; Timeliness

11392.2(a) Objections to Initial Election

11392.2(a)(1) Period of Alleged Objectionable Conduct

Conduct to be considered in connection with objections to an initial election is that which occurred on or after the date of filing of the petition. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961).

11392.2(a)(2) Timeliness of Filing

To be considered, objections must have been filed by the close of business on the seventh day after the tally of ballots has been prepared and made available to the parties. Sec. 102.69(a), Rules and Regulations.

A holiday which occurs during the 7 days after an election does not affect the filing date for objections, unless the due date falls on a holiday. The due date is then extended until the next day on which the Regional Office is open for business.

The Regional Director is not authorized by the Rules to extend the time for filing objections. *John I. Haas, Inc.,* 301 NLRB 300 (1991). Parties do not have the right to

amend objections or file further objections after the 7-day filing period. *Rhone-Poulenc, Inc*., 271 NLRB 1008 (1984); *Burns Security Services*, 256 NLRB 959 (1981). Also see Sec. 11392.11.

Objections to elections will be accepted as timely filed if delivered to the Regional Director on or before the official closing time of the receiving office on the due date or if postmarked on the day before (or earlier than the day before) the due date; documents which are postmarked on or after the due date are untimely. Secs. 102.69(a) and 102.111(b), the Rules and Regulations. "Postmarking" includes timely depositing the documents with a delivery service that will provide a record showing that the documents were tendered to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date.

Filing by facsimile transmission is permitted. If filing is by facsimile transmission, a failure to timely file will not be excused on the basis of a claim that transmission could not be accomplished. Sec. 102.114(f), Rules and Regulations.

11392.2(a)(3) Impact of Determinative Challenged Ballots

Objections must be timely whether or not challenges are sufficient in number to affect the results of the election.

11392.2(a)(4) Impounded Ballots

If ballots are impounded, the time for filing objections runs from the time the ballots are subsequently counted and the tally of ballots is prepared and made available to the parties.

11392.2(b) Objections to Rerun or Runoff Election

11392.2(b)(1) Rerun Election

Conduct to be considered in connection with objections to a rerun election (Secs. 11450–11456) is that which occurred from the date of the prior election. *Singer Co*., 161 NLRB 956 fn. 2 (1966). Objections to a rerun election are due within 7 days after the tally of ballots of the rerun election has been made available to the parties. Sec. 102.69(a), Rules and Regulations. If the rerun election is set aside, there can be a second rerun election.

11392.2(b)(2) Runoff Election

Conduct to be considered in connection with objections to a runoff election (Sec. 11350) is that which occurred from the date of the prior election. Objections to a runoff election are due within 7 days after the tally of ballots of the runoff election has been made available to the parties. Sec. 102.69 (a), Rules and Regulations. If the runoff election is set aside, there can be a rerun of the runoff election.

11392.2(c) Objections to Revised Tally of Ballots

Objections filed timely with respect to a revised tally of ballots, but not with respect to the original tally of ballots, have validity with respect to and should serve as

the basis for investigation of only those circumstances leading up to and surrounding the revised count, not those leading up to and surrounding the election itself. Objections to a revised tally of ballots are due within 7 days after the revised tally of ballots has been made available to the parties. Sec. 102.69 (h), Rules and Regulations.

11392.3 Objections Not Timely Filed

When the Regional Director rules that objections are not timely, he/she need not issue a report or supplemental decision on objections. The Regional Director may return the objections to the party with a letter of rejection as untimely and issue the appropriate certification.

The certification need not note the filing of untimely objections.

11392.4 Who May File Objections

Objections may be filed only by a party to the election, i.e., the following: the employer involved, the petitioner (which may be an individual), and any labor organization or individual whose name appeared on the ballot as a choice. Sec. 102.69(a), Rules and Regulations.

11392.5 Reasons for Objections

The objections must contain a short statement of the reasons therefor. Sec. 102.69(a), Rules and Regulations. The statement should be specific, not conclusionary, and constitutes an essential part of the objections. Objections which are nonspecific, for example, which allege "by these and other acts, etc.," are insufficient, should not be treated and should be dismissed on their face.

NOTE: Postelection challenges to voters' eligibility filed in the guise of objections should not be considered. Sec. 11362.1.

11392.6 Duty to Timely Furnish Evidence

It is incumbent on the party which has filed objections to furnish evidence sufficient to provide a prima facie case in support thereof within 7 days of the day the objections are required to be filed or within such additional time as may have, upon a timely request, been allowed by the Regional Director. The evidence must be submitted before the Regional Director is required to investigate the objections. Although Section 102.69(a) provides for the submission of evidence "within 7 days after the filing of the objections", the Board in *Craftmatic Comfort Mfg. Corp.*, 299 NLRB 514 (1990), interpreted the provision to provide that the evidence is due 7 days after the objections are required to be filed. Also see) Sec. 102.112, Rules and Regulations.

In addition to identifying the nature of the misconduct on which the objections are based, this submission should include a list of the witnesses and a brief description of the testimony of each. An objecting party normally should not be permitted to "piecemeal" the submission of evidence but should be required to disclose promptly all the evidence in support of its bjections. Absent the timely receipt of sufficient evidence, the Regional Director should overrule the objections without any further processing. *Star Video Entertainment L.P.,* 290 NLRB 1010 (1988). However, when an objecting party has

specifically identified witnesses who it claims would provide direct rather than hearsay evidence to support its objections, the Regional Director should proceed with processing of the objections rather than dismiss the objections for lack of direct evidence in support thereof. *Holladay Corp*., 266 NLRB 621 (1983). Also see Secs. 11392.10 and 11392.11.

11392.7 Prefiling Assistance

Prefiling assistance in filing objections may be offered to the extent allowable in connection with unfair labor practice charges.

11392.8 Filing Requirements

If objections are filed with the Regional Office, an original and five copies should be submitted. If objections are filed by facsimile transmission, extra copies need not be submitted. Sec. 102.69(a), Rules and Regulations.

11392.9 Service on Parties

The Regional Director will immediately serve a copy of the objections on each of the other parties to the proceeding.

11392.10 Nature and Scope of Processing

The investigation of objections is nonadversarial, insofar as the Agency is concerned, since it is part of the investigation of a representation question. This means that the role of the Board agent is completely nonpartisan; the Board agent is responsible for bringing to the Regional Director all the available facts. However, unlike the resolution of challenges, where the Regional Director must be independently satisfied that all the available facts have been obtained, the burden for supporting objections rests solely on the party making them.

11392.11 Unalleged Objectionable Conduct

It is within the Regional Director's discretion to determine initially the scope of the investigation. In the exercise of this discretion, the Regional Director may confine the investigation to matters specifically alleged in the objections or intimately connected to them. On the other hand, the Regional Director may view the objections as having cast suspicion on the entire election process, thereby justifying the independent investigation of matters not specifically contained in the objections.

> "The Regional Director is not required to, nor can he[/she] properly, ignore evidence relevant to the conduct of the election . . . simply because [a party] may not have specifically mentioned such conduct in its objections."

American Safety Equipment Corp., 234 NLRB 501 (1978). If the Regional Director receives or discovers evidence during the investigation that shows that the election has been tainted, he/she should not ignore such conduct even if it was not specifically alleged. *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988). However, parties do not have the right to amend objections or file further objections after the 7-day filing period, unless the objecting party demonstrates by clear and convincing proof that the evidence is not only newly discovered, but also previously unavailable. *Rhone-Poulenc,*

Inc., 271 NLRB 1008 (1984); *Burns Security Services*, 256 NLRB 959 (1981). Further, if evidence of misconduct unrelated to the timely filed objections comes to the Regional Director's attention during the investigation at the initiative of the objecting party after the time for filing objections has expired, the new evidence should not be considered as a basis for setting aside the election unless the objecting party has provided clear and convincing proof that the evidence was not only newly discovered, but also previously unavailable. *John W. Galbreath & Co*., 288 NLRB 876 (1988).

NOTE: In the event the Regional Director issues a notice of hearing (Sec. 11395.1), the hearing officer, by contrast with the Regional Director, has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director. Sec. 11424.3(b).

11393 Procedures Applicable to Objections

Initial procedures are the same, whether for a consent, stipulated, or directed election.

Within a few days of receipt of the evidence submitted in support of objections and any statements of position, a determination should be made as to whether a hearing or an administrative investigation is appropriate. Sec. 11391.1. Determinative challenges, if any, and evidence submitted regarding such should also be considered during this determination. Potential ways in which the issues could be resolved should be discussed. For example, the resolution of certain challenges, if any, by agreement or otherwise may eliminate the need to resolve others (Sec. 11361.3) and/or render objections moot (Sec. 11390.3). Some objections may involve clearly objectionable documents or conduct on the basis of which alone the election may be set aside. Sec. 11391.3. All such avenues should be thoroughly explored.

Where these initial efforts to resolve the issues are not successful and the parties' submissions appear on their face to raise substantial and material factual or legal issues requiring a hearing (Sec. 11395.1), no further investigation should be conducted and a notice of hearing should issue as expeditiously as possible setting the objections for hearing. Sec. 11395.2.

11394 Administrative Investigation

11394 Administrative Investigation: Generally

As described in Sec. 11391.1, the Regional Director must decide at the outset whether to resolve objections by administrative investigation, by hearing, or by a combination of both. Sec. 11395 discusses the hearing route. This Section discusses the administrative investigation route.

Where objections were untimely filed, an investigation should not be initiated. Sec. 11392.3.

Nonspecific objections should not be considered during the administrative investigation. Sec. 11392.5.

Evidence of unalleged objectionable conduct which the Regional Director receives or discovers during the investigation should be considered pursuant to the guidelines discussed in Sec. 11392.11.

11394.1 Investigation Methods

All objections ordinarily should be investigated. However, under appropriate circumstances some may be left unresolved if it appears that the resolution of some will render unnecessary the resolution of the rest. Sec. 11391.3. The position of each party on each objection, the supporting arguments and precedents, suggestions for avenues of exploration and names of witnesses should be secured in writing. The objecting party should be charged with the responsibility of offering full cooperation and whatever evidence is in its possession. Its failure to produce any evidence may obviate further investigation. Secs. 11392.6 and 11392.10.

Witnesses should be interviewed and, if applicable, records should be examined. Interviews should be reduced to affidavit form, if possible, and the results of record examination and other lines of investigation should be recorded in the file.

Requests by a party that counsel or a representative be present during the interview of the witnesses whose statements or actions would bind the party should be handled in accordance with the procedures employed in unfair labor practice investigations. Sec. 10056.1. See Sec. 10056.6 for procedures to be used in interviewing current or former agents or supervisors of a party. Witness requests for counsel or other representative should be treated in accordance with Sec. 10056.2.

11394.2 Conclusion of Investigation; Informing Parties

At the conclusion of the investigation, the Regional Director should issue either a report or a supplemental decision. Sec. 11394.4 discusses the circumstances that prescribe which document should issue.

Where challenges have also been the subject of investigation, the report or supplemental decision on objections should normally be combined with that on challenges.

Informing Parties: Prior to the issuance of a report or supplemental decision, the parties may be informed of the conclusions reached in order to facilitate voluntary resolution of the objections either by withdrawal or by stipulation. Sec. 11391.2. Oral requests to withdraw objections may be approved.

11394.3 Evidence to Support Report or Supplemental Decision

The report or supplemental decision should be supported by affidavits, memoranda or correspondence in the files. The evidence on which the Regional Director has based his/her findings should be fully set forth. Statements of witnesses may be quoted

freely, although their names should not be revealed. Except in unusual cases, affidavits of witnesses should not be appended. If an affidavit is appended, it should be redacted to the maximum extent possible to protect the anonymity of the witness.

The report or supplemental decision should be as specific and complete as to facts and conclusions as possible, thereby eliciting a more specific set of exceptions or request for review. The report or supplemental decision should set forth the facts and the rationale; this will also minimize the argument that a party was not given a full opportunity to know and address the issues. Further, a specific, comprehensive report or supplemental decision presents all the facts to the Board and provides a basis for its decision.

The Regional Director should clearly set forth in the report or supplemental decision the objective factors demonstrating that the election should or should not be vacated. Where the Regional Director, having obtained the facts alleged by the parties, concludes that there are no disputed facts or that objections can be resolved without the need to resolve disputed facts; or where the Regional Director in effect assumes the facts alleged in the objections but concludes as a matter of law that the facts do not present substantial grounds for setting aside the election, a report or supplemental decision should issue and no hearing is required. *NLRB v. Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245 (5th Cir. 1964); *Whitney Museum of American Art,* 636 F.2d 19 (2d Cir. 1980). Also, where the Regional Director recommends that an election be set aside solely on the basis of letters, handbills, or other writing, no hearing is necessary where the finding rests on the face of the documents without regard to any surrounding circumstances. Credibility resolutions should be made where possible, i.e., if credibility conflicts can be resolved on the basis of objective factors, the Regional Director should do so and a hearing is not required. The basis for the resolution should be set forth. But if there are factual contradictions raising substantial and material issues that could best be resolved by a hearing, the Regional Director should so proceed. Sec. 11395.1.

11394.4 Type of Document Issued

The document issued at the conclusion of the investigation is determined by the type of election that was conducted, i.e., whether the election was after a consent election agreement, after a stipulated election agreement, or after a decision and direction of election by the Regional Director or by the Board.

Consent Election Agreement: A report is used where the election was held pursuant to a consent election agreement. Sec. 102.62(a), Rules and Regulations. The report should contain the Regional Director's determination, which is final.

Stipulated Election Agreement: The report is used where the election was held pursuant to a stipulated election agreement. Secs. 102.69(c)(2) and (4), Rules and Regulations. The report should contain the Regional Director's recommendations to the Board.

Directed Election: Either a report or a supplemental decision is used where the election was directed, whether by the Regional Director or the Board. Sec. 102.69(c)(3), Rules and Regulations. The report may be used where the Regional Director prefers to transfer the case to the Board for decision; if a report is issued, it should contain the

Regional Director's recommendations to the Board. If a supplemental decision is issued, it should contain the Regional Director's determination, which is final unless the Board grants a request for review submitted by a party.

11394.5 Contents of Report or Supplemental Decision

Introduction: The opening paragraphs should contain the following:

(a) basis for the election (consent, stipulated, Regional Director, or Board directed) and description of the unit
(b) date of the election
(c) tally of ballots
(d) objections filed, the date filed, and by whom
(e) recitation of all other post election documents that have issued in the case
(f) summary of the objections by "counts." Alternatively, a copy of the objections may be attached.
(g) unalleged conduct concerning which evidence has been received or discovered, if any (Sec. 11392.11)

Count-Treatment Section: The count-treatment section should give the positions of the parties and the facts found for each objection. Names of employee witnesses should not be included, but the evidence provided should be fully described. Sec. 11394.3. Nonspecific objections (Sec. 11392.5) should be noted as insufficient on their face in this section.

Summary of Conclusions: The factual and legal conclusions with respect to the objections may be set forth at the close of each "Count-Treatment" section, but they should nevertheless appear in the "Summary of Conclusions" section. In this section, the Regional Director should set forth the final determinations (consent election agreement), the recommendations (stipulated election agreement or directed election) or the determinations (directed election), which should be as follows:

(a) that [numbered or unalleged] counts of the objections are without merit, and are [should be] overruled (nonspecific objections (Sec. 11392.5) should be recited as insufficient in this section)
(b) that [numbered or unalleged] counts of the objections have merit, on the basis of which the election is [should be] set aside, and a new [rerun] election scheduled
(c) (if necessary) that a hearing will [should] be held with respect to [named] issues.

The determinations or recommendations should account for all objections by count.

Attachments: Copies of pertinent documents referred to in the report or supplemental decision, such as contracts, defaced sample ballots, etc., may be attached to and made a part of the report or supplemental decision.

Right to File Exceptions or Request for Review: A report pursuant to a consent election agreement is final; there is no right of appeal. A report pursuant to a stipulated election agreement or a directed election should include a statement of the right to file exceptions. A supplemental decision should include a statement of the right to request review. The time by which such exceptions or request for review must be received by the

Board in Washington, D.C. (14 days) should be stated. A statement should be included concerning the composition of the record. Accordingly, use the following patterns:

(a) Report Pursuant to Stipulated Election Agreement or Directed Election:

Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, D.C. by [date]. Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

(b) Supplemental Decision:

Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. The request for review must be received by the Board in Washington, D.C. by [date]. Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the request for review or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

11394.6 Service

Copies should be served on all parties by regular mail.

11394.7 Board Review

11394.7(a) Obtaining Review

Where a report pursuant to a stipulated election agreement or directed election has issued, review is obtained by the filing of exceptions with the Board. In the absence of exceptions, the Board may decide the matter on the record or may make other disposition of the case.

Where a supplemental decision pursuant to a directed election has issued, the Regional Director's determination is final, unless the Board grants a request for review submitted by a party.

11394.7(b) Board Decision on Review

The Board will review a Regional Director's report; if it grants a request for review, it will review a Regional Director's supplemental decision. In either event, the Board will take such action as the circumstances call for.

11394.8 Treating Exceptions or Request for Review as Motion for Reconsideration

The Regional Director may decide to treat exceptions or a request for review filed with the Board as a motion for reconsideration of the report or supplemental decision. Sec. 102.65 (e)(1), Rules and Regulations. In such cases, the Regional Director should promptly advise the Executive Secretary that he/she is reconsidering the matter and may issue a second report or supplemental decision. The parties should also be similarly advised as soon as possible.

If the Board has granted the exceptions or review, the Regional Director lacks jurisdiction to vacate the report or supplemental decision. *North Jersey Newspapers,* 322 NLRB 394 (1996).

11395-11396 PROCESSING BY HEARING

11395 Processing by Hearing: Generally

As described in Sec. 11391.1, the Regional Director must decide at the outset whether to process objections by investigation, by hearing, or by a combination of both. Sec. 11394 discusses the administrative investigation route. This Section discusses the hearing route.

11395.1 Circumstances Warranting Hearing

Since there is no statutory requirement for a hearing on objections, the primary concern of a Regional Director is to afford due process to the parties. A hearing is required with respect to those objections or challenges which the Regional Director concludes raise substantial and material factual issues. Sec. 102.69(d), Rules and Regulations. Under this standard, substantial credibility issues concerning material facts are to be resolved at a hearing and not on the basis of an evaluation of the results of an administrative investigation. Thus, a hearing should be held if the objecting party has established that it could produce at a hearing evidence which, if credited, would warrant setting aside the election. However, if credibility conflicts can be resolved on the basis of objective factors or objections can be determined without the need to resolve disputed facts, if any, the Regional Director should do so and a hearing is not required. Sec. 11394.3.

11395.2 Issuance of Notice of Hearing

If a notice of hearing is being issued by the Regional Director, then no further investigation should be conducted and the facts may be set forth in summary form. Alternatively, the Regional Director may conclude that it would be useful for the hearing if he/she described in more detail the evidence submitted in support of and in response to

the objections, thereby setting the framework for the hearing and putting the other party/parties on notice of the evidence it/they should be prepared to address at the hearing.

11395.3 Nonspecific and Unalleged Objections

The notice of hearing should describe any nonspecific objections (Sec. 11392.5) as insufficient. They should not be included among the issues to be considered at the hearing and should be dismissed on their face in the notice of hearing.

If the Regional Director has received or discovered evidence of unalleged objectionable conduct (Sec. 11392.11) that is being included among the issues to be considered at the hearing, such should be described in the notice of hearing with sufficient specificity pursuant to Sec. 102.69(a) of the Rules and Regulations.

NOTE: The hearing officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director. Sec. 11424.3(b).

11395.4 Date of Hearing

Since postelection matters are to be resolved with the utmost dispatch, the notice of hearing should issue as expeditiously as possible and the hearing should be scheduled at the earliest practical date. Postponements of postelection hearings should not be granted, absent good cause, and such hearings should be held on consecutive days until completed. Postponement requests should be subject to the requirements set forth in Form NLRB-4338 and the notice of hearing sent to the parties should reflect these requirements. Sec. 11427.

11396 Notice of Hearing Procedures

11396.1 Notice of Hearing

11396.1(a) Contents of Notice of Hearing

The contents of the notice of hearing issued by the Regional Director are determined by the type of election that was conducted, i.e., whether the election was after a consent election agreement, after a stipulated election agreement, or after a decision and direction of election by the Regional Director or by the Board.

11396.1(b) Authority to Conduct Hearing

Where the election was held pursuant to a consent election agreement or a direction of election, the Regional Director has the authority to direct a hearing.

Where the election was held pursuant to a stipulated election agreement, Sec. 102.69(d) of the Rules and Regulations permits the Regional Director to direct a hearing. This direction is subject to special permission to appeal. Sec. 102.69(i)(1), Rules and Regulations. This preserves the right of any party to object. It is anticipated that special

permission to appeal will be requested "promptly," as stated in the proviso to Sec. 102.65(c) of the Rules and Regulations.

11396.2 Directions to Hearing Officer

Consent Election Agreement: In the notice of hearing, the Regional Director should direct the hearing officer to prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Regional Director; the hearing officer's report should provide for exceptions to be filed as follows:

> Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Regional Director. Exceptions must be received by the Regional Director at the Regional Office by [date].

The Regional Director must thereafter rule in a report upon the hearing officer's report and such exceptions as may be filed. The Regional Director's report is not subject to appeal.

Stipulated Election Agreement: In the notice of hearing, the Regional Director should direct the hearing officer to prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board; the hearing officer's report should provide for exceptions to be filed as follows:

> Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, D.C. by [date].

Directed Election: In the notice of hearing, the Regional Director should direct the hearing officer to prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Regional Director or to the Board, whichever the Regional Director decides is appropriate.

If the Regional Director directs the hearing officer's recommendations be made to the Regional Director, then exceptions to the hearing officer's report will be filed with him/her. The hearing officer's report should provide for exceptions to be filed as follows:

> Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Regional Director. Exceptions must be received by the Regional Director at the Regional Office by [date].

The Regional Director must thereafter rule in a supplemental decision upon the hearing officer's report and such exceptions as may be filed. The Regional Director's supplemental decision is subject to a request for review to the Board.

If the Regional Director directs that the hearing officer's recommendations be made to the Board, the hearing officer's report should provide for exceptions to be filed as follows:

Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, D.C. by [date].

11396.3 Conclusion

The notice of hearing should conclude with notice that a hearing on the named objections will be held at a given time and place before a duly designated hearing officer.

11396.4 Hearing Procedures

The procedures to be followed at hearing are set forth at Secs. 11420–11430.

11397 BIFURCATED PROCEEDINGS—OBJECTIONS

11397 Bifurcated Proceedings—Objections: Generally

When it is determined that some objections can be overruled by administrative investigation (Sec. 11394.3) and others raise substantial and material issues requiring a hearing (Sec. 11395.1), the Regional Director may issue a report or supplemental decision on those objections which can be administratively determined and issue a notice of hearing on the objections which raise substantial and material factual or legal issues. The hearing may be conducted notwithstanding the pendency of exceptions or a request for review with regard to a report or supplemental decision. Alternatively, the Regional Director may issue a notice of hearing on those objections which raise substantial and material issues and note therein that the objections which are not being noticed for hearing are being retained for further appropriate processing, i.e., a forthcoming report or supplemental decision.

There may also be situations in which an administrative investigation reveals that some objections clearly warrant setting aside the election, whereas other objections warrant a hearing. In these circumstances, the Regional Director may issue a report or supplemental decision on those objections which can be administratively determined and hold in abeyance the hearing on those objections which raise substantial and material issues.

If a report or supplemental decision has issued with respect to some objections and a notice of hearing with respect to other objections, the Regional Director should keep the Executive Secretary apprised of the progress of the hearing. In that way, the Executive Secretary can coordinate the Board's processing of any exceptions or requests for review that may be filed with regard to a report or supplemental decision. Any notice of hearing, report, supplemental decision, or hearing officer's report should refer to any prior postelection document issued in the case. A report or supplemental decision which deals with the objections that did not require a hearing should issue, at the very latest, by the time the hearing officer's report issues.

11407 CHALLENGES/OBJECTIONS INVESTIGATION WHEN UNFAIR LABOR PRACTICE CHARGE ALSO INVOLVED

11407 Challenges/Objections Investigation: Generally

In the event there are determinative challenged voters who are also involved in a related unfair labor practice charge, or who are also alleged discriminatees in an unfair labor practice charge, or there are objections to an election and an unfair labor practice charge, both of which encompass in whole or in part the same conduct, then the investigation of the challenges and/or objections and the charge should be coordinated.

NOTE: If determinative challenged voters are also alleged discriminatees in an unfair labor practice charge and if the tally of ballots reveals that, if some or all of the challenged ballots have been cast for the union, the union will receive a majority regardless of how the challenges are ultimately determined, see Sec. 11361.4.

A variety of circumstances may be presented by a combination of challenges/ objections and unfair labor practice charge cases. Thus, unfair labor practice allegations filed before the election may already be under investigation. Alternatively, the unfair labor practice allegations may be filed around the time of the election's determinative challenges and/or with objections, with which they may be partially or totally coextensive, and an initial investigation of each must be commenced. The Regional Director should review each set of circumstances carefully, from the perspective of the most expeditious overall processing thereof, and select among the options available.

Options:

(a) Objecting Party Withdraws Charge to Expedite Processing of Objections

A notice of hearing on challenges or objections requires merely a finding that there are substantial and material factual or legal issues, whereas a determination as to the merit of an unfair labor practice charge requires a complete administrative investigation. Under appropriate circumstances, a charging party may prefer to withdraw its unfair labor practice charge in order to permit the processing of the challenges and/or objections to proceed more quickly, including if warranted directly to a hearing.

(b) Objecting Party Does Not Withdraw Charge

If the charging party chooses not to withdraw the unfair labor practice charge, the Regional Director nonetheless may decide it is appropriate and more expeditious to hold the charge in abeyance and process the challenges and/or objections. Agreement of the parties is not required. This alternative procedure could be used where the unfair labor practice allegations and the challenges and/or objections are coextensive or related, and the resolution of the challenges and/or objections in the representation case, after Board review, is likely to provide an appropriate basis for resolving the unfair labor practice case.

For example, if objections were overruled after a hearing, the record in the objections proceeding may provide a basis for dismissal of the charge which was held in abeyance. If the objections were sustained and the election was set aside after a hearing

and the sole remedy for the unfair labor practices in the charge consists of the posting of a notice, such as is the case with 8(a)(1) or 8(b)(1)(A) statements or other conduct, the Regional Director may conclude that the coextensive charge should be dismissed consistent with prosecutorial discretion. A dismissal, for example, might be appropriate where provision has been made for a *Lufkin* notice prior to the rerun election. Sec. 11452.1. The *Lufkin* notice, coupled with the rerun election, may in essence provide an effective remedy for the unfair labor practice allegations. On the other hand, after reviewing the record evidence from the challenges/objections hearing, the Regional Director may conclude that dismissal of the charge would be inappropriate and the charge should be processed further. Whether a rerun election should be conducted notwithstanding a pending charge is governed by the considerations set forth in Secs. 11730–11734.

The situations described herein are not exhaustive. There may be other circumstances in which the procedures discussed in this Section may be appropriate.

11407.1 Circumstances Affecting Choice of Procedures

These procedures should not be used where the likelihood of duplicative proceedings is high and the representation case will not provide a suitable remedy for the unfair labor practice allegations, e.g., where restoration of the status quo ante is required. It also cannot be utilized where a finding of an unfair labor practice is required in order to resolve the objections or challenges, such as is the case with an allegation of an 8(a)(3) discharge. *Texas Meat Packers,* 130 NLRB 279 (1961). Also see 11361.4.

11420–11430 HEARING ON CHALLENGES/OBJECTIONS

11420-11427 ISSUES PRELIMINARY TO HEARING

11420 Issues Preliminary to Hearing: Generally

To the extent they are adaptable, the procedures discussed herein apply to hearings on challenges as well as to hearings on objections. Where, in the same case, there are challenges and objections, see Secs. 11360.2–11360.3 and 11390.2–11390.3.

11420.1 Procedures: Unfair Labor Practice Charge Also Involved

In some cases, there are determinative challenged voters who are also involved in related unfair labor practice allegations, or who are also the subject of 8(a)(3) unfair labor practice allegations (Sec. 11361.4), or there are objections to an election and an unfair labor practice charge, both of which encompass, in whole or in part, the same conduct. If after investigation merit determinations have been made on the unfair labor practice charge and complaint has been authorized, then the complaint and the related challenges and/or objections normally should be consolidated for hearing before an administrative law judge. Sec. 11407 discusses alternative procedures that may be applicable.

If a consolidated hearing has been directed, the procedures applicable to the hearing are mixed. To the extent that alleged unfair labor practices are involved, the

procedures set forth in Sections 10380–10412 should be followed; to the extent that challenges and/or objections, the substance of which does not coincide with the substance of the alleged unfair labor practices, are involved, the procedures set forth in Sections 11420–11438 should be followed; to the extent that there is overlapping, ambiguity, or conflict, the procedures set forth in Sections 10380–10412 should be followed. The administrative law judge will thereafter make appropriate recommendations in a decision; except where the election was held pursuant to a consent election agreement, the cases will be transferred to the Board. Where the election was held pursuant to a consent election agreement, the administrative law judge will sever the cases and transfer the R case to the Regional Director for further processing.

Unless the election had been held pursuant to a consent election agreement, the order directing a hearing on objections in a representation case, which is to be consolidated with a hearing on unfair labor practice charges, should include the following language:

> **IT IS HEREBY ORDERED**, pursuant to Section 102.33 of the National Labor Relations Board Rules and Regulations, that these cases be, and they hereby are, consolidated for the purposes of hearing, ruling, and decision by an administrative law judge and that thereafter [here designate the R case] be transferred to and continued before the Board in Washington, D.C., and that the provisions of Sections 102.46 and 102.69(e) of the above-mentioned Rules shall govern the filing of exceptions.

Where the election had been held pursuant to a consent election agreement, the order should include the following language:

> **IT IS HEREBY ORDERED**, pursuant to Section 102.33 of the National Labor Relations Board Rules and Regulations, that these cases be, and they hereby are, consolidated for the purposes of hearing, ruling, and decision by an administrative law judge and that thereafter [here designate the R case] shall be severed and transferred to the undersigned Regional Director for further processing.

In a consent election agreement case, the administrative law judge should issue an appropriate order as a part of the decision severing and transferring the R case to the Regional Director for appropriate action.

11422 Nature and Objective

A hearing on challenges/objections is a formal proceeding designed to elicit information on the basis of which the Regional Director or the Board may discharge their duties under Section 9 of the Act. As such, insofar as the Agency is concerned, it is investigatory and nonadversarial.

The hearing on challenges/objections should be conducted with the same formality as is accorded a preelection hearing. Sec. 11182.

11424 Participating Agency Personnel

The hearing on objections/challenges is ordinarily conducted by an administrative law judge (Sec. 11424.1) or by a hearing officer (Secs. 11424.2–11424.3). When no unfair labor practices are involved, the Regional Director may also assign a Board agent designated as representative of the Regional Director (Sec. 11424.4) to appear at the hearing to see that evidence adduced during the Region's investigation becomes part of the record. However, as the parties are expected to carry the burden of ensuring that a full record is made (Secs. 11362.2 and 11392.10), a representative of the Regional Director will ordinarily not be necessary.

11424.1 Administrative Law Judge

If the Board's order directing that a hearing be held specifies that it be before an administrative law judge, or when a Regional Director determines objections and/or challenges are appropriate for hearing by an administrative law judge (those cases where the hearing officer's report would be submitted directly to the Board), the Region should contact the Chief or Associate Chief Administrative Law Judge to inquire whether an administrative law judge is available for a date and at the location for hearing. OM 03-84. The Region should provide the Chief or Associate Chief Administrative Law Judge all available information concerning the nature of the objections and/or challenges and an estimate of the number of days the hearing is expected to last. The Region would then issue a notice of hearing and the administrative law judge would conduct the hearing as the hearing officer. The matter would not be transferred to the Division of Judges but instead remain in the Region.

11424.2 Selection of Hearing Officer

The hearing officer ordinarily should be a Board agent from the Region in which the hearing is to be held, except:

(a) If a hearing is directed by the Regional Director or the Board where an issue involves the conduct of a Board agent. (Sec. 11429.1 discusses requests for testimony by a Board agent.)

(b) If a hearing is directed by the Board concerning credibility findings previously made by the Regional Director. Secs. 11364.3, 11365.1, 11394.3, and 11395.1.

There may be unusual circumstances that, in the Regional Director's judgment, warrant further exceptions to this procedure. In any event, all requests and arrangements for obtaining a hearing officer from outside the Region should be made through the Division of Operations Management.

11424.3 Functions and Duties of Hearing Officer

11424.3(a) Prehearing

The hearing officer should be given all formal papers. These include a copy of the notice of hearing, any order directing hearing, amendments thereto, Regional Director's report or supplemental decision on objections and/or challenges, exceptions, request for review, Board order and any motions or requests on which prehearing rulings

have been made that bear on the issues to be resolved by the hearing. Working from this material alone, the hearing officer should become familiar with the factual and legal issues presented and the general Board precedents relevant to the indicated issues.

11424.3(b) Hearing

The hearing officer should not access the Region's case file, or have direct or indirect knowledge of its contents, except to the extent that he/she has been furnished the pleadings in advance (Sec. 114243(a)). The role of the hearing officer in a postelection challenges and/or objections hearing differs from the role of the preelection hearing officer in two significant respects: in a postelection hearing, the hearing officer makes (1) credibility resolutions and (2) findings, conclusions, and recommendations, whereas the preelection hearing officer does neither (Sec. 11250). In other respects, however, the roles are similar. Secs. 11180–11248. Thus, the postelection hearing officer conducts the hearing, opens, adjourns and closes the hearing, and maintains order while the hearing is in session. The hearing officer listens to and passes on the admissibility of oral testimony and arguments concerning documentary evidence offered.

The hearing officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director. Allegations based on a new legal theory or different factual circumstances are insufficiently related to the objections set by the Regional Director for hearing. *Precision Products Group, Inc*., 319 NLRB 640 (1995); *Iowa Lamb Corp*., 275 NLRB 185 (1985).

The hearing officer is not an advocate of any position but must be impartial in his/her rulings and in conduct both on and off the record. The hearing officer should not have access to the Region's case file, nor direct or indirect knowledge of its contents, except to the extent that he/she has been furnished the pleadings in advance (Sec. 11424.3(a)) and to the extent developed by the evidence presented at the hearing. Therefore, although the hearing officer should take pains to see that the record contains all relevant and competent evidence, his/her efforts in this direction will be without the benefit of the material elicited in any prehearing investigation.

The hearing officer should actively participate. As necessary, he/she should cross-examine, call and question witnesses, and call for and introduce appropriate documents. It should be recognized, however, that, under some circumstances, the hearing officer's pursuit of his/her responsibility for the development of a full record may lead to an appearance of undue assistance to one party or another. The hearing officer should exercise self-restraint, should give the parties prior opportunity to develop points, and should refrain from needlessly "taking over." The hearing officer must keep constantly in mind that the parties will expect his/her objective and considerate regard. Nonetheless, the hearing officer, while exercising self-restraint, should also be cognizant that his/her primary responsibility is, as noted above, to see that the record is full and contains all relevant and competent evidence, within the confines of the issues set for hearing by the Regional Director.

The hearing officer should keep the record as short as is commensurate with its being complete, in the same manner as at a preelection hearing. Sec. 11188.1. By requiring the parties to state succinctly their positions on the record (Sec. 11217), by

receiving stipulations (Sec. 11222), and by excluding irrelevant and cumulative material, including by utilizing offers of proof (Sec. 11226), the hearing officer should achieve an uncluttered record.

Finally, it is the duty of the hearing officer, on consideration of the record, to make credibility resolutions when necessary, as well as to make findings, conclusions, and recommendations that are fully explained and supported by the facts and analysis contained in his/her report.

11424.4 Functions and Duties of Representative of Regional Director

11424.4(a) Prehearing

The representative of the Regional Director, if one is utilized (Sec. 11424), should be thoroughly familiar with the contents of the Regional Office case file. Whether or not the representative was the Board agent assigned to the original investigation of objections, he/she should not reinterview witnesses.

11424.4(b) Hearing

As indicated in Sec. 11424, the primary function of a representative of the Regional Director is to see that the relevant evidence adduced during the Region's investigation becomes part of the record. During the hearing, the file should be in his/her possession. The representative may voice objections; cross-examine, call and question witnesses; and call for and introduce appropriate documents. If the information in the representative's possession warrants it, he/she should seek to impeach the testimony of witnesses called by others or contradict evidence that has been presented. However, the representative of the Regional Director should not offer new material unless he/she is certain it will not be offered by one of the parties.

If the representative finds it necessary to impeach the testimony of witnesses or contradict evidence that has been presented, the representative must exercise self-restraint and display impartiality as well as the appearance of impartiality.

11424.4(c) Hearing After Remand

In the event there is a remand by the Board in which the Board orders that a hearing be held, the role of the representative of the Regional Director, if any, does not change. The representative does not have the duty of sustaining at the hearing the Regional Director's report or supplemental decision.

11426 Prehearing Procedures

11426.1 Regional Office Preparation

11426.1(a) Formal Papers

In advance of the hearing, the formal papers should be prepared. They consist of the notice of hearing, any order directing hearing, amendments thereto, Regional

Director's report or supplemental decision on challenges and/or objections, exceptions, request for review, Board order and any motions or requests on which prehearing rulings have been made that bear on the issues to be resolved by the hearing. They should be placed in one legal backing, in chronological order from the bottom upward, marked as Board's Exhibit 1(a)–( ).

11426.1(b) Statements of Witnesses

Some statements obtained during the prehearing investigation that are in the possession of the Regional Office may be producible at the hearing under Sec. 102.118(c) of the Rules and Regulations. Sec. 11429.2. In preparation for the hearing, it may be suitable to prepare copies of relevant portions of these statements. If there is to be a representative of the Regional Director at the hearing (Sec. 11424.4(b)), these copies would enable him/her to provide copies as appropriate as the hearing progresses. In the event there is to be no representative, these copies may be provided to the hearing officer, prior to the hearing, in sealed envelopes labeled with the names of the affiants, to enable him/her to provide copies as appropriate as the hearing progresses. Such copies of statements are not part of the record and should not be opened or examined by the hearing officer except in connection with their production under Sec. 102.118(c) of the Rules and Regulations.

11426.1(c) Foreign Language Witnesses

In the event foreign language witnesses are required, the Regional Office should ensure that the appropriate arrangements are made in order to avoid unnecessary expense or delay. Sec. 11429.4.

11427 Postponement Requests

Postponements should be granted only in unusual circumstances. As indicated in Secs. 11365.3 and 11395.4, Form NLRB-4338 should have been sent to each party with the notice of hearing. The parties should be required to adhere to its requirements.

11428-11430 CONDUCT OF HEARING

11428 Hearing Procedures

11428.1 Generally

The frame of reference for the hearing on objections/challenges is the notice of hearing and order directing the hearing; the hearing officer must limit the hearing to the matters that the Regional Director has set for hearing. Sec. 11424.3(b). Material not bearing on the issues posed therein should not be offered; if offered, it should not be received.

The procedures used in a hearing on objections/challenges are similar to those used in a preelection representation case or an unfair labor practice case. Sec. 11420.

The functions and duties of the hearing officer and a representative of the Regional Director, if one is utilized, are set forth in Secs. 11424.3 and 11424.4.

11428.2 Opening Statement

At the beginning of the hearing, the hearing officer/administrative law judge should make the following statement:

> The hearing will be in order.
>
> This is a hearing before the National Labor Relations Board in the matter of _____ Case _____ pursuant to the order of the Regional Director/Board dated _____.
>
> The Hearing Officer/Administrative Law Judge conducting this hearing is _____.
>
> The official reporter makes the only official transcript of these proceedings and all citations in briefs and arguments must refer to the official record. In the event that any of the parties wishes to make off-the-record remarks, requests to make such remarks should be directed to the Hearing Officer/Administrative Law Judge and not to the official reporter.
>
> Statements of reasons in support of motions and objections should be specific and concise. Exceptions automatically follow all adverse rulings. Objections and exceptions may, on appropriate request, be permitted to an entire line of questioning.
>
> It appears from the Regional Director's/Board's order dated _____ that this hearing is held for the (limited) purpose of taking evidence concerning _____.
>
> In due course the Hearing Officer/Administrative Law Judge will prepare and file with the Regional Director/Board his/her report and recommendations in this proceeding and will cause a copy thereof to be served on each of the parties. The procedure to be followed from that point forward is set forth in the Board's Rules and Regulations, more particularly Section 102.69 thereof.
>
> Will counsel and other representatives for the parties please state their appearances for the record? For the Regional Director? . . . . Are there any other appearances? . . . . Let the record show no (further) response.

During these introductory remarks, the hearing officer should indicate that in the event briefs are permitted (Sec. 11430), a party which plans to order a transcript for purposes of preparing a brief should make arrangements with the reporting service contractor to obtain it on an expedited basis, by pick up, delivery or overnight mail. The hearing officer should also advise the parties that a party's request for an extension of time to file briefs based upon a delay in receipt or the nonreceipt of a transcript will normally be denied, in the event such arrangements for expedited delivery were not made by the party. The hearing officer should then continue:

> You may proceed Mr./Ms. _____ (Representative of the Regional Director).

The representative, if any, should say:

> I am here as Representative of the Regional Director to see that the evidence adduced during the investigation is made available to the hearing officer. In pursuance of this function, I may ask some questions and, if necessary, call witnesses.
>
> I want to say that I am not here to support any preconceived positions. My services are equally at the disposal of the hearing officer and all parties.

11428.3 Introduction of Formal Papers

The representative of the Regional Director, if one is utilized, should introduce the formal papers (Sec. 11426.1(a)); otherwise, they will be offered by the hearing officer or administrative law judge.

11428.4 Order of Presentation

Following the receipt of the formal papers and the explanatory statement of the representative of the Regional Director, the party that filed the objections or the party that made the challenges in question should be asked to proceed. After he/she has put in his/her case, the other parties should put in their cases.

The representative of the Regional Director normally should refrain from introducing evidence until other parties have completed their cases — and then only if the evidence involved is essential to the completeness of the record. If the information in the representative's possession warrants it, he/she should seek to impeach the testimony of witnesses called by others or contradict evidence that has been presented. Sec. 11424.4(b).

11429 Witnesses

11429.1 Board Agent Testimony

Pursuant to Sec. 102.118(a)(1) of the Rules and Regulations, Board agent testimony, if requested by a party, is prohibited without the General Counsel's written authorization. The General Counsel has delegated the authority to permit such testimony to Regional Directors, who should rule on any such requests. In ruling on such requests, the Regional Director should apply the Board's strong and longstanding policy against Agency employees appearing as witnesses in Agency proceedings. This policy is intended to avoid the appearance of partiality; unusual circumstances must be present to justify overriding the prohibition. Unusual circumstances are not present where other witnesses are available and the issues can be resolved through credibility resolutions. *Laidlaw Transit, Inc.*, 327 NLRB 315 (1999).

11429.2 Production of Statements of Witnesses

The production of statements of witnesses at a postelection hearing is governed by Sec. 102.118(c) of the Rules and Regulations. That Section provides essentially that, after a witness called by any party has testified, any statement of the witness in the possession of the Board or the General Counsel that, under Sec. 102.118(b) would be producible at an unfair labor practice hearing, should on motion of any other party be produced, in accordance with the procedures applicable in unfair labor practice hearings. The hearing officer exercises the authority that the administrative law judge would exercise at an unfair labor practice hearing. It should be noted, however, that since the statement is to be used solely for the purpose of cross-examining the witness, the party calling the witness is not entitled to production of the statement unless the circumstances would permit it to cross-examine.

11429.3 Copies of Statements of Witnesses

The representative of the Regional Director or, if there is none, the hearing officer, may be in possession of witnesses' affidavits and copies thereof (Sec. 11426.1(b)) for the purpose of their production as described in Sec. 11429.2. If such is not the case, the representative or the hearing officer should contact the Regional Office to obtain these statements as required, ensuring that the hearing is not unduly delayed by the need to have them provided from the Regional Office file.

11429.4 Foreign Language Witnesses

In the event foreign language witnesses are required, the Regional Office will secure and pay for interpreter services. Unnecessary expense and delay regarding such should be avoided. *Solar International Shipping Agency,* 327 NLRB 369 (1999); Sec. 11221.

11430 Briefs

In a hearing on challenges/objections the parties have no right to file briefs. The filing of briefs is generally to be discouraged to the extent they are unnecessary and interfere with the promptness with which postelection matters should be resolved. However, where allowed, the hearing officer has the authority to set time limits for filing. It is assumed, however, that in the interests of expeditiously resolving a representation question, no more time than is necessary will be allowed, usually 7 days.

Parties should be advised that requests for extensions of time to file briefs will not be granted by the hearing officer except under the most unusual circumstances. As is the case in preelection hearings, the hearing officer should advise the parties, at the opening of the hearing, that requests for extensions of time to file briefs based upon the unavailability or delayed receipt of transcripts will not be entertained unless arrangements were previously made with the reporting service for the expedited delivery of transcripts. Sec. 11428.2.

The representative of the Regional Director should not file a brief in a hearing on challenges/objections.

11432-11438 POSTHEARING

11432-11434 HEARING OFFICER REPORT ON CHALLENGES/OBJECTIONS

11432 Hearing Officer Report

The order directing that a hearing on challenges/objections be held should specify that the hearing officer/administrative law judge prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations as to the disposition of each issue. The order directing hearing will specify whether the report should be served on the Regional Director or the Board. Secs. 11366.2 and 11396.2. If the hearing is conducted by an administrative law judge, the report is always submitted directly to the Board. Sec. 11424.1.

The form and content of the report will vary according to the case. Normally, it should note the occasion for the hearing (the order) and any other postelection documents that have preceded the report, narrate the background material and then recite factual findings.

Questions of credibility should be resolved, with the basis for resolution being cited. Finally, appropriate recommendations should be made to the Board or the Regional Director, whichever is appropriate. A copy of such report shall be served on all parties. Parties' exceptions to the report are discussed in Sec. 11434. If the report is filed with the Board, a copy should also be served on the Regional Director.

The hearing officer should file his/her report with the Board or Regional Director as quickly as possible after the close of hearing. Immediately upon the filing of exceptions to the report, the transcript and exhibits, bearing the case name and number, should be forwarded to the Associate Executive Secretary. OM 02-28.

11434 Exceptions to Hearing Officer Report

The order directing hearing should specify that, within 14 days of the issuance of the report, any party may file exceptions thereto with the Board (eight copies) or with the Regional Director (an original and one copy) immediately serving copies on all other parties. Secs. 11366.2 and 11396.2. If filed with the Board, a copy should be served on the Regional Director. In the absence of exceptions, recommendations in the hearing officer's report may be adopted.

11436-11438 BOARD OR REGIONAL DIRECTOR DECISION

11436 Decision

The Board or Regional Director, as the case may be, having considered the hearing officer's report on challenges/objections and the exceptions thereto, will issue a decision.

If the decision sustains the objections in any part, an order will set aside the original election and direct a rerun election "at such time as the Regional Director deems appropriate." Sec. 11450.

Thereafter, the Regional Director should issue a notice of the rerun election that the Board or he/she has directed. Normally, the eligibility date will be the latest completed payroll period preceding the date of issuance of the notice of rerun election.

11438 Withdrawal After Election Invalidated

Between the setting aside of an election by the Regional Director or the Board and the conduct of a rerun, there may be an attempted withdrawal of the petition or a withdrawal from the election agreement or the ballot. Such an attempt is considered a postagreement/posthearing request, and the principles relevant thereto (Secs. 11098 through 11116) should be applied.

11450–11456 RERUN ELECTIONS

11450 Rerun Elections: Occasion

A rerun election is conducted when the original election is a nullity by virtue of its tallied results (Secs. 11350.1–11350.2) or because it is set aside, either by the Board or the Regional Director (Sec. 11436) or by agreement of the parties (Sec. 11391.2).

11452 Timing and Conditions

11452.1 Date of Rerun Election

The rerun election should be held when appropriate after the original election is set aside, within the terms of the enabling determination or direction. When selecting the date for the rerun election, the passage of a significant period of time between the original election and the determination or direction of the rerun may be taken into consideration. Sec. 11284.

When an election has been set aside on the basis of objections which were consolidated with unfair labor practices, the arrangements for the rerun election may be affected by the status of the unfair labor practice allegations. Sec. 11452.4.

11452.2 Terms of Rerun Election

The voting unit(s) or group(s) in a rerun election will be the same as in the original election. The payroll period determining eligibility, however, will be the latest completed payroll period preceding the date of issuance of the notice of rerun election, as set forth in Sec. 11436. The preparation and preelection check of the voting eligibility list should follow the principles applying to an original election, as set forth in Sec. 11312.1(i).

Intervention for the first time in a rerun election should not be permitted. *Waste Management of New York*, 326 NLRB 1126 (1999); *Jeld-Wen of Everett, Inc*., 285 NLRB 118 (1987); *General Motors Corp*., 17 NLRB 467 (1939).

The date, hours and place, and general conditions should be set in accord with the principles applying to an original election.

11452.3 Notice of Election

In accordance with the Board decision in *Lufkin Rule Co*., 147 NLRB 341 (1964), the standard notice of election may be modified to include a paragraph explaining why the original election was set aside.

Where there has been a finding of objectionable conduct by the Board or Regional Director, the following language should be included upon request or where no request is made, if in the judgment of the Regional Director the situation warrants it. Also see Sec. 11407.

The language adapted from the *Lufkin* decision is as follows:

NOTICE TO ALL VOTERS

> The election conducted on _____ was set aside because the National Labor Relations Board found that certain conduct of the (Employer) (Union) interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

While the Board looks favorably on granting requests to use this language in all cases where an election has been set aside and a new election directed, this should not be viewed as mandatory. Where the Regional Director determines that the use of *Lufkin* language is appropriate based upon a stipulation of the parties to void and set aside the election and to conduct a rerun election, and absent an actual finding of merit to the objections, the following language should be used:

> The election conducted on _____ was set aside by mutual agreement of the parties based upon alleged objectionable conduct of the (Employer) (Union) that interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, from interference by any of the parties.

If, in the discretion of the Regional Director, *Lufkin* language is not used, the notice of election should be modified to the extent that it should explain that the election to be conducted is a "rerun of the election held on [date of original election]."

In accordance with the Board's decision in *Builders Insulation, Inc*., 338 NLRB 793 (2003), when the originally scheduled election has been set aside through no fault of any party to the election (i.e., Board agent misconduct, weather, etc.), the standard notice of election shall be modified to include a statement that the election is being rerun for administrative reasons beyond the control of the parties to the election. Pattern language that may be utilized to accomplish this notification is:

NOTICE TO ALL VOTERS

> The election conducted on _____ (date) has been set aside for administrative reasons beyond the control of any party to the election. Therefore a rerun election will be held in accordance with the terms of this notice of rerun election.

11452.4 Consolidated Representation and Unfair Labor Practice Cases

As discussed in Sec. 11420.1, objections may have been consolidated for hearing with an unfair labor practice case. If the Board sets aside the election on the basis of the

objections, while also finding merit to the unfair labor practice charge, the Regional Director should consider the impact of the meritorious charge upon a rerun election, i.e., whether a rerun election should be conducted notwithstanding a pending charge. Secs. 11730–11734. In the event the charged party petitions in the Court of Appeals for review of the Board order in the unfair labor practice case, the Regional Director should nonetheless proceed with the rerun election, if otherwise appropriate. *Graham Architectural Products v. NLRB,* 697 F.2d 534 (3d Cir. 1983).

11454 Voting Procedures

The voting procedures of a rerun election are the same as those of an original election.

11456 Count; Tally

The count and the preparation and service of the tally of ballots are the same as for an original election, except that the tally of ballots should indicate that the election is a rerun.

11456.1 Challenges

As in the case of an original or a runoff election, the number of challenges may be sufficient in number to affect the results of a rerun election. If so, the machinery to resolve challenges (Secs. 11360–11378) should be put into operation.

11456.2 Results

The results of a rerun election may call for a runoff election, but not if the original election that is being rerun was itself a severance or runoff election. There can be no runoff of a severance or runoff election.

11456.3 Objections

Objections to a rerun election are due within 7 days after the tally of ballots of the rerun election has been made available to the parties. Sec. 102.69(a), Rules and Regulations.

Conduct to be considered in connection with objections to a rerun election is that which occurred from the date of the prior election. *Singer Co*., 161 NLRB 956 fn. 2 (1966). If the rerun election is set aside, there can be a second rerun election.

11470–11478 CERTIFICATIONS

11470 Certifications: Generally

The ultimate product of a representation election is a certification. If a union has received a majority of the valid votes, a certification of representative should be issued.

EXCEPTION: Sec. 11091, Self-Determination Elections.

If a union has not received a majority of the valid votes cast, a certification of results should be issued. (Unless the contrary is indicated, the term certification will be used herein to denote either.)

Certification is not issued on the basis of any results calling for a runoff. Nor is it issued with respect to an invalid election or one in which the number of challenged votes is sufficient to affect the results. Thus, if objections are timely filed or if the number of challenged votes is sufficient to affect the results, such issue(s) must be resolved before certification can issue.

A certification issued by the Regional Director has the same force and effect as one issued by the Board.

11472 Issuance

11472.1 Election Pursuant to Consent Election Agreement

In all cases, the certification will be issued by the Regional Director.

11472.2 Election Pursuant to Stipulated Election Agreement

(a) The certification will be issued by the Regional Director where no objections are filed (or, if filed, are withdrawn); and where challenges are not determinative of the results (or, if determinative, are withdrawn or resolved by agreement).

(b) The certification will be issued by the Board where objections are filed or challenges are determinative of results, *except* that the Regional Director will issue a certification (if one is called for by the results) after the opening and counting of challenged ballots pursuant to an agreement of the parties or a direction of the Board, at the expiration of the 7-day period for filing objections to the revised tally only. Sec. 102.69(h), Rules and Regulations.

11472.3 Election Directed by Regional Director or Board

(a) The certification will be issued by the Regional Director where no objections are filed (or, if filed, are withdrawn); and where challenges are not determinative of the results (or, if determinative, are withdrawn or resolved by agreement).

(b) Objections filed or challenges determinative of results:

(1) Certification may be issued by the Regional Director in a supplemental decision based on an administrative investigation, a hearing or both. The Regional Director's supplemental decision should include the certification; issuance of the certification should not be delayed until after the expiration of the time for filing a request for review.

(2) Certification may be issued by the Board after consideration of a Regional Director's report or after consideration of a hearing officer/ administrative law judge report or both.

(c) The Regional Director will issue a certification (if one is called for by the results) after the opening and counting of challenged ballots pursuant to a direction of the Regional Director or the Board, after the expiration of the 7-day objections period (if no objections have been filed to the revised tally).

11474 Form

The form of a certification will vary with the circumstances. A certification may be a separate document or may appear at the end of a report or supplemental decision on challenges and/or objections.

When the Board or a Regional Director does not rule on eligibility or unit placement prior to an election, and directs that the disputed classification be permitted to vote subject to challenge and those challenges are not determinative of the results, appropriate language should be used 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. Such information should be conveyed in a footnote in a certification, such as:

> Note, however, that (*unit category*) are neither included in nor excluded from the bargaining unit covered by this certification, inasmuch as the Board, in denying the (employer/union)'s request for review of the Regional Director's decision in this matter, excepted the unit placement of (*unit category*) and ordered them voted subject to challenge.

In a self-determination election held among professional employees (Sec. 11091.1), appropriate language should be used. For example, whatever the majority answer may be to the first question ("Do you wish to be included with nonprofessional employees in a unit for the purposes of collective bargaining?"), a footnote on the certification of representative or certification of results (whichever applies) should convey this information.

11476 File

Regions and Subregions should maintain a permanent file of certifications issued in their cases. The file should be arranged alphabetically or by case number and should contain all certifications of representative and certifications of results issued by the Regional Director or by the Board, including certifications contained in the Regional Director's supplemental decision or in the Board's decision on challenges or objections.

In all cases, the certification should contain a unit description.

11478 Authority of Regional Director to Correct, Amend, or Revoke

11478.1 Correction

A Regional Director has authority to correct inadvertent errors in a certification, whether issued by the Board or by the Regional Director. Matters of substance must be disposed of by amendment.

11478.2 Amendment

On appropriate petition, the Regional Director may amend any certification by a decision issued with or without a hearing. Secs. 11490–11498.

Where the certification involved arose out of a consent election agreement, the Regional Director's decision on amendment shall be final.

Where the certification involved arose out of a directed election or a stipulated election agreement, the Regional Director's decision on amendment shall be final, provided that any party may file a request for review with the Board, as provided in Sec. 102.67 of the Rules and Regulations.

11478.3 Revocation

A Regional Director has authority to revoke a certification on a motion by one of the parties or on his/her own initiative, if he/she feels that revocation is appropriate in a given situation.

Where the certification involved arose out of a consent election agreement, the Regional Director's action on revocation shall be final.

Where the certification involved arose out of a directed election or a stipulated election agreement, the Regional Director's action shall be final, subject to the right of the parties to request review by the Board. A statement of the right to request review should be included in the action on revocation.

11490–11540 UC, AC, UD AND OTHER CASES

11490-11498 UC AND AC CASE PROCEDURES

11490 UC and AC Case Procedures: Generally

11490.1 UC (Unit Clarification) Petition

A UC petition is usually filed by an employer or a labor organization to clarify whether particular employees should be included in or excluded from an existing unit. The collective-bargaining representative named therein need not have been certified.

UC petitions are sometimes filed when there have been changes in the employer's operations or among the employer's employees and the parties are unable to agree whether or not the affected employees should be included in or excluded from the recognized unit. A UC petition may also be used to decide the status of individuals whose status was not determined by the Regional Director or the Board (Sec. 11474) or who voted subject to challenge in an election but whose ballots were not determinative.

11490.2 AC (Amendment of Certification) Petition

An AC petition is usually used to confirm a change in the name of the employer or labor organization involved or to reflect a change in the affiliation of the labor organization.

11490.3 Concurrent Unfair Labor Practice Charge

When a UC or AC petition and an 8(a)(2) or (5) charge raise the same issue, the UC or AC petition may be the more effective way of resolving the issue. Ordinarily, the UC or AC case should be processed while the 8(a)(2) or (5) charge is held in abeyance, unless the potential for excessively lengthy or duplicative proceedings warrants a determination to process the issue through the unfair labor practice case. Secs. 11730.5 and 11731.3.

11491 Processing UC and AC Petitions

11491.1 Initial Communications

When a petition for clarification of a bargaining unit or for amendment of a certification is filed, it must contain a description of the proposed clarification or amendment and a statement of the reasons therefor. Secs. 102.61(d)(5) and (9) and 102.61(e)(5), Rules and Regulations. If the description and the reasons are not attached to the petition when received, steps to obtain them should immediately be taken. An acknowledgment is sent to the petitioner and notification, along with a copy of the petition, is sent to all interested parties, with the name of the Board agent to whom the case has been assigned.

11491.2 Interested Parties

Interested parties consist of the employer(s) involved; the recognized or certified bargaining agent; all labor organizations and individuals who claim or are believed to claim to represent any employee within the unit involved or who would be affected by the proposed clarification, as the case may be; any labor organization that, by letter within the past 6 months, has notified the Regional Office that it represents employees of the employer involved, or is presently actively campaigning among employees of the employer; and any labor organization whose name appears as an interested party in any prior case involving the same employees that has been closed within the last 2 years.

If the interest of a party is not apparent at the outset, that party is notified of the proceeding, in the form and manner indicated above, as soon as that party's interest becomes apparent. For purposes of initial communication, it is preferable to err on the side of considering a party to be interested rather than on the side of ignoring the party. Blanket requests for notice of "all" petitions filed should not be honored.

11491.3 Information Requested

A certified labor organization should be requested to submit a copy of the certification. All parties should be requested to submit copies of any presently existing or recently expired contracts covering any of the employees. They should also be requested to notify the Board agent at once of any other interested parties, including any potential joint employers, who should be apprised of the proceedings.

11492 Investigation

11492.1 Generally

On receipt of the case, the Board agent should review the petition and any accompanying papers and check any prior related cases. With respect to any issue that may be anticipated on the basis of such examination, the Board agent should become familiar with the existing precedents. The agent should ensure that there are no fatal defects on the face of the petition and that the requested changes and the reasons therefor are described. Sec. 11491.1.

In many UC cases, the information needed to determine the matter can be obtained through a telephone investigation and the submission of documents, although occasionally it may be necessary to take one or more affidavits from individuals with information about the facts involved. A notice to show cause may also be utilized. The Board agent should advise the parties that the determination as to the future course of the case may be made on the basis of the investigation, without the need for a hearing. Sec. 102.63(b), Rules and Regulations. He/she should prepare the parties for issuance of the Regional Director's decision without hearing or, if necessary, for issuance of notice of hearing. Explaining, if necessary, the need for promptness, the Board agent should inform the parties that if a hearing is to be held the notice will issue promptly.

11492.2 Lack of Cooperation

In the event of lack of cooperation in investigating the petition, a factual dispute should be resolved against the noncooperating party. Thus, failure of petitioner to make facts available should result in issuance of a decision and order dismissing the petition. Sec. 11494.

Failure of other parties to furnish information on a given point should lead to acceptance of credible information that is available on that point.

11492.3 Withdrawal

If it appears that a question concerning representation exists, or if for any other reason it appears that the case would ultimately be dismissed, the petitioner should be made aware of such and a withdrawal request should be solicited. If a withdrawal is not received, a decision and order dismissing the petition should issue. Sec. 11494.

11493 Amendment

The petitioner on its own initiative and irrespective of developments in the pending investigation may add to or delete from its original or last amended petition. Assistance to the extent permitted in connection with the original petition may be rendered in connection with the filing of such amendments.

A petition is amended by typing "Amended'' (or "Second Amended,'' "Third Amended,'' etc.) before the word "Petition'' on the regular petition form and by rewriting the contents of the petition to include the desired changes. An amendment merely referring to the existing petition and stating what is being added to or dropped from the petition should not be used. Whenever amended petitions are filed, all interested parties should be notified of the effected change.

An amendment filed after the dismissal of a petition should be docketed as a new petition, no matter how titled, and assigned a new number.

11494 Regional Determination

At the earliest point possible, the Regional Director should determine the case. The Regional Director's determination should be set forth in a decision or a decision and order. A decision may amend a certification or clarify a bargaining unit; a decision and order may dismiss a petition. These actions may be taken after issuing a notice to show cause, after an administrative investigation without a hearing or after a hearing. If the unit involved was certified pursuant to a consent election agreement, the decision is final. Otherwise, the decision should include a footnote advising the parties of their right to file a request for review with the Board. Sec. 102.63(b), Rules and Regulations. Copies of the decision should be sent to the petitioner and all other parties or their representatives. Sec. 11006.

11495 Hearing

If hearing is indicated, all hearing and posthearing procedures, insofar as applicable, shall be in conformance with instructions governing representation case proceedings (Secs. 11140–11274), except that where the certification of the unit involved arose out of a consent election agreement, the Regional Director's decision shall be final with no right of the parties to request review (Sec. 11494).

11496 Patterns

11496.1 Pattern Dismissal of UC Petition

DECISION AND ORDER

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

[OR, if no hearing conducted: Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, careful investigation and consideration took place.]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the Regional Director finds:

(1) The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

(2) The Petitioner proposes to clarify the bargaining unit as follows:

(3) Clarification of the bargaining unit is not warranted inasmuch as

ORDER

The petition filed in this matter is dismissed.

Dated _____ At _____

_____

Regional Director, Region ___

11496.2 Pattern Dismissal of AC Petition

DECISION AND ORDER

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

[OR, if no hearing conducted: Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, careful investigation and consideration took place.]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the Regional Director finds:

(1) The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

(2) The Petitioner proposes to amend the certification as follows:

(3) Amendment of the certification is not warranted inasmuch as

ORDER

The petition filed in this matter is dismissed.

Dated _____ At _____

_____

Regional Director, Region ___

11496.3 Pattern Decision and Clarification of Bargaining Unit

DECISION AND CLARIFICATION OF BARGAINING UNIT

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

[OR, if no hearing conducted: Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, careful investigation and consideration took place.]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the Regional Director finds:

(1) The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

(2) The Petitioner proposes to clarify the bargaining unit as follows: [also in this section set forth the applicable facts, discussion, and law]

(3) Accordingly, the [position of/job classification of] is [excluded from/included in] the bargaining unit.

Dated _____ At _____

_____

Regional Director, Region ___

11496.4 Pattern Decision and Amendment of Certification

DECISION AND AMENDMENT OF CERTIFICATION

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[OR, if no hearing conducted: Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, careful investigation and consideration took place.]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the Regional Director finds:

(1) The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

(2) The Petitioner proposes to amend the certification as follows: [also in this section set forth the applicable facts, discussion, and law]

(3) Accordingly, the Certification of Representative issued on [date] in Case [number] should be, and it hereby is, amended as follows: by substituting [name] as [Employer] [certified union].

Dated _____ At _____

_____

Regional Director, Region ___

11498 Transmission of Regional Director Decision to Washington

The decision should be forwarded to Washington by electronic submission pursuant to Memorandum OM 99-7 (January 22, 1999).

11500–11516 UD CASE PROCEDURES

11500 Objective

The objective of a UD (Union Deauthorization) — or 9(e)(1) — case is to determine whether or not a majority of the eligible employees within a voting unit covered by an agreement between their employer and a labor organization, which is the exclusive representative of such employees, desire to rescind the authority of such labor organization to require, under such agreement, that employees make certain lawful payments to that labor organization in order to retain their jobs. The Board modified the language on the UD ballot from the literal language of Section 9(e)(1) after the decision of the Supreme Court in *Communications Workers v. Beck*, 487 U.S. 735 (1988).

11502 Initiation

A UD case is initiated by the filing of a petition alleging that the employees covered by a union-security clause desire to rescind the authority to maintain such a clause. Prefiling assistance is discussed in Sec. 11001, especially Sec. 11001.7.

11504 Initial Notification and Service

Upon docketing of the petition, the employer and union involved should be notified in writing of the filing. The notice should give the name of the Board agent to whom the case has been assigned; define the unit named in the petition; invite the parties' cooperation; request of the employer commerce information and a current list of the names and classifications of eligible voters; and request of both the employer and the union copies of the current or recently expired contract and any relevant correspondence.

11506 Investigation

11506.1 Generally

In almost all UD cases, the information needed to determine the matter can be obtained through a telephone investigation and the submission of documents, although occasionally it may be necessary to take one or more affidavits from individuals with information about the facts involved. A hearing is very rarely required in a UD case. Sec. 11506.8. The Board agent should advise the parties that the determination as to the future course of the case will most likely be made on the basis of an investigation, without the need for a hearing.

11506.2 Question Concerning Representation Precludes Processing

No UD petition will be investigated while a question concerning representation of the employees involved is pending. If a timely representation petition is filed, a concurrent UD petition should not be dismissed until the Regional Director or the Board actually finds that a representation question exists or until the parties so agree by signing an election agreement in the R case. Meanwhile, the investigation should be suspended.

11506.3 Concurrent Unfair Labor Practice Charge

The effect of a concurrent unfair labor practice case is found at Secs. 11730–11734.

11506.4 Jurisdiction

With respect to exercising jurisdiction in UD cases, the principles to be applied are the same as those applied to other types of cases. Subject only to unamended errors on the face of the petition, jurisdiction constitutes the first issue to be disposed of in the investigation.

11506.5 Evidence in Support of Petition

A requirement of Section 9(e)(1) of the Act for the processing of a UD petition is the presentation of a petition by at least 30 percent of the covered employees asking that the union-security authorization be rescinded.

The showing requirement will be satisfied for a petitioner in a UD case if he/she has submitted cards or a signature list in support of the petition. The showing of interest for a UD petition need not be in the precise language of the Act; it is sufficient if the intent is clear. Sec. 11001.7.

NOTE: The language on a list of signatures to be used as the showing of interest in support of a RD petition may not ordinarily be used as a showing of interest in support of a UD petition, or vice versa.

The evidence should be submitted with the petition. If it is not, a 48-hour notice should be given by the Regional Director; if the proof is not submitted within that period, the petition may be dismissed.

Where applicable, the procedures and principles outlined for establishing a showing of interest in R cases should be followed. Secs. 11020–11034.

The file should contain a memo or Form NLRB-4069 showing the results of the interest investigation.

In seasonal industries, although no election may be held until a representative number of employees are employed, the UD petition will be accepted for filing before the season commences and proof of interest may be based on the total number of permanent employees working at the time the petition is filed or on some other reasonable formula that satisfies the spirit of the showing requirement. Sec. 11027.5.

11506.6 Union-Security Clause

The existence of a union-security clause is a prerequisite in a UD case. It is not necessary, however, that the clause be a lawful one; to hold otherwise would serve to defeat the intent of Congress.

11506.7 Contract as Bar

The existence of a contract with a union-security clause is a prerequisite to proceeding in a UD case. Hence, the Board has consistently held that the normal contract-bar principles are not applicable to UD petitions.

11506.8 Bargaining Unit

The unit covered by a UD petition should be the same as the contractually defined unit. On the other hand, if the former differs from the latter only in the descriptive terms used but not in substance, the petition should not be dismissed; if there is substantial variation between the two, the case should be put before the Regional Director by hearing if it appears that the UD unit is an appropriate one and the contract unit is not.

11508 Regional Determination

11508.1 Basis of Disposition

The Board agent should ascertain, as early as possible, the facts as to the various issues and should recommend dispositive action.

If the precedents for formal proceedings are not met, the petition should be dismissed, absent withdrawal, with opportunity for appeal to the Board. Sec. 11100.

If further processing is appropriate, efforts should be made to obtain an election agreement. However, processing of the petition should not be delayed by such efforts.

11508.2 Direction of Election by Regional Director

If the parties do not promptly enter into an agreement, the Regional Director should, in most situations, have the necessary election arrangements made and issue a letter directing that an election be held.

EXCEPTION: Sec. 11506.8.

There is no provision for filing a request for review of a letter directing a UD election and none should be provided. Sec. 102.85, Rules and Regulations.

Directions of election issued by the Regional Director should carry an *Excelsior* footnote. Secs. 11312–11313.

NOTE: Since a majority of those eligible to vote, rather than a majority of those voting, determines the outcome of a UD election (Sec. 11512), it is especially important that provision be made for checking the list of eligible voters with the parties in advance of the election.

Copies of the notice of election should be prepared and enclosed with the direction of election. Sec. 11314. The requirement that the employer must post the official notice of election for 3 full working days prior to the date of the election should be noted. Sec. 11314.7(a); Sec. 103.20, Rules and Regulations. The correspondence sent to the employer should contain sufficient extra copies for posting at the employer's premises.

11508.3 Pattern Direction of Election

Petitioner Date _____

Employer

Union

Re: [Case Name]

Sir/Madam:

On the basis of the investigation made to date in the above matter, it appears appropriate now to conduct a secret-ballot election to determine whether or not certain of the employees of [employer name] wish to withdraw the authority of [union name] to require, under its agreement with their employer, that employees make certain lawful payments to the union in order to retain their jobs.

Accordingly, pursuant to Section 9(e)(1) of the National Labor Relations Act, as amended, and Section 102.85 of the Board's Rules and Regulations, an election by secret ballot will be conducted as provided in the enclosed notice of election.[1]

---

[1] 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 Inc*., 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 this 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. 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.).

Additional copies of the notice of election are herewith furnished the employer for posting in conspicuous places throughout the plant. 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 date 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.

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

Your cooperation will be appreciated.

Very truly yours,

Regional Director

11510 Prehearing and Hearing Procedures

Only in rare cases will issuance of a notice of hearing be warranted, since the voters are all those covered by the union-security clause and substantial issues rarely exist. Sec. 11506.8. Where a notice of hearing issues, the prehearing and hearing procedures are the same as those for R cases. Secs. 11140–11275.

11512 Election

Whether agreed or directed, election procedures are the same. Except to the extent indicated below, they are the same as those applicable to R case elections. Secs. 11300–11456.

Since in UD elections, a *majority of those eligible to vote* must vote for rescission of authority before a certification rescinding such authority will be issued, it is important that the eligibility list be checked in advance with the parties. Sec. 11508.1.

NOTE: Persons who are ill, on vacation, or temporarily laid off, but not employees in the armed services who do not actually appear to vote in person, will be included as "eligible" employees.

The question on the ballot should be, "Do you wish to withdraw the authority of your bargaining representative to require under its agreement with the employer that employees make certain lawful payments to the union in order to retain their jobs?"

11514 Postelection Procedures

Postelection procedures in UD cases, including investigation and disposition of challenges and objections (Secs. 11360–11407), follow the same general course as those applicable to elections in R cases.

11516 Certification of Results

At the conclusion of the case, a certification of results of union deauthorization election issues.

11516.1 Certification of Results of Election

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

[Type of Election]

(name of party)
Employer
and Case

(name of party)
Petitioner
and

(name of party)
Union

CERTIFICATION OF RESULTS OF ELECTION

Following the filing of a petition, pursuant to Section 9(e) of the National Labor Relations Act, as amended, an election was conducted herein under the supervision of the Regional Director for the National Labor Relations Board. No objections were filed to the conduct of the election or to the tally of ballots.

Pursuant to the authority vested in the undersigned by the National Labor Relations Board.

It is certified that a majority of employees eligible to vote has (not) voted to withdraw the authority of (name of union) to require, under its agreement with the Employer, that employees make certain lawful payments to that labor

organization in order to retain their jobs in conformity with Section 8(a)(3) of the Act, as amended.

Signed at _____, this _____ day of _____.

_____

Regional Director for Region ____

National Labor Relations Board

11520-11540 OTHER CASES

11520 Last-Offer Elections

Preparations for and conduct of elections held under Section 209(b) of the Labor Management Relations Act, 1947 (Title II—National Emergencies) should be undertaken pursuant to advice provided by the Division of Operations Management on a case-by-case basis.

11540 Certification of Representative Under FLSA

Under Section 7(b) of the Fair Labor Standards Act (FLSA), a union (including labor organizations representing Federal, state, or local government employees) may seek certification as a bona fide representative of a given group of employees. The procedure to be followed is set forth below.

(a) Petition Form NLRB-1026 should be filed in the appropriate Regional Office by the labor organization seeking the certification; and the Regional Office should give the case a W.H. number.

(b) At the time the petitions are filed for the bona fide certification, the Regional Office should request a copy of the current or most recent contract between the labor organization and the employer.

(c) The Region should ascertain whether there is a certification as exclusive bargaining agent outstanding.

(d) The Regional Office should issue a notice to show cause as to why the petitioned for certification should not issue, which should be posted on the employer's premises and sent to all interested parties. Responses to the notice to show cause should be filed with the Regional Director within 14 days or any other time period as set forth in the notice.

(e) If there is no response to the notice, the Regional Director should send the file to the Board with the Regional Director's recommendation.

(f) If there is a response to the notice to show cause that raises issues sufficient to go to a hearing, a hearing officer should be assigned who, at the conclusion of such hearing, makes a written report without recommendation. The Regional Director reviews the report and record and makes a recommendation to the Board and the report and record are transmitted to the Board, which will decide whether or not to issue the certification. Procedures in such hearing

will be similar to representation proceedings with the burden on the moving party.

A certificate of bona fides for purposes of the FLSA does not necessarily establish the right of the organization so certified to be recognized as the exclusive bargaining representative of the affected employees under the provisions of the NLRA.

11700–11886 COMMON TO ALL CASES

11700–11711 JURISDICTION

11700 Jurisdictional Standards

The Board's jurisdictional standards existing on August 1, 1959, provide the extent to which the Board might, in its discretion, decline to exercise its legal jurisdiction. Pursuant to Section 14(c)(1) of the Act, these standards may be modified, provided that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing on August 1, 1959.

Although the Board has statutory authority to assert jurisdiction over all enterprises, not specifically exempted by Section 2(2) of the Act, whose operations affect interstate commerce, the Board has exercised its discretion to assert jurisdiction only over enterprises that meet monetary standards which are based on the character of the business. The standards which have the broadest application are those for retail and non-retail operations and are set forth in *Siemons Mailing Service,* 122 NLRB 81 (1959). Jurisdiction will be asserted over any retail operations with a gross volume of business in excess of $500,000 annually and which has some business, greater than de minimis, across State lines. The nonretail standard requires $50,000 of direct or indirect inflow or outflow of goods or services across State lines.

In addition, the Board has established separate individual standards to address certain industries and types of enterprises, including health care organizations, newspapers, and educational institutions. The Agency's publication "An Outline of Law and Procedure in Representation Cases," Chapter 1, Jurisdiction, contains a more complete discussion of the Board's jurisdictional standards and their application.

Even where an employer fails to meet the appropriate Board discretionary monetary standard, the Board will assert its jurisdiction to the extent necessary to address alleged violations of Section 8(a)(4) of the Act if it can be established that the Board has statutory jurisdiction, i.e., a greater than de minimis flow of goods or services across State lines. *Pickle Bill's, Inc.,* 224 NLRB 413 (1976).

11702 Investigation

Among the earliest determinations to be made is whether the employer is an "employer" under Section 2(2) of the Act and whether the employer meets the appropriate Board jurisdictional standard. If Board jurisdiction cannot be asserted, the Regional Office should dismiss the charge or petition, absent withdrawal.

11702.1 Obtaining Commerce Information from Employer

Normally, commerce information is furnished by the employer involved. Where appropriate, a Questionnaire on Commerce Information, NLRB Form-5081, is sent to the

employer with the initial letter serving the charge or petition. If the completed questionnaire is not conclusive, further investigation must be undertaken. As an alternative to the Commerce Questionnaire, the Regional Office may, where appropriate, accept a written stipulation of facts establishing Board jurisdiction.

11702.2 Examination of Employer Records

If an employer fails or refuses to stipulate to commerce facts, or to return a properly completed questionnaire on commerce, or if the Regional Office has reason to question the accuracy of a stipulation or questionnaire, an examination of the relevant records of the employer should be undertaken.

11702.3 Commerce Affidavit

The Regional Director may wish to procure an affidavit from an official of an employer certifying the completeness and accuracy of the employer's records examined by the Regional Office relative to the question of jurisdiction. The Regional Office should obtain such an affidavit where the investigation reveals that an employer's revenues fall just short of the Board's jurisdictional standards or where the Regional Director finds compelling circumstances. As with other witnesses in appropriate circumstances, the Board agent should inform the affiant of the criminal penalties under the United States Code applicable to any one giving false information to the U.S. Government. The affidavit could contain the following statement, which appears on petitions and charges:

> Willful false statements herein can be punished by fine and imprisonment. (U.S. Code, Title 18, Section 101)

If an employer refuses to provide such an affidavit in an R case and there exists a reasonable question as to the issue of the Board's jurisdiction, the matter should be set for hearing. However, in an unfair labor practice investigation, see Sec. 11704.2.

11702.4 Action on Basis of Commerce Investigation

All determinations on jurisdiction should be based on admissible evidence or stipulated facts, rather than bare admissions.

11704 Subpoenas for Commerce Information

11704.1 Representation Cases

In representation cases, if reasonable and practical efforts fail to develop sufficient evidence to dispose of the question of jurisdiction, production of the relevant material should be demanded by subpoena returnable either at the hearing or, in appropriate circumstances, before issuance of the notice of hearing.

The hearing officer should be prepared to establish facts concerning statutory jurisdiction and otherwise make a record appropriate for a jurisdictional determination under the rule set forth in *Tropicana Products,* 122 NLRB 121 (1958), in the event of noncooperation or noncompliance with the subpoena.

Under the Board's *Tropicana* rule, in a case where an employer refuses, on reasonable request by a Board agent, to provide information relevant to the Board's jurisdictional determination, jurisdiction will be asserted without regard to whether any specific monetary jurisdictional standard is shown to be satisfied, if the record at a hearing establishes that the Board has statutory jurisdiction.

11704.2 Unfair Labor Practice Cases

If the utilization of reasonable and practical means fails to develop sufficient evidence to dispose of the question of jurisdiction in an unfair labor practice case, a subpoena—normally a duces tecum—should be served on the employer. It should be returnable *before* issuance of complaint unless it is otherwise clear by way of prior cases, widespread repute, etc., that the Board has jurisdiction. In the latter case, the subpoena should be returnable at the C case hearing. The *Tropicana* rule described above may also be applied in similar circumstances in C case hearings. *Strand Theatre, K.I.M.V.B.A. Corp.,* 235 NLRB 1500 (1989).

11704.3 Failure to Comply with Subpoena

Where a person has failed to comply with a subpoena relating to commerce, it should be enforced (Secs. 11770 and 11790) unless the Board's *Tropicana* rule is relied on or the need for the subpoenaed material is otherwise obviated.

11705 Other Sources for Obtaining Commerce Information

Other sources may be used as a supplement to, a check on or substitutes for information supplied directly by the employer. For example:

Prior cases

Employees, such as receiving/shipping department employees

Suppliers or customers of employer

Transportation services

State and Federal agencies

Commercial and financial reporting services and trade journals

11705.1 Contacts with Other Agencies

Regional Offices may directly contact field offices of other agencies for commerce information. Contact with the headquarters of other agencies should be made through Operations.

11706 Jurisdictional Standards Not Met

Where it is clear that an employer does not meet the Board's discretionary monetary standards, the case should be dismissed, absent withdrawal.

11707 Jurisdictional Policy Question

Wherever a C case involves a policy question regarding jurisdiction, it may be submitted to Advice (Sec. 11750), whether or not any party objects to the assertion of jurisdiction.

11708 Proof in Formal Proceedings

In any formal proceeding, commerce facts sufficient to determine whether the Board has jurisdiction over the dispute must be established either through factual stipulation or by record evidence.

11709 Advisory Opinions

As set forth fully in Secs. 102.98 through 102.104, Rules and Regulations and Secs. 101.39 through 101.40, Statements of Procedure, under certain limited circumstances the Board will, at the request of a court or agency of a State or Territory, issue an advisory opinion as to whether it would assert jurisdiction over the parties to a particular controversy. (By Final Rule of January 10, 1997, Federal Register, Volume 61, Number 239, private parties may not petition for such advisory opinion.)

Whenever an agency or court of any State or Territory is in doubt whether the Board would assert jurisdiction over the parties in a proceeding pending before such agency or court, the agency or court may file a petition with the Board for an advisory opinion on whether the Board would decline to assert jurisdiction over the parties before the agency or the court (1) on the basis of its current monetary standards or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act. Unlike most other Agency matters that are initiated through the filing of documents with a Regional Office, petitions for advisory opinions must be filed directly with the Board. Although a copy of the petition should be served on the Regional Director, such does not satisfy the petitioner's obligation to serve the original on the Board.

11709.1 Regional Office Action

Upon the filing of a petition for an advisory opinion, a review of the petition and the Regional Office case files should be undertaken. If the Regional Director is in possession of facts bearing on the jurisdictional issues before the Board secured during the investigation of a prior or current C or R case and believes such facts would assist the Board in rendering its advisory opinion, the Regional Director should move to intervene in the advisory opinion proceeding. After conducting any additional investigation into jurisdiction, the Regional Director should submit to the Board the jurisdictional facts contained in the investigatory files with such motion. If the case is closed, however, no further investigation should be conducted unless the Board so requests.

In this regard, the Regional Director should:

- In accord with Sec. 102.113, Rules and Regulations, serve copies of the Regional Director's motion to intervene and a statement of jurisdictional facts on the State court or agency and the parties to the State proceedings
- Advise the parties so served that pursuant to Sec. 102.101, Rules and Regulations, they have 14 days after service thereof within which to make a response.

11710 Declaratory Orders

The procedures for the filing of a petition for a declaratory order on a question of Board jurisdiction by the General Counsel are set forth fully in Secs. 102.105 through 102.110, Rules and Regulations and Secs. 101.42 through 101.43, Statements of Procedure. Such a petition may be filed when both an unfair labor practice charge and a representation case relating to the same employer are contemporaneously on file in a Regional Office; there is doubt whether the Board would assert jurisdiction over the employer involved; and there is no dispute as to the facts concerning commerce. See, e.g., *Latin Business Assn.,* 322 NLRB 1026 (1997).

If the Regional Director determines that a declaratory order should be sought, a proposed petition containing the facts and pleadings required by Sec. 102.106, Rules and Regulations should be submitted to the Division of Operations-Management with a transmittal memorandum setting forth the Regional Office's recommendations. Eight copies of the petition, plus additional copies for service on all parties, and an affidavit of service, original and two copies, containing the names and addresses of all parties involved in the unfair labor practice and representation cases, should also be submitted.

If the petition is deemed appropriate, the General Counsel will sign it, file it with the Executive Secretary of the Board, serve a copy of the petition on each of the parties involved, complete the affidavit of service and notify the Regional Office by means of a conformed copy of the affidavit of service.

11711 National Mediation Board Jurisdiction

At times, questions may arise as to whether a particular employer involved in an NLRB proceeding is under the jurisdiction of the Railway Labor Act (RLA), administered by the National Mediation Board (NMB). See 45 U.S.C. §§ 151 (railroads) and 181 (air carriers). Section 2(2) of the National Labor Relations Act excludes from the definition of employer "any person subject to the Railway Labor Act."

11711.1 Jurisdiction Clear

If it is clear that the NLRB has jurisdiction over the employer, the Regional Office should proceed with the processing of the case. See *United Parcel Service,* 318 NLRB 778 (1995), for circumstances in which referral to NMB is not appropriate.

Conversely, if it is clear that the employer falls under the jurisdiction of the RLA, the parties should be referred to the NMB and the charge or petition should be dismissed, absent withdrawal.

11711.2 Arguable RLA Jurisdiction

The Board's practice is to refer cases of arguable or doubtful RLA jurisdiction to the NMB for an advisory opinion on the jurisdictional issue. *Federal Express Corp.,* 317 NLRB 1155 (1995). Thus, in such circumstances, the Regional Office should submit the case for referral either to the Executive Secretary or the Division of Operations-Management as specified below. In such cases, the written submission should contain the relevant facts as outlined in OM 90-83, concerning referrals to the NMB and should include the names, addresses, telephone numbers, fax numbers, and e-mail addresses of all parties to the proceedings and their representatives.

(a) *C Case:* In a C case, the Regional Office should initially contact the Division of Operations-Management to informally discuss the matter. If a formal submission is required, the Regional Office should draft a letter to the Chief of Staff of the NMB for the signature of the Associate General Counsel, Division of Operations-Management. The letter should be entitled "Request for Opinion on National Mediation Board Jurisdiction under the Railway Labor Act" and should be structured as follows:

- Background
- Facts
- Issues
- Contentions of the Parties

The letter should conclude with a statement that the question of jurisdiction is being submitted for NMB consideration. The Regional Office should also submit its case file.

(b) *R Case:* Generally, in an R case, the Regional Office should conduct a hearing to develop a record on the jurisdictional issue. If, after review of the record, the

RLA jurisdictional issue remains doubtful, the Region should prepare a memorandum directed to the Office of the Executive Secretary which should be structured as follows:

- Background
- Facts
- Issues
- Contentions of the parties

The memorandum should not contain a legal analysis by the Regional Office but should conclude with the recommendation that the Board consider whether the issue should be submitted to the NMB. If a hearing is held, the Regional Office should forward the transcript, exhibits and all briefs on the issue with the memorandum. If the Regional Office investigates the matter without a hearing, the Regional Office should submit all evidence and position statements relating to the jurisdictional issue. The Regional Office must also issue an Order Transferring the Case to the Board, NLRB Form-4481.

11712–11720 TRANSFER, CONSOLIDATION, AND SEVERANCE

11712 Generally

The transfer, consolidation and severance of cases are addressed at Sec. 102.33, Rules and Regulations as to charges and Sec. 102.72 as to petitions. Transfer, consolidation, and/or severance may be appropriate in order to effectuate the purposes of the Act and for cost and time considerations.

11714 Interregional Transfers

Generally, there are two categories of interregional case transfers.

11714.1 Individual Case(s) Transfer

Individual cases may be transferred from one Regional Office to another for the purposes set forth above at the time of filing or as soon thereafter as the necessity becomes apparent. In such circumstances, the Regional Offices involved in the transfer will confer about the proposed action and the reasons therefor. The sending Regional Office will then request that the Division of Operations-Management issue an order transferring the case. See Clerical Procedures, Sec. 12420. The request will contain the case name, petitioner or charging party, the present case number, and the case number to be assigned by the assisting Regional Office; a brief statement of the reasons for transfer; and an indication of whether the assisting Regional Office concurs in the proposed action.

A copy of the request will be sent to the assisting Regional Office. On receipt of the General Counsel's order of transfer, the sending Regional Office will send the file to the assisting Regional Office after notifying all parties to the case of the transfer and that future correspondence in the case should be directed to that office. The assisting Regional Office should notify the parties of the name of the agent to whom the case has been assigned.

11714.2 Interregional Assistance Program

Due to staffing considerations and/or backlogs of overage cases, cases may be transferred between Regional Offices pursuant to an interregional assistance program by which a set number of cases and/or specified counties will be transferred over a specified period of time. See OM 98-5 and OM 96-26. Under the interregional assistance program, the General Counsel may issue a blanket order setting forth the terms of the anticipated transfers.

(a) *ULP Cases:* Unfair labor practice cases susceptible to telephonic investigation are appropriate for transfer under this program. Both the sending Regional Office and the assisting Regional Office will assign case numbers to the transferred cases. Typically, the blanket transfer order will direct the assisting Regional Office to process the case through: dismissal; approval of withdrawal; issuance of a deferral letter; approval of and compliance with a settlement agreement; or a determination to issue complaint. Thereafter, the case will be returned to the sending Regional Office which will be responsible for any further processing required.

(b) *Representation Cases:* Representation cases may be assigned to an assisting Regional Office for the limited purpose of drafting and issuing a decision after a preelection hearing. The resulting decision will issue under the originating Regional Office's case number. Generally, the assisting Regional Office's Director will sign the decision as Acting Regional Director for the originating Regional Office and will include a footnote stating that the case was transferred pursuant to the interregional assistance program for decision writing only. In some situations, the originating Regional Office's Director will sign the decision and in that event such a footnote should not be included. In either circumstance, the originating Regional Office will document that the assisting Regional Office provided decision writing assistance, along with the dates the assistance was provided, by making an entry in Case Notes in the Case Activity Tracking System (CATS). Thus, the case will remain under a single case number throughout the entire process, eliminating unnecessary paperwork and confusion. See OM 03-77.

Assisting Regional Offices may also be requested to supply hearing officers to other Regional Offices for preelection or postelection hearings. In such circumstances, the case need not be transferred between Regional Offices.

(c) *Temporary Changes to Regional Office Boundaries:* Due to staffing considerations and/or backlog of overage cases, unfair labor practice cases, and representation petitions may also be transferred pursuant to temporary changes to Regional Office boundaries. Thus, the General Counsel may issue a blanket transfer order requiring that all cases arising in specified counties of one Regional Office be filed in another designated, usually contiguous, Regional Office.

Under these circumstances, both the sending Regional Office and assisting Regional Office will assign case numbers to the transferred cases. The assisting Regional Office will retain responsibility for the processing of the cases, including litigation, if necessary, until they are closed and will then forward the case files to the sending Regional Office.

For further instruction with respect to the latter two methods of transfer, consult OM 98-5 and OM 96-26.

11716 Consolidation

Pursuant to Secs. 102.33(c) and 102.72(c), Rules and Regulations, the Regional Director has the authority to consolidate unfair labor practice and representation cases, respectively, which are pending in the same Regional Office. A consolidation normally does not take place while the cases involved are in the investigative stages, but occurs upon the institution of formal proceedings or thereafter.

The following are examples of circumstances where cases may be consolidated:

- C cases where the respondent is the same in each case, where multiple respondents are sufficiently related or where the fact situations are sufficiently related
- R cases where the employer is the same in each case or multiple employers are sufficiently related
- A postelection R case with a C case, where the two cases involve sufficient issues in common

The authority for the consolidation of cases pending in more than one Regional Office rests with the General Counsel; the Division of Operations-Management should be consulted on such issues.

11718 Severance

Pursuant to Secs. 102.33(c) and 102.72(c), Rules and Regulations, the Regional Director has the authority to sever unfair labor practice charges and representation cases, respectively, which have been previously consolidated by the Regional Office. Where the General Counsel has authorized consolidation, clearance should be obtained from the Division of Operations-Management before severing cases.

11720 Motions to Consolidate or Sever

11720.1 Unfair Labor Practice Cases

Pursuant to Secs. 102.33(d) and 102.24, Rules and Regulations, motions by parties to consolidate or sever unfair labor practice cases after the issuance of complaint should be filed with the Chief Administrative Law Judge, if prior to hearing, or with the ALJ, if during hearing.

11720.2 Representation Cases

Motions by the parties to consolidate or sever representation cases should be filed in accordance with Sec. 102.65, Rules and Regulations.

11730–11734 CONCURRENT R (REPRESENTATION) AND C (ULP) CASES

To the extent relevant, the principles of these Sections should also be applied to situations involving UD petitions.

These sections apply to preelection situations. They generally do not deal with those postelection situations in which challenges and/or objections and related unfair labor practice charges are being processed. Such situations are discussed in Secs. 11407 and 11420.1.

For special procedures where there are concurrent 8(b)(7) cases, see Secs. 10240–10248.

11730–11731 BLOCKING UNFAIR LABOR PRACTICE CHARGES; EXCEPTIONS

11730 Blocking Charge Policy—Generally

The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted. However, there are significant exceptions to the general policy of having a charge "block" a petition. Accordingly, the filing of a charge does not automatically cause a petition to be held in abeyance.

The exceptions to the blocking charge policy are set forth in detail in Sec. 11731. Where the Regional Director is giving consideration to these exceptions while implementing the blocking charge policy, it should be recognized that the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition. Rather, the blocking charge policy is

premised solely on the Agency's intention to protect the free choice of employees in the election process.

11730.1 Types of Blocking Charges

Blocking charges fall into two broad categories. The first, called Type I charges, encompasses charges that allege conduct that only interferes with employee free choice. The second, called Type II charges, encompasses charges that allege conduct that not only interferes with employee free choice but also is inherently inconsistent with the petition itself. After the investigation of the latter charges and a determination as to their merit, such charges may also cause a petition to be dismissed.

11730.2 Type I Charges: Charges that Allege Conduct that Only Interferes With Employee Free Choice (Request to Proceed May be Honored)

When the charging party in a pending unfair labor practice case is also a party to a petition, and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted, and no exception (Sec. 11731) is applicable, the charge should be investigated and either dismissed or remedied before the petition is processed. A request to proceed by the charging party (Sec. 11731.1) may be honored in these cases. *Columbia Pictures Corp.,* 81 NLRB 1313, 1314 (1949); *Carson Pirie Scott & Co.,* 69 NLRB 935, 938–939 (1946); *United States Coal & Coke Co.,* 3 NLRB 398, 399 (1937); see also *Holt Bros.,* 146 NLRB 383, 384 (1964).

11730.3 Type II Charges: Charges that Affect the Petition or Showing of Interest, that Condition or Preclude a Question Concerning Representation, or that Taint an Incumbent Union's Subsequent Loss of Majority Support (Request to Proceed May be Honored in Limited Circumstances)

Some unfair labor practice charges allege conduct that, if proven, would not only have a tendency to interfere with the free choice of employees in an election, but also would be inherently inconsistent with the petition itself. Regardless of whether such charges are filed by a party to the petition or a nonparty, such charges block a related petition during the investigation of the charges, because a determination of the merit of the charges may also result in the dismissal of the petition. Inherently inconsistent charges include, but are not limited to, the situations described below in Secs. 11730.3(a) through (c). When a valid request to proceed is filed by the charging party in a Type II case, the Regional Director should evaluate the request in light of the factors described below in Sec. 11731.2–11731.5. If the Regional Director is of the opinion that the employees could, under the circumstances, exercise their free choice in an election, the Regional Director has the discretion to honor the request to proceed.

11730.3(a) Charges that Affect the Petition or Showing of Interest

These are Section 8(a)(1) and (2) or 8(b)(1)(A) charges that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition. If meritorious, such a charge may invalidate the petition or some or all of the showing of interest. As a consequence, the petition may be dismissed. Sec. 11733.2(a)(1).

Examples:

- A finding of merit to an 8(a)(1) charge that alleges the employer's representatives were directly or indirectly involved in the initiation of a RD or UD petition.
- A finding of merit to an 8(a)(1) charge that alleges the employer's representatives were directly or indirectly involved in the support of a RD or UD petition, if the showing is reduced below 30 percent after the tainted showing is subtracted.
- A finding of merit to an 8(a)(2) charge that alleges employer representatives assisted in the showing of interest obtained by a labor organization, if the showing is reduced below 30 percent after the tainted showing is subtracted.
- A finding of merit to an 8(b)(1)(A) charge that alleges a labor organization's showing of interest was obtained through threats or force, if the showing is reduced below 30 percent after the coerced showing is subtracted.

NOTE: See Sec. 11028.2 for the limited circumstances under which a petition may be dismissed because of conduct relating to the petition or the showing of interest, where such conduct is not the subject of an unfair labor practice charge.

11730.3(b) Charges that Condition or Preclude a Question Concerning Representation

These are Section 8(a)(2) and (5), 8(b)(3), or other charges which allege violations that involve recognition issues. These charges include allegations of 8(a)(5) or 8(b)(3) failure to recognize or bargain, or 8(a)(1) and/or (3) violations requiring a remedial bargaining order, or 8(a)(2) unlawful recognition. A determination of merit in such a charge may impose conditions upon or preclude the existence of the question concerning representation sought to be raised by the petition (e.g., *Big Three Industries,* 201 NLRB 197 (1973)). Sec. 11733.2(a)(2).

Examples:

- An 8(a)(5) or 8(b)(3) charge, which seeks to establish, to continue or to reestablish a bargaining relationship and for which the remedy is an affirmative bargaining order, may require dismissal of a related petition upon a finding of merit to the charge.
- An 8(a)(1) and/or (3) charge, in which a remedial bargaining order is being sought, seeks to establish a bargaining relationship, and would require dismissal of a related petition upon a finding of merit to the charge. *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).
- An 8(a)(2) charge that seeks to disestablish a bargaining relationship imposes a condition upon the question concerning representation that the

petition seeks to raise and must be resolved prior to processing the petition. In this situation, a determination of no merit, permitting the challenged bargaining relationship to continue, may, because of contract or recognition bar principles, require dismissal of a related petition which seeks to establish a new bargaining relationship. A determination of merit to the 8(a)(2) charge may cause the petition to continue to be blocked, until resolution of the charge by the Board, since the bargaining relationship must be disestablished before the petition can be processed. EXCEPTION: Sec. 11731.1(c)(1).

NOTE: Not all merit determinations in charges alleging 8(a)(2) and (5) or 8(b)(3) violations would require dismissal of the petition. If the remedy for the 8(a)(2) and (5) or 8(b)(3) conduct would not have an effect on the bargaining relationship and thus does not condition or preclude the existence of the question concerning representation sought to be raised by the petition, and if other Type II charges are not involved (Secs. 11730.3(a) and (c)), the petition would not be subject to dismissal.

Examples:

- Remedying a meritorious 8(a)(2) allegation of limited assistance by a low-level supervisor does not necessarily require disestablishment of a bargaining relationship.
- Remedying meritorious allegations of 8(a)(5) or 8(b)(3) unilateral change or failure to furnish information does not necessarily require an affirmative bargaining order.

Accordingly, these kinds of charges should be viewed as type I charges that allege only interference (Sec. 11730.1(a)), notwithstanding their allegations of 8(a)(2) and (5) or 8(b)(3) conduct.

FURTHER NOTE: An 8(a)(2) and (5) or 8(b)(3) charge involving recognition conduct that postdates the filing of the petition does not warrant dismissal of the petition, since the petition was already on file when the later allegedly unlawful conduct occurred. Similarly, such conduct that postdates the obtaining of the showing of interest and did not affect the filing of the petition does not warrant dismissal of the petition. Hence, these kinds of charges should be viewed as Type I charges that allege only interference (Sec. 11730.1(a)). *Empresas Inabon, Inc.,* 309 NLRB 291 (1992) (also *Union de la Construccion v. NLRB,* 10 F.3d 14, 16 (1st Cir. 1993)); *Celebrity, Inc.,* 284 NLRB 688 (1987).

11730.3(c) Charges that Taint an Incumbent Union's Subsequent Loss of Majority Support

These charges can be of any kind, other than a charge that affects the circumstances surrounding the petition or the showing of interest or a charge that involves a general refusal to recognize and bargain with the union. These charges raise the issue of a causal relationship between the violations alleged and the subsequent expression of employee disaffection with an incumbent union. A finding of merit to such a charge and of a causal connection between the violations alleged and the employee disaffection would warrant dismissal of a petition that was filed based upon that disaffection. Sec. 11733.2(a)(3).

Example:

An 8(a)(1) statement to a group of represented employees that the employer intends to operate in the future as a nonunion employer may require the dismissal of a petition that follows, if upon a finding of merit to the charge a causal relationship is established between the statement and the subsequent expression of employee disaffection with the incumbent union which is used to support the petition. *Williams Enterprises,* 312 NLRB 937, 939 (1993).

In *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004), the Board concluded that a hearing should be held to resolve genuine factual issues as to whether there was a causal nexus between alleged unfair labor practices and the filing of a decertification petition before the dismissal of such a petition.

Accordingly, in such circumstances the Regional Office should conduct a preliminary administrative investigation and proceed as follows:

(a) If no evidence of causal nexus exists, e.g., the showing of interest was obtained prior to the alleged unlawful conduct or the disputed conduct was de minimus or isolated:

- No further consideration should be given to dismissal of the petition
- The decision to treat the charge as blocking the processing of the petition should be reconsidered

(b) If evidence may support a finding of a causal nexus:

- Contact the Division of Operations-Management as to the appropriate action including a possible hearing on the causal nexus issue
- Advise the Office of Representation Appeals of the issue
- Continue to treat the charge as blocking the processing of the petition

11730.4 Decision Whether to Hold Petition in Abeyance

Regardless of whether the charge is already pending at the time of the filing of the petition or is filed after investigation of the petition has already begun, the Regional Director should decide whether the general policy of holding the petition in abeyance should be applied (Sec. 11730) or if one of the exceptions in Sec. 11731 applies. In implementing the blocking charge policy, the Regional Director should assess, throughout the steps of processing the charge and the petition, whether the charge blocks the petition. In situations where the processing of a representation petition is, or may be, blocked by unfair labor practice charges that are otherwise appropriate for deferral under *Collyer* or *Dubo*, the Region should follow the guidance set forth in Sec. 11731.3.

If at any time during or after investigation the Regional Director establishes that there was no causal relationship between the unfair labor practice allegations and the decertification petition, the Regional Director should not give further consideration to dismissing the petition and should reconsider whether the charge should continue "blocking" the processing of the petition.

11730.5 AC and UC Cases

Although the blocking charge policy applies to AC and UC petitions, in most situations the charge and the petition raise significant common issues which may better be resolved by processing the UC or AC petition. Secs. 11490.3 and 11731.3.

11730.6 Period of Pendency of Charge

A charge is pending at all stages up to and including an administrative decision to dismiss or a withdrawal, on the one hand; or, on the other, up to and including a court judgment with which there has not been full compliance. However, also see Sec. 11732 regarding the impact of charges that are to be or have been dismissed.

11730.7 Informing Parties

The Board agent handling the matter should inform the parties of any determinations made with regard to concurrent charges and petitions and the reasons therefor. If any party requests the reasons in writing, the Regional Director should promptly provide them. If the determination is to hold the petition in abeyance, the letter should also inform the parties of their right to obtain review by the Board of this determination under Sec. 102.71 of the Rules and Regulations.

If as a result of the determination a scheduled election is postponed, see Secs. 11302.1(b) and 11314.8 regarding notification to the parties.

11730.8 Notification to Board

If a blocking charge is filed at a time when a petition is pending before the Board in Washington, the Executive Secretary should be notified of the filing, as well as of any request to proceed that may be received. All subsequent relevant developments or dispositions of the unfair labor practice charge should also be reported to the Executive Secretary.

11731 Exceptions to Blocking Charge Policy

Exceptions to the Agency's general policy to block petitions are described below in Secs. 11731.1 through .5 as Exceptions 1 through 5. As noted in Sec. 11730.4, their applicability may be invoked or reconsidered at any time during the pendency of the petition.

NOTE: Exceptions 2 through 5 apply to Type II as well as Type I charges. The fact that a Type II charge may ultimately involve dismissal of the petition should be an element in the Regional Director's consideration as to whether an exception applies.

11731.1 Exception 1: Request to Proceed

11731.1(a) Receipt of Request to Proceed in Type I and Type II Charges

If the party filing the charge requests that the petition proceed, a petition may be processed notwithstanding the pendency of a Type I charge (Sec. 11730.2) in a related C case, subject to the limitations set forth below. A petition may be processed notwithstanding the pendency of a Type II charge (Sec. 11730.3) if the Regional Director is of the opinion, after evaluating the factors described below in Sec. 11731.2–11731.5, that the employees could, under the circumstances, exercise their free choice in an election. Form NLRB-4551 may be used for this purpose. On receipt of a request to proceed and if otherwise appropriate, the Regional Director may proceed with action on the petition. If the matter is before the Board for any reason, the Executive Secretary should be advised.

11731.1(b) Rescission of Request to Proceed

Should a party seek to rescind a request to proceed and once again suspend action on the petition, the reasons for the change should be ascertained. The Regional Director should rule on the request to rescind, applying the same considerations outlined in Sec. 11730 regarding the Agency's blocking charge policy, differentiating between the factors applicable to Type I and Type II charges. The charging party's prior willingness to attempt to continue with processing the petition should not, in and of itself, be viewed as a reason not to honor the charging party's subsequent attempt to rescind its request to proceed. It may contend, for example, that with the passage of time the unfair labor practices had had a tendency to interfere with the free choice of employees in an election. On the other hand, if the Regional Director determines, upon consideration of all the relevant factors, not to grant approval of the rescission, processing of the petition should continue.

The parties should be appropriately informed. Sec. 11730.7.

11731.1(c) Section 8(a)(2) *Carlson* Waiver

In cases in which the Board has entered an order requiring the respondent employer to withdraw and withhold recognition from the assisted union unless and until it has been certified, the Regional Director may honor a waiver whereby the petitioner affirmatively indicates a willingness to withdraw an 8(a)(2) assistance charge in the event the allegedly assisted union is certified. *Carlson Furniture Industries,* 157 NLRB 851

(1966). In the event all parties reach an agreement that accomplishes the same purpose as a Board order disestablishing a bargaining relationship, thus removing recognition or contract bar as an issue from the processing of the petition, the Regional Director may honor a waiver from the petitioner modeled on *Carlson Furniture*.

11731.1(d) Withdrawal and Attempted Reinstatement of Charge

A party which requests withdrawal of a refusal-to-bargain charge or of a domination of or assistance to union charge, in order to unblock a R case (in other words, which attempts to accomplish by withdrawal what it cannot accomplish by a request to proceed), should be advised that reinstatement of the charge might not be permitted after an election. *Fernandes Supermarkets,* 203 NLRB 568 (1973).

11731.2 Exception 2: Free Choice Possible Notwithstanding Charge

There may be situations where, in the absence of a request to proceed (Secs. 11731.1(a)), the Regional Director is of the opinion that the employees could under the circumstances, exercise their free choice in an election and that the R case should proceed notwithstanding the existence of a concurrent Type I or Type II unfair labor practice case and the absence of a request to proceed or a waiver.

11731.3 Exception 3: Charges Otherwise Appropriate for Deferral Under *Collyer* or *Dubo*

In situations where the processing of a representation petition is, or may be, blocked by unfair labor practice charges that are otherwise appropriate for deferral under *Collyer* or *Dubo*, Regional Offices should conduct a complete investigation of the charges and reach a determination on the merits. If the charges are without merit, Regions should dismiss them, absent withdrawal, and unblock the representation case. If the investigation discloses sufficient merit to proceed to a complaint, the parties should be so advised, and given an opportunity to enter into an informal settlement agreement resolving the allegations. In settling the case, the Region must consider the implications for the representation case. See OM Memo 07-69, Sec. 11733.2. Absent settlement, and prior to the issuance of complaint, the matter should be forwarded to the Division of Advice for consideration of whether deferral is appropriate, and whether *Saint Gobain Abrasives, Inc.,* 342 NLRB 434 (2004), is implicated. See OM Memo 08-74.

11731.4 Exception 4: Petition and Charge Raise Significant Common Issues; UC and AC Petitions

There are situations where the Type I or Type II alleged unfair labor practices are so related, at least in part, to the unresolved question concerning representation sought to be raised by the petition that the processing of the petition will resolve significant common issues. *Panda Terminals,* 161 NLRB 1215, 1223–1224 (1966); *Krist Gradis,* 121 NLRB 601, 615–616 (1958). Thus, it may be appropriate to conduct a hearing and issue a decision to resolve an issue, such as supervisory status, that is relevant to both the petition and the unfair labor practice case. Sec. 11228. Where appropriate, the conditions of Exception 2 (Sec. 11731.2) should also be taken into account, especially with respect to proceeding to an election.

UC and AC Petitions: When a UC or AC petition and an 8(a)(2) or (5) charge raise the same issue, the UC or AC petition may be the more effective way of resolving the issue. Sec. 11490.3. Ordinarily, the UC or AC case should be processed while the 8(a)(2) or (5) charge is held in abeyance, unless the potential for excessively lengthy or duplicative proceedings warrants a determination to process the issue through the unfair labor practice case.

11731.5 Exception 5: Scheduled Hearing

In situations where a R case hearing has already been scheduled when a Type I or Type II unfair labor practice charge is filed and time does not permit determination of possible merit of the charge, the Regional Director may proceed with the hearing in the R case. A separate determination should then be made by the Regional Director pursuant to Exceptions 2 and 3 above (Secs. 11731.2 and .3) with regard to issuing a decision and/or conducting an election.

11731.6 Exception 6: Scheduled Election

When an election has already been scheduled and thereafter a Type I or Type II unfair labor practice charge is filed too late to permit adequate investigation before the scheduled election, the Regional Director may, in his/her discretion:

(a) Postpone the election pending disposition of the charge; or

(b) Hold the election as scheduled and impound the ballots until after disposition of the charge; or

(c) Conduct the election, issue the tally of ballots and, in the absence of objections, issue a certification; and then proceed to investigate the charge.

Factors: The following are among the factors to be considered under this exception:

(1) The extent to which substantial evidence in support of the allegations is submitted by the charging party with its charge.

(2) The passage of time between the alleged conduct and the filing date of the charge.

(3) The seriousness of the allegations and the evidence submitted with the charge as to its dissemination.

Relevant factors recited in Exception 2 (Sec. 11730.2) may also be considered.

If as a result of the determination a scheduled election is postponed, see Secs. 11302.1(b) and 11314.8 regarding notification to the parties.

11732–11733 FINDING AS TO MERIT OF UNFAIR LABOR PRACTICE CHARGE

11732 Charge Found Not to Have Merit

If, upon completion of investigation of the charge, it is determined that the charge lacks merit and is to be dismissed, absent withdrawal, the Regional Director should proceed with the processing of the petition.

Where the situation involves a Type I charge (Sec. 11730.2), the Regional Director should proceed with the petition as if there were no concurrent charge, even though the dismissal of the charge is either pending or on appeal, unless, in his/her discretion, he/she concludes that further processing of the petition should await the results of the appeal.

Where the situation involves a Type II charge (Sec. 11730.3) and the dismissed charge is either pending or on appeal, the Regional Director may await the results of an appeal before processing or dismissing the petition, as appropriate, or he/she may proceed immediately.

If an appeal of the dismissal of the charge is filed with the Office of Appeals, that office should be immediately notified of the pending concurrent petition and its current status. If subsequent to this notification an election is scheduled in the petition, separate notification of such should be sent to the Office of Appeals. If an election is to be conducted before the Office of Appeals has ruled on the appeal of a Type II charge, the ballots ordinarily should be impounded pending a ruling from the Office of Appeals.

11733 Charge Found to Have Merit

If, upon completion of investigation of the charge, it is determined that the charge has merit and that a complaint should issue, absent settlement, the Regional Director should determine whether further processing of the petition should be blocked by the charge or the petition should be dismissed. The parties should be informed accordingly. Sec. 11730.7. For the purposes of that determination, the Regional Director shall accept the allegations to be set forth in the complaint as true.

11733.1 Blocking of Petition Warranted

If the Regional Director determines that the petition should be blocked by a Type I charge, because the impact of the meritorious unfair labor practices would have a tendency to interfere with employee free choice in an election, were one to be conducted, he/she should hold the petition in abeyance until disposition of the charge, whereupon the processing of the petition may be resumed. Absent unusual circumstances, Exceptions 1 through 5 to the foregoing, set forth in Secs. 11731.1 through .5, are equally applicable after a merit determination has been made in the charge.

11733.2 Dismissal of Petition Warranted

11733.2(a) Types of Violations Found

11733.2(a)(1) Violations that Affect the Petition or Showing of Interest

If the Regional Director finds merit to an 8(a)(1) and (2) or 8(b)(1)(A) charge that challenges the circumstances surrounding a petition or the showing of interest submitted in support of a petition (Sec. 11730.3(a)) and the alleged conduct, if proven, directly affects a petition or its showing of interest to an extent that the showing is insufficient, then the petition should be dismissed with a dismissal letter setting forth the specific connections between the alleged unfair labor practice allegations and the petition, subject to a request for reinstatement by the petitioner after final disposition of the C case. See Sec. 11733.2(b), OM 07-69, *Williams Enterprises*, 312 NLRB 937, 939 (1993), and *Canters Fairfax Restaurant, Inc.*, 309 NLRB 883, 884 (1972). However, the petition cannot be dismissed based upon a settlement of alleged but unproven unfair labor practices. In these circumstances, unless the petitioner withdraws the petition or the respondent admits liability as part of the settlement, the petition should be processed. See *Truserv Corp.*, 349 NLRB No. 23 (2007), and OM 07-69.

NOTE: Sec. 11028.2 discusses the limited circumstances under which a petition may be dismissed because of conduct relating to the petition or the showing of interest, where such conduct is not the subject of an unfair labor practice charge.

11733.2(a)(2) Violations That Condition or Preclude a Question Concerning Representation

If the Regional Director finds merit to charges involving violations of Sections 8(a)(1), (2), (3), (5) or 8(b)(3), and the nature of the alleged violations, if proven, would condition or preclude the existence of a question concerning representation, as described in Section 11730.3(b), the petition should be dismissed with a dismissal letter setting forth the specific connections between the alleged unfair labor practice allegations and the petition, subject to a request for reinstatement by the petitioner after final disposition of the charge. Sec. 11733.2(b) and *Williams Enterprises*, 312 NLRB 937, 939 (1993). However, the petition cannot be dismissed based upon a settlement of alleged but unproven unfair labor practices. In these circumstances, unless the petitioner withdraws the petition or the respondent admits liability as part of the settlement, the petition should be processed. See *Truserv Corp.*, 349 NLRB No. 23 (2007), and OM 07-69.

11733.2(a)(3) Violations That May Affect an Incumbent Union's Subsequent Loss of Majority Support

This section applies to an unfair labor practice charge of any kind other than one that directly challenges the circumstances surrounding the petition or the showing of interest or one that involves a general refusal to recognize and bargain with the union. If the Regional Director finds merit to an unfair labor practice charge of another kind than described in the preceding sentence, and there is specific proof of a causal relationship between the unfair labor practice allegations and ensuing events indicating that the alleged unfair labor practices caused a subsequent expression of employee disaffection

with an incumbent union, then the Regional Director should dismiss a petition that was filed based upon that disaffection**.** Prior to making such a decision, the Regional Office may be required to conduct a hearing on the causal nexus between the allegedly unlawful conduct and the filing of the petition. See Sec. 11730.3(c). The petition is subject to a request for reinstatement by the petitioner after final disposition of the C case. Sec. 11733.2(b). *Williams Enterprises,* 312 NLRB 937, 939 (1993). However, the petition cannot be dismissed based upon a settlement of alleged but unproven unfair labor practices. In these circumstances, unless the petitioner withdraws the petition or the respondent admits liability as part of the settlement, the petition should be processed. See *Truserv Corp.*, 349 NLRB No. 23 (2007), and OM 07-69.

11733.2(b) Dismissal of Petition

The dismissal letter (Sec. 11102) or order dismissing the petition should set forth the basis for the action, including the reasons that the unfair labor practice findings would affect further processing of the petition. The specific connection between the conduct alleged as unfair labor practices and the petition should be clearly articulated. If more than one basis for dismissal is arguably present, all such bases ordinarily should be stated. For example, conduct, such as direct dealing, which the investigation revealed was causally related to the employee disaffection upon which the petition was based (Sec. 11730.3(c)), may also be conduct the remedy for which—bargaining—precludes a question concerning representation (Sec. 11730.3(b)); the petition should be dismissed for both reasons. The parties should be informed of the right to obtain review by filing a request for such with the Board. Sec. 102.71, Rules and Regulations. Where there is provision for reinstatement of the dismissed petition on application of the petitioner after final disposition of the unfair labor practice case, the dismissal letter or order dismissing the petition should so advise the petitioner. A petition is subject to reinstatement only if the allegations in the unfair labor practice case, which caused the petition to be dismissed, are ultimately found to be without merit. An application for reinstatement under any other circumstances should be denied.

In order to assure notification to the petitioner of the disposition of the unfair labor practice proceeding, the petitioner should be made a party in interest in the unfair labor practice proceeding, with an interest limited solely to receipt of a copy of the order or other document that operates to finally dispose of the proceeding and the dismissal letter or order dismissing the petition should so advise.

11734 RESUMPTION OF PROCESSING OF PETITION

11734 Resumption of Processing of Petition Upon Disposition of Charge

Processing of a petition held in abeyance during the pendency of an unfair labor practice charge may be resumed upon the disposition of the charge. Where the charged party or respondent in the unfair labor practice proceeding has taken all action required by a settlement agreement, administrative law judge's decision, Board Order, or court judgment, except that the full period for posting any required notice has not passed, certain preelection action with respect to the R case may be taken, whether or not the charging party requests that the R case proceed. Thus:

(a) A hearing may be held

(b) An election agreement may be approved

(c) An order dismissing petition or a decision and direction of election may be issued.

As noted, these preelection actions may be taken in the absence of a request to proceed.

ELECTION: In the event the charging party wishes to proceed to an election during the posting period, a written waiver must be obtained from the charging party, stating that the unremedied unfair labor practices referred to in the posted notice may not constitute grounds on which the Board may set aside the election.

Absent such a waiver, an election should not be held until the posting period has expired.

EXCEPTION: When the remedy requires that recognition of an unlawfully assisted union be withdrawn and withheld unless and until that union has been certified by the Board, neither a RC petition filed by that union nor a RM petition should be entertained until after the expiration of the posting period. The showing of interest submitted in support of a petition filed by that union must be dated after expiration of the posting period.

11740 PRIORITY OF CASE PROCESSING

11740 Priority of Cases—Impact Analysis

Recognizing that limited resources prevent the processing of all cases on a first in, first out basis, the Agency has developed an Impact Analysis system. Impact Analysis assesses representation, unfair labor practice and compliance cases in terms of their relative impact on the public and their significance in effective achievement of the Agency's mission. Under Impact Analysis, cases are categorized as Category III,

exceptional impact; Category II, significant impact; or Category I, important impact. Since cases in a higher category should receive greater resources and have shorter time goals than cases in a lower category, categorization should be made as soon as possible, not later than 1 week from filing, and should be revised as warranted.

The General Counsel determines the type of cases which belong in each Impact Analysis category and establishes different time goals for the disposition of ULP cases within each category. These goals are most stringent for Category III cases and least stringent for Category I cases. The specific types of cases which belong in each category and the time goals are reviewed periodically and may be modified, depending upon a variety of factors, such as case intake, staffing, and budget. GC Memo 02-02.

The following guidelines are intended only to assist Regional Offices in exercising discretion as to the appropriate differentiation of cases; unusual situations undoubtedly will arise which will warrant placement in a category different from that which would ordinarily appear appropriate. As a guiding principle, Regional Offices should resolve any doubts about the appropriate category by selecting the higher category.

11740.1 Category III Cases: Exceptional Impact

Category III (Exceptional) cases involve the allegations most central to achievement of the Agency's mission.

Illustrations include:

- 10(j) and (l) cases
- All representation cases involving the resolution of a question concerning representation, i.e., RC, RD, and RM petitions, as well as any postelection cases
- All blocking charge cases
- All cases in which the establishment or continuation of a union's status as a 9(a) representative is at stake. This would include: cases involving *Gissel* bargaining orders; the relocation, transfer or elimination of a bargaining unit; test of certification summary judgment; and alleged misconduct designed to frustrate a union's ability to obtain an initial contract after certification
- Cases involving the resolution of whether a strike or lockout is based on economic or unfair labor practice considerations
- Any case involving the issue of whether a strike is unprotected or the status of strikers or the employment status of significant numbers of employees
- 8(g) cases
- 8(a)(1), (3), (4), or (5) permanent or indefinite loss of employment cases

- 8(b)(2) cases where individuals have been denied work opportunities because of the union's alleged discrimination, including hiring hall refusal to refer allegations
- National cases or cases of unusually high visibility.

11740.2 Category II Cases: Significant Impact

Category II (Significant) cases are all other cases, except for those included in Categories III and I. They typically involve conduct which affects core rights under the Act and for which there is no alternative remedy. In addition, this category includes those cases involving 8(d) duties where the conduct does not imperil the bargaining relationship itself.

Illustrations include:

- 8(a)(1), (3), and (4) discrimination cases which do not involve a permanent or indefinite loss of employment
- Refusal to hire cases
- Nonsection 10(j) picket line violence or misconduct cases
- All Representation cases which do not involve the resolution of a question concerning representation, i.e., UC, UD, AC, and WH cases
- 8(a)(5)/8(b)(3) refusal to provide information cases
- 8(a)(5) unilateral change allegations
- 8(b)(1)(A) duty of fair representation cases
- Independent 8(a)(1) allegations

11740.3 Category I Cases: Important Impact

Category I (Important) cases make up the remainder of the Agency's work. They either are deferrable or involve conduct for which alternative means of redress are available to the charging party.

Illustrations include:

- *Collyer/Dubo* and other deferral cases
- 8(a)(5) pension and welfare contribution collection cases. See GC Memo 02-05

11740.4 Priority of Cases Within Each Category

In determining which of several cases should be given priority within the particular Impact Analysis category, consideration should be given to the particular facts of each case, the nature of the alleged violation, its impact on the parties or the public, the type of relief indicated, and any other factors that would affect the policies of the Act. Generally, cases in which injunctive relief is being considered will take precedence over other matters, even in the same category.

11750–11754 SUBMISSIONS TO DIVISIONS OF ADVICE AND OPERATIONS-MANAGEMENT, THE SPECIAL LITIGATION BRANCH AND THE OFFICE OF THE EXECUTIVE SECRETARY

This section sets forth the general procedures regarding the submission of unfair labor practice case issues to the Divisions of Advice or Operations-Management, or the Special Litigation Branch for advice, clearance, or authorization. It also addresses the issues in representation cases which are to be submitted to the Board through the Office of the Executive Secretary. There are also other sections of the Manual regarding specific matters, including Section 10(j), 10(k), and compliance issues, in which advice, clearance or authorization should or must be sought.

11750 Unfair Labor Practice Cases

11750.1 Submissions to Division of Advice

Although the Regional Director generally has the responsibility to determine whether an issue warrants submission to the Division of Advice, the General Counsel's guidelines as set forth in GC Memo 02-03 establish that the following types of issues should be submitted:

- Developing areas of the law
- New technology, methods of business organization or union organizing activity
- Special prominence or matters of more than local interest
- Interregional impact
- Matters traditionally requiring Advice clearance.

In addition, certain other matters, as set forth in Secs. 11753.1(a) and 11753.2(a), should also be submitted to the Division of Advice. Credibility issues should not normally be submitted, but rather should be resolved by the Regional Director.

The Regional Office should notify the parties that the case is being submitted to the Division of Advice and the specific issue(s) involved. If the parties have not submitted a position on the advice issues, they should be invited to do so promptly. However, the Regional Office must not communicate its recommendation to the parties.

With regard to cases interregional in scope, the Regional Office should consult with the Division of Operations-Management prior to submitting the case to the Division of Advice.

In all cases pending in the Division of Advice, any subsequent developments (such as withdrawals, settlements and private adjustments) should be promptly reported by the Regional Office.

If any skip counsel issues arose during an investigation, the Regional Office's submission to the Division of Advice should note the information listed in Sec. 10058.

11750.2 Format and Content of Request for Advice

All issues submitted should be clearly posed in a memorandum captioned: Request for Advice. Although the Request for Advice should be transmitted to the Divisions of Advice and Operations-Management electronically, the entire file should be forwarded to the Division of Advice promptly thereafter. The Request for Advice should be arranged in the following order:

- Charge
- Issues: The Regional Office should clearly note the specific issues on which advice is sought.
- Facts: The Regional Office should set forth a concise statement of relevant facts including credibility resolutions. If a Regional Agenda Minute is sufficiently detailed, it can be submitted as an attachment to the Advice memo rather than repeating the facts in the Request for Advice.
- Regional Office's Position: The Regional Office should set forth its position on each issue, noting any dissents.
- Analysis: The Regional Office should set forth its analysis of the strengths and weaknesses of the arguments on either side.
- Related Cases.

11750.3 Requests by Division of Advice for Further Investigation

All cases in which the Division of Advice requests further investigation should receive priority treatment consistent with their categorization under Impact Analysis. The information requested should be transmitted by the most expeditious means. Advice should be notified of any undue delay and the reasons therefor, with an estimate of the additional time required.

11751 Suits Against the Agency and Requests for Intervention

The Regional Office should promptly inform the Special Litigation Branch whenever the Agency or its agent has been sued or upon a request that the Agency intervene in private litigation. Pleadings and papers, as received, should be forwarded as expeditiously as appropriate to the Special Litigation Branch with a copy to the Division of Operations-Management.

11752 Precomplaint Submissions to Division of Operations-Management

- Clearance must be sought before naming an attorney in a complaint as a party respondent and/or agent of the respondent in the commission of unfair labor practices
- In cases in which the alleged unfair labor practices also arguably violate the Occupational Safety and Health Act, the Regional Office should refer to GC Memo 75-29 and GC Memo 79-4 for instructions regarding submission to the Division of Operations-Management
- In cases in which the alleged unfair labor practices also arguably violate the Federal Mine Safety and Health Act of 1977, the Regional Office should refer to GC Memo 80-10 for instructions regarding submission to the Division of Operations-Management
- In cases in which the alleged unfair labor practice charge also involves the Americans with Disabilities Act (ADA), the Regional Office should consult with the Division of Operations-Management
- Misconduct by attorneys or other representatives should, where appropriate, be referred to the Division of Operations-Management. Sec. 102.177(e), Rules and Regulations and OM Memos 97-2 and 01-80
- Certain settlements amounting to less than 80 percent or more than 100 percent of net backpay require clearance from the Division of Operations-Management as follows:
    - All formal and informal Board settlements, Sec. 10592.4 and .8 of the Compliance Manual
    - Non-Board settlements in cases where the Regional Office has decided to issue complaint, Sec. 10592.4 and .8 of the Compliance Manual.

11753 Postcomplaint, Posthearing, and Compliance Submissions

11753.1 Postcomplaint Submissions

(a) *Division of Advice*

Authorization from the Division of Advice should be obtained before:

- Issuing postcomplaint investigative subpoenas in certain situations. See Sec. 11770.4 for more detailed guidance.
- Issuing trial subpoenas if there are foreseeable impediments to enforceability, such as where the witness may assert a recognized privilege
- Seeking subpoena enforcement where previously unforeseen impediments arise. Sec. 11790
- Denying a private party's request for subpoena enforcement. Sec. 11790.1

(b) *Division of Operations-Management*

Authorization from the Division of Operations-Management should be obtained before introducing or agreeing to the introduction of confidential Agency documents. Sec. 10398.

Misconduct by attorneys or other representatives should, where appropriate, be referred to the Associate General Counsel, Division of Operations-Management. Sec. 102.177(e), Rules and Regulations and OM 97-2 and OM 01-80.

11753.2 Posthearing Submissions

(a) *Division of Advice*

Authorization from the Division of Advice should be sought in the following matters:

Before deciding whether or not to file exceptions where the Admini-strative Law Judge's decision raises previously unforeseen novel or complex policy issues. Sec. 10430.1

Where complaint was authorized by the Division of Advice, the Regional Office should make a timely recommendation to Advice regarding exceptions

Before requesting oral argument before the Board. Sec. 10438.6

Where oral argument is ordered by the Board, to determine who will argue and the nature of the argument. Sec. 10442.

Before filing a motion for reconsideration of a Board order. Sec. 10452

Before filing an opposition to another party's motion for reconsideration where new or novel issues are involved. Sec. 10452

(b) *Office of Appeals*

Where complaint was authorized by the Office of Appeals, the Regional Office should make a timely recommendation to Appeals regarding exceptions.

11753.3 Compliance

For any issues regarding whether clearance is necessary from the Division of Operations-Management with respect to compliance with a settlement agreement, administrative law judge's decision, Board order or court judgment, the appropriate section in the Compliance Manual should be consulted.

11753.4 Equal Access to Justice Act (EAJA)

When a Region is uncertain regarding Agency policy with respect to an EAJA issue, the matter should be submitted to the Division of Advice.

11754 Representation Cases

11754.1 Generally

All requests for advice in representation cases except as set forth in Sec. 11754.2 should be directed to the Board through the Office of the Executive Secretary. Normally, requests for advice with respect to substantive law will not be submitted to the Board as the Regional Director is expected to apply Board precedent and to decide questions of statutory interpretation. Sec. 11273. In unusual cases presenting novel issues, the Regional Director may exercise discretion and transfer such matters to the Board for decision.

Advice, clearance, or authorization should be sought from or notification given to the Board, the Executive Secretary or the Director of Representation Appeals in the following circumstances:

(a) Where no-raiding procedures are involved. Secs. 11018.1 and .2 and 11019

(b) Prior to any relaxation of the rule requiring a 30-percent showing of interest of petitioner. Sec. 11023.1

(c) If an officer or responsible agent of the petitioner was responsible for or had knowledge of and condoned submission of a forged showing and the remaining valid showing satisfies the interest requirement. Sec. 11029.3(b)

(d) Before treating exceptions or a request for review as a motion for reconsideration. Secs. 11100.3, 11274, 11364.8, and 11394.8

(e) Where a petitioner wishes to withdraw a petition after a valid election. Sec. 11116.1

(f) Where the validity of the showing of interest has been raised in a request for review. Sec. 11274

(g) Where the date of an election has been set and a request for review is filed with the Board. Secs. 11274 and 11302.1

(h) Where the date of an election has been set and a motion for reconsideration has been or is to be filed with the Board. Sec. 11282

(i) Before updating the eligibility list used in a runoff. Sec. 11350.5

11754.2 Authorization From Headquarters

Submission for clearance is not required before referring to other Federal or State agencies possible violations of other statutes, except there is a requirement of clearance when the potential violation concerns possible criminal conduct related to Agency proceedings. Examples are forgery of authorization cards, perjury, or obstruction of justice in connection with NLRB proceedings. Similarly, there is a clearance requirement prior to referral if alleged unethical conduct of attorneys is involved.

(a) *Authorization from Advice and Special Litigation is required before:*

Issuing investigative subpoenas in the limited circumstances set forth in Sec. 11770.4. But see Sec. 11770.2.

Issuing hearing subpoenas if there are new or doubtful legal problems of enforceability. Secs. 11770.4 and 11772

Denying request of private party for enforcement of subpoenas. Sec. 11790

Seeking enforcement of subpoena, where, between the necessity to issue and necessity of enforcement, intervening circumstances created enforce-ment problems. Sec. 11770.6

(b) *Authorization from Advice is required before:*

Filing a motion for reconsideration of a Board decision or an answer to such a motion filed by any other party that raises new or novel legal problems. Sec. 10452

(c) *Authorization from Operation-Managements is required before:*

Preparing and conducting last-offer elections. Sec. 11520

Notifying voters of an election by newspapers, radio, or television. Sec. 11314.7(b)

Obtaining non-Board personnel to participate in the conduct of an election

Requesting an Administrative Law Judge to handle a complex hearing on objections/challenges. Sec. 11424.1

Consolidation of interregional cases. Sec. 11716

Severance of interregional cases. Sec. 11718

Payment of special fees for expert testimony

11770–11784 SUBPOENAS

Section 11(1) of the Act provides that the Board or any Member may issue subpoenas calling for attendance and testimony of witnesses or the production of evidence in any investigation or proceeding. Sec. 102.31(a) (for C cases) and Sec. 102.66(c) (for R cases), Rules and Regulations set forth the procedure for issuance of such subpoenas and provide that the Executive Secretary of the Board has the authority to sign and issue subpoenas on behalf of the Board.

11770 Investigative Subpoenas

During certain investigations, in both R and C cases, resort to subpoenas will be necessary in order to ascertain the facts on which to base an administrative decision on the merits.

Investigative subpoenas, however, are no substitute for a promptly initiated, dogged, and thorough pursuit of relevant evidence from cooperative sources. Investigative subpoenas should be utilized responsibly to make available to the Regional Director evidence necessary for:

Deciding whether a complaint or compliance specification should issue, absent settlement

Determining whether there has been compliance with remedial obligations or

Making appropriate determinations in processing R cases

11770.1 Application for Investigative Subpoena

Upon Regional determination that it is necessary to issue an investigative subpoena, the Board agent assigned to the case should request such subpoena from the Regional Director. The application must be in writing and should contain a statement of

the scope of the information or documents sought and of their relevance. There is no right to an investigative subpoena available to parties other than the General Counsel.

11770.2 Scope of Regional Director's Discretion

The Regional Director has full discretion to issue precomplaint investigative subpoenas ad testificandum and duces tecum seeking evidence from parties and third party witnesses whenever the evidence sought would materially aid in the determinations described above in Sec. 11770 and whenever such evidence cannot be obtained by reasonable voluntary means.[2] The Regional Director's discretion is subject only to limited clearance and recordkeeping requirements.

Subpoenas ad testificandum may compel testimony by affidavit, by oral testimony under oath before a court reporter or by response to written interrogatories.[3] Where the Regional Office reasonably anticipates that a subpoenaed witness may be uncooperative, an interview of such witness should normally be conducted under oath before a court reporter.

11770.3 Notification of Counsel or Representative

Board agents are reminded of ethical restrictions against bypassing counsel that may mandate the notification of counsel to a party or witness who is subject to a subpoena. Sec. 10058. However, there is no general requirement that counsel for a party be notified of a subpoena to a neutral witness.[4]

11770.4 Clearance by Headquarters

A Regional Director should obtain Headquarters' clearance prior to issuance of a subpoena where there is likely to be raised a serious constitutional defense, claim of privilege or other legal problem, or when the Regional Office wants to issue a subpoena subsequent to complaint and before issuance of a Board order. However, Section 11

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[2] *NLRB v. North Bay Plumbing, Inc.,* 102 F.3d 1005, 1008 (9th Cir. 1996). Accord: *Carolina Food Processors v. NLRB,* 81 F.3d 507, 511–512 (4th Cir. 1996). The courts have, in fact, interpreted Sec. 11 to permit the Board "to obtain everything it [could seek] from an order compelling discovery" under the Federal Rules of Civil Procedure. *NLRB v. Interstate Material Corp.,* 930 F.2d 4, 6 (7th Cir. 1991).

[3] See Compliance Manual, Sec. 10590.2. The Board's investigative authority under Sec. 11 includes the power to require responses to written questions (see *EEOC v. Bay Shipbuilding Corp.,* 668 F.2d 304, 306, 313 (7th Cir. 1981)*; EEOC v. Maryland Cup Corp.,* 785 F.2d 471, 478–479 (4th Cir.), cert. denied 479 U.S. 815 (1986)); to compel the production of documents (see, e.g., *NLRB v. G.H.R. Energy Corp.,* 707 F.2d 110, 113–114 (5th Cir. 1982); *EEOC v. Maryland Cup,* supra at 476–478); and to require oral testimony before the investigator concerning the matters in question (e.g.*, NLRB v. North Bay Plumbing,* supra at 1008; *Link v. NLRB*, 330 F.2d 437, 438 (4th Cir. 1964*)*; cf. *FTC* v. *Standard American, Inc.,* 306 F.2d 231, 233–236 (3d Cir. 1962); *FTC v. Scientific Living, Inc.,* 150 F.Supp. 495, 497–499 (M.D. Pa. 1957), affd. 254 F.2d 598 (3d Cir. 1958), cert. denied 358 U.S. 867 (1959), rehearing denied 358 U.S. 938 (1959)). Such investigative subpoenas can be directed not only to the charged party, but to another party that might be derivatively liable for unfair labor practices (*NLRB v. CCC Associates,* 306 F.2d 534, 537–540 (2d Cir. 1962); *NLRB v. Thayer, Inc.,* 201 F.Supp. 602, 603–604 (D. Mass. 1962)); or indeed to any person having information relevant to the investigation (*Link v. NLRB*, 330 F.2d at 440)).

[4] See generally *S.E.C. v. O'Brien,* 467 U.S. 735 (1984).

subpoenas may be utilized, without clearance, where there is a postcomplaint need to investigate new allegations, where there is a need to investigate the possible dissipation of assets, where there is a need to preserve testimonial evidence as contemplated under Sec. 102.30, Rules and Regulations, or where there is a need to investigate noncompliance with Board orders or court decrees enforcing such orders. See, e.g., *Alaska Pulp Corp.,* 149 LRRM 2684, 2688 fn. 6 (D.D.C. 1995) (court enforced subpoena investigating possible noncompliance with court enforced Board order).

Thus, clearance should be secured prior to issuing a subpoena:

> Where a witness or entity may claim a constitutional protection or invoke a privilege, e.g., where the subpoena is addressed to a medical doctor or attorney or seeks evidence of communications between an attorney and any employee of the client
>
> Upon a member of the press to elicit testimony relating to information gained in his or her capacity as a member of the press or requiring the production of materials secured as a result of news gathering activities

Clearance may also be required in circumstances where an attorney of a party to the case also represents a third-party witness as an individual. See also Sec. 10058.4(c). Generally, in these cases, requests for clearance should be submitted to the Division of Advice and the Special Litigation Branch, which is primarily responsible for subpoena enforcement litigation. If the issue(s) under investigation involve a compliance matter or possible violation of a Board order or court decree enforcing such an order, clearance requests should also be submitted to the Contempt Litigation and Compliance Branch.

11770.5 Financial Institution Records

The provisions of the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401 et seq., must be observed if an investigative subpoena is to be served on a financial institution for financial records of individuals and small partnerships. Compliance Manual, Secs. 10590.2, 10593.6 and 10601.3.

The RFPA does not apply to the financial records of a corporation. Nor does it restrict in any way the issuance of administrative subpoenas to obtain financial or banking records of individuals or partnerships directly from such parties or from any entity other than a "financial institution." The RFPA does not apply, for example, to a subpoena for financial or tax records issued to an individual's accountant or CPA.[5]

[5] The RFPA also contains a "delayed notification" provision, 12 U.S.C. § 3409, pursuant to which the Government can request a district court to permit withholding of the required notice to an individual whose records are being sought for 90 days under exigent circumstances. The Region should consult with the Contempt Litigation and Compliance Branch regarding the availability and use of this provision. See Compliance Manual, Sec. 10601.3 for further information concerning the RFPA.

11770.6 Problems Regarding Enforceability; Reports to Headquarters

When problems of enforceability arise following issuance of investigative subpoenas, the Regional Director should report developments to the Division of Advice and the Assistant General Counsel for Special Litigation. If the issue(s) under investigation involve a compliance matter or possible violation of a Board order or court decree enforcing such an order, the Regional Director should also report developments to the Contempt Litigation and Compliance Branch.

In order to permit the continued oversight of Agency use of investigative subpoenas, Regional Offices should maintain reporting files, which may be in electronic format, that list, for each investigative subpoena issued, the name of the case, the name of the party or witness to whom the subpoena is directed, the evidence sought, the date of issuance, a brief description of the basis for issuance, and a notation of any petition to revoke and/or enforcement proceedings.

11772 Trial or Hearing Subpoenas

The need to subpoena testimony or the production of records at C or R Case hearings should initially be determined by the Board agent assigned, in consultation with supervision. Thus, Board agents may be required to notify supervision of the name of, and the need for, any subpoenaed person or document, along with a description of such document.

In determining whether to issue a subpoena, the Regional Director should consider both the necessity for the subpoena and the enforceability of the subpoena. The subpoena should not be requested if it appears that it cannot be enforced in the event of noncompliance. If there are foreseeable impediments to enforceability, the matter should be submitted to the Division of Advice and the Special Litigation Branch prior to issuance of the subpoena. If the issues(s) under investigation involve a compliance matter or possible violation of a Board order or court decree enforcing such an order, the Regional Director should also notify the Contempt Litigation and Compliance Branch.

Application for a subpoena made prior to the hearing (whether by a Board agent or by other parties) should be made to the Regional Director; one made at the hearing should be made to the Administrative Law Judge or hearing officer, as the case may be, and may be made ex parte. See Sec. 102.31(a), Rules and Regulations, for C Cases and Sec. 102.66(c) for R Cases. These rules require only a written application for subpoenas; neither the name of the witness nor the description of the documents need be included.

Upon receipt of a request for a subpoena from a private party, the Regional Director should grant the application for the requested subpoena. However, the Regional Director retains discretion in granting an application from a Board agent.

11774 Persons Subpoenaed

Generally, witnesses that the trial attorney expects to use at the hearing should be subpoenaed. However, absent unusual circumstances, an exception should be made

where the witness has a definite personal interest or stake in the outcome; e.g., a charging party, or its agents, or alleged discriminatees.

Pursuant to Sec. 102.118 Rules and Regulations, Board agents are prohibited from testifying at formal proceedings without authorization from the appropriate agency official.

11776 Subpoenas Duces Tecum

A subpoena duces tecum should seek relevant evidence and should be drafted as narrowly and specifically as is practicable. The use of the word "all" in the description of records should be avoided wherever possible. For example, the phrase "the corporate records showing total purchases" might be substituted for the phrase "all books, records, documents, and other writings that will show total purchases." Under some circumstances, the subpoena may provide for alternatives in lieu of physical production. In such instances the subpoenaed party may furnish a sworn affidavit setting forth the desired evidence or an admissible summary of that evidence, provided that pertinent records are made available to the Board agent to ensure accuracy.

The subpoena duces tecum should be addressed to the entity with control of the records sought, whether the entity is a corporation, partnership, or labor organization. Subpoenas directed to a sole proprietorship or individual should be addressed to that individual.

Where the same person has control and knowledge of the records, the subpoena duces tecum may be addressed to the entity, attention to that person. Where the agent who can explain the records is unknown, a subpoena duces tecum should be addressed to the entity itself and a subpoena ad testificandum should be served on a person who is known or believed to be familiar with the records.

11778 Service of Subpoenas

Sec. 102.113(c), Rules and Regulations requires that subpoenas be served personally, by registered or certified mail, by telegraph, or by delivery at the principal office or business address of the person being served. Also see Sec. 11(4) of the Act. Absent unusual circumstances, such service should be by certified mail or hand delivery with a copy served by regular mail, hand delivery, or by facsimile on any attorney or other representative of the party or witness. If a party or witness is represented by more than one attorney or representative, service on any one of such persons, in addition to the party or witness, satisfies this requirement. However, as a matter of courtesy, an effort should be made to serve all attorneys or representatives of a party or a witness. See Secs. 11842.2–.3 and Sec. 102.113(f), Rules and Regulations.

A claim form for payment of fees and mileage may in appropriate circumstances be enclosed with the subpoena if it is mailed or given to the witness if it is hand delivered.

There is no obligation on the part of the General Counsel (as opposed to outside parties) to tender witness fees at the time of service. In cases of need or emergency, travel accommodations, where authorized by the Regional Director, may be provided in advance. Where necessary, tickets may be obtained in advance through the Agency travel account.

Although no particular period of notice is prescribed, the service and return date for the following types of subpoenas should, where circumstances allow, normally be as follows:

- Investigative Subpoenas – served with a prompt and reasonable return date under all the circumstances.

- Trial Subpoenas – served at least 2 weeks prior to the return date at hearing, but, at any rate in sufficient time to allow 5 days after receipt of the subpoena to petition to revoke the subpoena. See Sec. 11782.4.

- Representation Case Subpoenas – served with a prompt and reasonable hearing return date under all the circumstances.

11780 Witness Fees

Witnesses subpoenaed by a Board agent should be advised that they are entitled to appearance fees and travel expenses, if they make the appropriate claim. Where appropriate, witnesses are also reimbursed for travel, lodging and meal expenses. Since the amounts and terms of these reimbursements may vary from time to time, refer to the latest Administrative Policy Circular or GC Memoranda for current terms and rates.

Witnesses subpoenaed by the Board agent expected to make a claim should complete and sign a claim form promptly after appearance at the proceeding, upon release from the subpoena. Approval of a witness fee claim is the responsibility of the Board agent.

Although private parties may elect to compensate witnesses for lost income while appearing and testifying, there is no like compensation paid by the Government.

If it comes to the Board agent's attention that a private party refuses to pay appropriate fees to an employee witness, the witness and the party should be advised that such failure could violate the Act. *Howard Mfg. Co.,* 231 NLRB 731 (1977).

11782 Petition to Revoke

Secs. 102.31(b) (C cases) and 102.66(c) (R cases), Rules and Regulations set forth procedures regarding petitions to revoke subpoenas. Such rules provide that a subpoenaed person who does not intend to comply with the subpoena, whether ad testificandum or duces tecum, may file a petition to revoke within 5 days after the date

the subpoena is received. Although not required by the Rules and Regulations, a copy of the subpoena should be attached to the petition to revoke.

Petitions to revoke may be based on the ground that the subpoena does not relate to any matter under investigation or at issue in a hearing, does not describe the evidence sought with sufficient particularity or if for any other reason sufficient in law the subpoena is otherwise invalid.

11782.1 Filed Prior to Hearing

A petition to revoke filed prior to a hearing is filed with the Regional Director. If the subpoena under attack is an investigative subpoena in a C case, the Regional Director should refer it to the Board for ruling; if it is a hearing subpoena in a C case, the petition should be referred to the Administrative Law Judge with a copy of the subpoena attached. If it is either an investigative or hearing subpoena in an R case, the Regional Director may rule on it or refer it to the hearing officer.

11782.2 Filed at Hearing

A petition to revoke filed at a hearing should be filed with either the Administrative Law Judge or hearing officer, who should then rule on it.

11782.3 Notice of Filing

Notice of the filing of the petition to revoke (which need not have been served on all parties) should be given timely by the Regional Director, Administrative Law Judge, or hearing officer, as the case may be, to the party at whose request the subpoena was issued.

11782.4 Five-Day Period

Section 11(1) of the Act and Secs. 102.31(b) and 102.66(c), Rules and Regulations provide that petitions to revoke shall be filed within 5 days from the service (i.e., receipt) of a subpoena. There is case authority which holds that the 5-day period is a maximum and not a minimum. Absent a showing of prejudice, the subpoenaed party may be required to file and argue its petition to revoke and, if ordered by the Administrative Law Judge or hearing officer, produce subpoenaed testimony and documents at hearing in less than 5 days from receipt of the subpoena. See *Packaging Techniques, Inc.,* 317 NLRB 1252, 1253–1254 (1995) and *NLRB v. Strickland,* 220 F.Supp. 661, 665–666 (D.C.W. Tenn., 1962), affd. 321 F.2d 811, 813 (6th Cir. 1963).

11782.5 Not a Part of the Record

Actions and documents in connection with petitions to revoke, including rulings, are not part of the record, unless the aggrieved person specifically requests it.

11784 Witness Claims of Privilege Against Self-Incrimination

Sec. 102.31(c), Rules and Regulations addresses claims of privilege against self-incrimination. The rule provides that whenever a witness at any proceeding before the

Board claims such a privilege, any party may request the Board to issue an order compelling testimony. It is necessary for the Board to obtain the U.S. Attorney General's approval before issuing an order compelling the witness claiming such privilege to testify or provide other information.

Before seeking a Board order to compel testimony from a witness claiming a privilege against self-incrimination, the Regional Office should submit a request for clearance, along with supporting reasons, to the Division of Advice. If the issue(s) under investigation involve a compliance matter, possible violation of a Board order or court decree enforcing such an order, a copy of the request for clearance should also be sent to the Contempt Litigation and Compliance Branch.

A witness who claims the privilege against self-incrimination will not be required, or permitted, to testify or give other information covered by the claim of privilege until the Board has issued the requested order.

11790–11808 ENFORCEMENT OF SUBPOENA

11790 Enforcement of Subpoena

Since the issuance of a subpoena includes prima facie authority to enforce, clearance to enforce is not normally necessary. However, when previously unforeseen impediments create enforcement problems, the matter should be referred to the Division of Advice and Special Litigation Branch for clearance and consultation. If the issue(s) under investigation involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, the matter should also be referred to the Contempt Litigation and Compliance Branch.

11790.1 Issued at Request of Private Parties

Section 11(2) of the Act provides that subpoena enforcement proceedings must be instituted "upon application by the Board." Sec. 102.31(d), Rules and Regulations provides that proceedings for enforcement of subpoenas issued at the request of a private party shall be instituted by the General Counsel in the name of the Board "on relation of such private party," unless, in the Board's judgment, the enforcement of such subpoena would be inconsistent with the law or the policies of the Act.

If a Regional Office is in doubt regarding whether the enforcement of a subpoena satisfies the above-noted criteria, it should submit the matter to the Division of Advice and Special Litigation Branch for clearance. If the subpoena involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, the matter should also be referred to the Contempt Litigation and Compliance Branch.

Prior to filing the application, the Regional Office must advise the requesting party that it bears the responsibility for prosecuting the subpoena enforcement proceeding and that the Regional Office will not assume responsibility beyond the filing of the application. Sec. 102.31(d), Rules and Regulations. Exceptions to this policy arise when

the respondent questions the Board's jurisdiction, its power to issue the subpoena or the validity of the issuance. Under these limited circumstances, the General Counsel may seek to retain control of the case, since the issues raised relate to the Board's basic authority and an adverse decision may affect other cases.

After institution of a subpoena enforcement proceeding, the Regional Office should inform Advice and Special Litigation if unusual circumstances arise. If the issue(s) under investigation involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, the matter should also be referred to the Contempt Litigation and Compliance Branch.

If there is noncompliance with an enforced subpoena, upon the request of the party on whose behalf the subpoena was issued and enforcement proceedings were instituted, the Regional Office must initiate contempt proceedings in the appropriate U.S. district court, unless contempt proceedings would be inconsistent with law or the policies of the Act.

Absent a request by the party on whose behalf the subpoena was issued, contempt proceedings need not be instituted by the Regional Office. *Best Western City View Motor Inn,* 325 NLRB 1186 (1998).

11790.2 Issued at Request of the General Counsel

Enforcement proceedings with respect to subpoenas requested by the General Counsel are handled by the Regional Office involved.

11790.3 Notification to Headquarters

In cases where clearance has been obtained from Headquarters, the Regional Office should forward, if requested, copies of the pleadings, briefs and any orders that issue to the Division of Advice and Special Litigation Branch and, if the investigation involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, also to the Contempt Litigation and Compliance Branch.

11790.4 Appeal Proceedings

Appeal proceedings will be handled by the Special Litigation Branch. If the Regional Office's enforcement application is denied in full or in part, the Regional Office should promptly notify and make a recommendation to the Special Litigation Branch as to whether an appeal should be taken to the circuit court. Upon receipt of a notice of appeal made by another party, the Regional Office should promptly advise and provide all relevant papers to the Special Litigation Branch. If the appeal involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, notice should be also given to the Contempt Litigation and Compliance Branch.

11790.5 Stays Pending Appeal

After an Agency subpoena has been enforced, any request for a stay pending appeal should be referred to the Special Litigation Branch. If the appeal involves a

compliance matter or possible violation of a Board Order or court decree enforcing such an order, a copy of the stay request should also be forwarded to the Contempt Litigation and Compliance Branch.

11792 Subpoena Authority of the Board/Court Jurisdiction

11792.1 Authority of Board to Issue Subpoenas

Section 11(1) of the Act grants statutory authority to the Board for the exercise of subpoena power, which is similar to that of other administrative agencies. The intent of Congress to confer such authority is clear. S.Res. 573, 74th Cong., 1st Session; Sec. 6(c) of the Administrative Procedure Act, 5 U.S.C. § 556(c)) and the courts have long upheld the power of administrative agencies to issue subpoenas. *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946); *NLRB v. North Bay Plumbing,* 102 F.3d 1005, 1007 (9th Cir. 1996).

Section 11 of the Act, 29 U.S.C. § 161, grants to the Board and its agents broad investigatory authority, including the power to subpoena any evidence "that relates to any matter under investigation or in question." 29 U.S.C. § 161(1); *NLRB v. Interstate Material Corp.,* 930 F.2d 4, 6 (7th Cir. 1991) (describing the Board's broad Section 11 powers); *NLRB v. Steinerfilm, Inc.,* 702 F.2d 14, 15 (1st Cir. 1983) (same); *NLRB v. G.H.R. Energy Corp.,* 707 F.2d 110, 113 (5th Cir. 1982) (same). This broad subpoena power enables the Board "to get information from those who best can give it and who are most interested in not doing so." *U.S. v. Morton Salt Co.,* 338 U.S. 632, 642 (1950). Thus, such subpoenas may be directed to any person having information relevant to an investigation. See, e.g., *Link v. NLRB,* 330 F.2d 437, 440 (4th Cir. 1964). See also Sec. 11770.2 above.

11792.2 Jurisdiction of Courts to Enforce Subpoenas

The district courts receive their power to order enforcement of subpoenas issued by the Board by virtue of Section 11(2) of the Act. The granting of such power has been approved and exercised repeatedly by the courts. Consistent with the bounds of reasonableness, subpoena enforcement may be sought in any district where the investigation is undertaken or where the subpoenaed person is found, resides or transacts business. *NLRB v. Ronny Line,* 50 F.3d 311, 313–314 (5th Cir. 1995); *NLRB v. Alaska Pulp Corp.,* 149 LRRM 2682, 2684 (D.D.C. 1995); *NLRB v. Brooklyn Manor Corp.,* 1999 WL 1011935 (E.D.N.Y.).

11792.3 Collateral Proceedings

Since the Board has the power to make the initial determination of its jurisdiction in any case pending before it (*Oklahoma Press,* 327 U.S. at 209–214), a court in a subpoena enforcement proceeding lacks the authority to decide that issue. In *NLRB v. Barrett Co.,* 120 F.2d 583 (7th Cir. 1941), the court enforced the Board's subpoena seeking commerce data. See also *Oklahoma Press,* 327 U.S. at 214; *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501 (1943); *NLRB v. Northern Trust Co.,* 56 F.Supp. 335, 337–338 (D.C. Ill. 1944), affd. 148 F.2d 24, 27 (7th Cir. 1945). Cf. *Myers v. Bethlehem*

Shipbuilding Corp., 303 U.S. 41, 50 (1938), where *Bethlehem* challenged the Board's jurisdiction in an injunction proceeding. If the subpoenaed party argues that the Board's jurisdiction is plainly lacking as a matter of law, the Special Litigation Branch should be consulted consistent with Sec. 11770.4.

11794 Relevance

The testimony or documentary evidence sought by enforcement of a subpoena must be relevant to the matter under investigation or in question before the Board. The application should assert that the evidence is relevant to the petition, charge, complaint, or notice of hearing, which is attached to the application as an exhibit. *Oklahoma Press Publishing Co.,* 327 U.S. at 214–215. See also *NLRB v. Carolina Food Processors,* 81 F.3d 507 (4th Cir. 1996).

"For purposes of an administrative subpoena, the notion of relevancy is a broad one . . . . So long as the material requested 'touches a matter under investigation,' an administrative subpoena will survive a challenge that the material is not relevant." *Sandsend Financial Consultants, Ltd. v. Federal Home Loan Bank Board,* 878 F.2d 875, 882 (5th Cir. 1989) (citation omitted) and cases cited therein; *NLRB v. Alaska Pulp Corp.,* 149 LRRM 2684, 2689 (D.D.C 1995); accord: *NLRB v. Carolina Food Processors,* 81 F.3d at 511. An investigative subpoena may properly seek evidence regarding all issues under investigation, including potential defenses. *NLRB v. North Bay Plumbing,* 102 F.3d at 1008. A party seeking to have a subpoena quashed must establish that "the subpoena is intended solely to serve purposes outside the purview of the jurisdiction of the issuing agency." *NLRB v. Interstate Dress Carriers, Inc.,* 610 F.2d 99, 112 (3d Cir. 1979).

11796 "Fishing Expedition" as a Defense

The Board agent should carefully draft subpoenas in order to avoid potential arguments that the subpoena constitutes a "fishing expedition." The subpoena should describe all documents sought with respect to content and time period. The *Oklahoma Press* decision is especially instructive regarding whether a subpoena constitutes a "fishing expedition."

However, the Board is entitled to obtain all relevant information requested, as long as compliance with the subpoena does not impose an "undue burden" on the recipient. With respect to assertions of "undue burden," the courts have made clear that "[s]ome burden on subpoenaed parties is to be expected and is necessary in the furtherance of the agency's legitimate inquiry and the public interest . . . . The question is whether the demand is *unduly* burdensome or *unreasonably* broad." *FTC v. Texaco,* 555 F.2d 862, 882 (D.C. Cir. 1977), cert. denied sub nom. *Standard Oil of California v. FTC,* 431 U.S. 974 (1977) (emphasis in original). The burden of demonstrating unreasonableness or undue burden clearly rests with the party asked to produce the information and "[t]hat burden is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." Id. at 882

and cases cited there. In order to show that a subpoena is unduly burdensome, the subpoenaed party must show that the subpoena seriously disrupts regular business operations. See *EEOC v. Maryland Cup Corp.,* 785 F.2d 471, 477 (4th Cir.), cert. denied 479 U.S. 815 (1986); *NLRB v. Carolina Food Processors,* 81 F.3d at 513.

11798 Subpoena Enforcement Procedures

11798.1 Order to Show Cause Procedure

Under Section 11(2) of the NLRA, subpoena enforcement proceedings are commenced by the filing of an application by the Board. The courts repeatedly have held that subpoena enforcement proceedings need not be commenced by service of a summons and complaint normally required to commence a civil suit pursuant to Rule 4 of the Federal Rules of Civil Procedure. *Goodyear Tire & Rubber Co. v. NLRB,* 122 F.2d 450, 451 (6th Cir. 1941); *Cudahy Packing Co. v. NLRB,* 117 F.2d 692, 694 (10th Cir. 1941); *NLRB v. D. L. Baker,* enfd. mem. 166 F.3d 333 (4th Cir. 1998) (unpublished disposition).

The local rules for the U.S. district court in which the application for enforcement will be filed should be reviewed so that the application conforms to the procedural requirements of that court.

The Manual contains patterns to be used in subpoena enforcement proceedings. Sec. 11800.1. The order to show cause set forth in Sec. 11806.1 as Pattern 53, when signed by the court, will provide explicit authorization for service to be accomplished pursuant to Rule 5 of the Federal Rules or by certified mail. Absent such a signed order to show cause, personal service of the application and supporting papers should be obtained in order to avoid unnecessary disputes concerning the validity of service.

11798.2 Motion Procedure

Alternatively, an application for enforcement can be treated by the Regional Office as a motion, without obtaining an order to show cause. In such circumstances, the Regional Office should obtain personal service of the application and supporting papers in order to avoid unnecessary disputes concerning the validity of service.

While this approach may be used in any such subpoena enforcement action, it can be particularly useful in situations where (a) the local district court rules permit a moving party to set the hearing date at the time a motion is filed and (b) the Regional Office is seeking summary enforcement of a subpoena, based upon the failure of the subpoenaed party to file with the Board a timely petition to revoke the subpoena. But see Sec. 11800.2(c) below, noting cases where subpoenaed parties have been permitted to raise for the first time in court constitutional and privilege defenses.

Advice and assistance on the use of this motion procedure may be obtained from the Special Litigation and Contempt Litigation and Compliance Branches. The Contempt Litigation and Compliance Branch has had experience in treating the application as a motion and can supply sample pleadings.

11800 Subpoena Enforcement Documents

Pattern documents suitable for general use in subpoena enforcement matters are set forth below.

11800.1 Patterns Provided

Pattern 51	Application for order enforcing subpoena ad testificandum (Sec. 11802.1)
Pattern 52	Application for order enforcing subpoena duces tecum (Sec. 11804.1)
Pattern 53	Order to show cause (Sec. 11806.1)
Pattern 54	Notice of institution of proceeding to enforce subpoena ad testificandum (Sec. 11808.1)

11800.2 Procedural Issues

(a) *Service by Certified Mail:* For language setting out service of subpoena by certified mail, see paragraph d of Pattern 52.

(b) *Personal Service:* For language setting out personal service, see paragraph c of Pattern 51.

(c) *Failure to Petition to Revoke:* Paragraph e of Pattern 52 sets out the statutory procedure for administrative revocation of the subpoena and alleges that respondent failed to utilize this procedure. This allegation will support a contention that the respondent is estopped from questioning the validity of the subpoena or the relevancy of the evidence requested. Such a contention was sustained in *NLRB v. Frederick Cowan,* 522 F.2d 26, 28 (2d Cir. 1975); *Maurice v. NLRB,* 691 F.2d 182, 183 (4th Cir. 1982); *American Motors v. FTC,* 601 F.2d 1329, 1332–1337 (6th Cir. 1979). But see *EEOC v. Cuzzins of Georgia, Inc.,* 608 F.2d 1062, 1063 (5th Cir. 1979) (constitutional defense not waived); *NLRB v. Midland Daily News,* 151 F.3d 472, 474 (6th Cir. 1998) (same); *NLRB v. Detroit News,* 185 F.3d 602 (6th Cir. 1999) (privilege defenses not waived); *EEOC v. Lutheran Social Services,* 186 F.3d 959 (D.C. Cir. 1999) (strong presumption of need to exhaust administrative remedies is not jurisdictional and exhaustion requirements may be waived by court in particular circumstances).

(d) *Petition to Revoke Denied:* If respondent petitioned to revoke the subpoena and the petition was denied, use paragraph d of Pattern 51. Paragraph e of Pattern 52 alleges that respondent did not appear in answer to the subpoena.

(e) *Refusal to Testify or Produce Records:* If respondent did appear at the hearing but refused to testify or produce the required records, see paragraph e of Pattern 51.

11802 Pattern 51, Application for Order Enforcing Subpoena ad Testificandum

This form is designed to be used where the subpoena issued at the request of a private party and was directed to an individual; for situations where the subpoena was issued at the request of the General Counsel or where respondent is a corporation, see Pattern 52 (Sec. 11804.1). (Whenever an ex rel. proceeding is brought, Pattern 54, which is the notice to the relator or his attorney, should be used.)

11802.1 Pattern 51

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA

NATIONAL LABOR RELATIONS BOARD
ON BEHALF OF LOCAL 1, UNITED
SQUIBB WORKERS OF AMERICA, U.S.W., IND.
Applicant
v. Civil No. 13579
JOHN DOE
Respondent

APPLICATION FOR ORDER ENFORCING
SUBPOENA AD TESTIFICANDUM

The National Labor Relations Board, an administrative agency of the Federal Government, on behalf of Local 1, United Squibb Workers of America, USW, Ind. (herein Local 1) applies to this Court for an order enforcing a subpoena ad testificandum issued by the Board and served on Respondent John Doe by Local 1. This application is made

under Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), (herein the Act). In support of this application, the Board urges as follows:

a. This Court has jurisdiction of the subject matter of the proceeding and of the person of Respondent by virtue of Section 11(2) of the Act (29 U.S.C. 161(2)). That is, the unfair labor practice hearing to which Respondent was subpoenaed to appear occurred within this judicial district [add or substitute any other criterion applicable under 11(2), such as that Respondent resides or does business within this judicial district**].**

b. This application arises as a result of events in an unfair labor practice proceeding currently pending before the Board, pursuant to Section 10(b) of the Act. The Board process leading to that proceeding began with a charge Local 1 filed in Case 42–CC–233 that alleged that Fireworks Machinery Corp. violated the Act. After that charge was investigated by the Regional Office of the Board, the Regional Director of Region 42 of the Board issued a complaint and notice of hearing alleging that Fireworks Machinery violated the Act and setting the matter for a hearing before an administrative law judge of the Board. Fireworks Machinery filed an answer to the complaint denying that it violated the Act. Copies of the charge, complaint and notice of hearing and answer are attached as exhibits A, B and C, respectively. Each of these documents was prepared, filed and served consistent with the requirements of Section 10(b) of the Act and of 29 C.F.R. Sections 102.9, 102.10, 102.15 and 102.20 of the Board's Rules and Regulations. These Rules and Regulations have been issued pursuant to Section 6 of the Act (29 U.S.C. 156) and have been published in the Federal Register (24 F.R. 9095), pursuant to the Administrative Procedure Act (5 U.S.C. 552). See 29 C.F.R. 102. This court may take judicial notice of the Board's Rules and Regulations under 44 U.S.C. 1507.

c. In order to procure testimony in the hearing before the administrative law judge, Local 1 requested and received a subpoena ad testificandum from the Board. On December 26, 20__, Local 1 issued the subpoena ad testificandum directing Respondent to appear at the hearing before the administrative law judge on

January 7, 20_, at 1:00 p.m. in the hearing room of the Board located at 4 Mammoth Drive, Zenith City, Nebraska. The issuance of this subpoena is consistent with the requirements of Section 11(1) of the Act and Section 102.31(a) of the Board's Rules and Regulations. The subpoena was served on Respondent by personal service on him, as provided for in Section 11(4) of the Act and Section 102.113 of the Board's Rules and Regulations. Copies of the subpoena and the affidavit of service are attached as exhibits D and E, respectively.

d. On January 2, 20__, Respondent filed a petition to revoke subpoena, as provided by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations. Respondent's petition to revoke was denied by Administrative Law Judge Ringer S. Williams in an order dated January 7, 20_. Copies of the petition to revoke the subpoena and the order denying the petition to revoke are attached as exhibits F and G, respectively.

e. Respondent appeared at the hearing before ALJ Williams on January 28, 20_ and was sworn as a witness. Counsel for Local 1 propounded questions to Respondent but he refused to answer the questions on the ground of irrelevancy. ALJ Williams ruled that the evidence sought was relevant to the issues in the unfair labor practice hearing before him and directed Respondent to answer. Respondent refused to comply with the ruling of ALJ Williams, withdrew from the witness stand and left the hearing room. Thereafter, ALJ Williams determined that the testimony of Respondent was necessary and pertinent to a resolution of the issues pending before him and adjourned the hearing to permit the Board to institute these proceedings to compel Respondent to testify. A copy of the pertinent portion of the transcript from the hearing is attached as exhibit H.

f. Respondent's refusal to testify as required by the subpoena ad testificandum and as directed by the ALJ, who concluded that Respondent's testimony is relevant to the issues in the unfair labor practice proceeding, constitutes contumacious conduct within the meaning of Section 11(2) of the Act. Furthermore, Respondent's conduct has impeded and continues to impede the unfair labor practice proceeding before the Board and is preventing the Board from carrying out its duties and functions under the Act.

In view of Respondent's contumacious conduct, the Board requests:

1. That an order to show cause issue directing Respondent to appear before this Court on a date specified in the order and to show cause why an order should not issue directing him to appear before ALJ Williams in Board Case 42–CC–233 at such time and place as ALJ Williams may designate and to give testimony and answer any and all questions relevant to the matters in question at the Board's unfair labor practice hearing;

2. After considering arguments in response to the order to show cause, that this Court issue an order requiring Respondent to appear before Administrative Law Judge Ringer S. Williams, at a time and place to be fixed by ALJ Williams, and to give testimony and answer any and all questions relevant to the matters in question in the unfair labor practice proceedings before the Board; and

3. That the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated: February 7, 20__.

National Labor Relations Board

By: [GC's name], General Counsel
[RA's name], Regional Attorney

[signature of attorney]
Attorney for Applicant
Region 42
4 Mammoth Drive
Zenith City, NE

11804 Pattern 52, Application for Order Enforcing Subpoena Duces Tecum

This form is designed to be used where the subpoena issued at the request of the General Counsel or his agent and was directed to a corporate respondent; for situations where the subpoena was issued at the request of a private party or where respondent is an individual, see Pattern 51 (Sec. 11802.1).

11804.1 Pattern 52

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA

NATIONAL LABOR RELATIONS BOARD
Applicant
v. Civil No. 13579
GOODWILL R. R. CO.
Respondent

APPLICATION FOR ORDER ENFORCING SUBPOENA DUCES TECUM

The National Labor Relations Board, an administrative agency of the Federal Government, applies to this Court for an order compelling compliance with a subpoena duces tecum that the Board issued and served on Respondent Goodwill R.R. Co. This application is made under Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), (herein the Act). In support of this application the Board states as follows:

a. This Court has jurisdiction of the subject matter of the proceeding and of Respondent by virtue of Section 11(2) of the Act (29 U.S.C. 161(2)). The subpoena was issued within this judicial district and Respondent is a domestic corporation chartered under the laws of the United States and licensed to do business in the State of Nebraska, with an office at 25 Omnibus Avenue, Zenith City, Nebraska. Respondent is engaged in business in this district.

b. This application arises as a result of events in an unfair labor practice proceeding currently pending before the Board pursuant to Section 10(b) of the Act. The Board process leading to that proceeding began with a charge filed by Local 1, United Squibb Workers of America, U.S.W Ind. in Case 42–CC–233, which alleged that Fireworks Machinery Corp. violated the Act. After that charge was investigated by the Regional Office of the Board, the Regional Director of Region 42 of the Board issued a complaint and notice of hearing alleging that Fireworks Machinery violated the Act and setting the matter for a hearing before an administrative law judge of the Board. Fireworks Machinery filed an answer to the complaint denying that it violated the Act. Copies of the charge, complaint and notice of hearing and answer are attached as exhibits A, B and C, respectively. Each of these documents was prepared, filed and served consistent with the requirements of Section 10(b) of the Act and of 29 C.F.R. Sections 102.9, 102.10, 102.15 and 102.20 of the Board's Rules and Regulations. These Rules and Regulations have been issued pursuant to Section 6 of the Act (29 U.S.C. 156) and have

been published in the Federal Register (24 F.R. 9095), pursuant to the Administrative Procedure Act (5 U.S.C. 552). See 29 C.F.R. 102. This court may take judicial notice of the Board's Rules and Regulations under 44 U.S.C. 1507.

c. In order to procure evidence for the hearing before the administrative law judge, a representative of the General Counsel made a written request for and received a subpoena duces tecum from the Board. On December 26, 20__, a representative of the General Counsel issued the subpoena duces tecum directing Respondent to appear at the hearing before the administrative law judge on January 7, 20_, at 1:00 p.m. in the hearing room of the Board located at 4 Mammoth Drive, Zenith City, Nebraska to give testimony and to produce certain records and papers more fully described as follows:

> **Records and papers in the possession of the Goodwill R. R. Co., including bills of lading, consignments, receipts or other documents showing shipment of goods via Goodwill R. R. Co., to and from Fireworks Machinery Corp., Zenith City, Nebraska for the calendar year 20__.**

A copy of the subpoena is attached as exhibit D. The issuance of this subpoena is consistent with the requirements of Section 11(1) of the Act and Section 102.31(a) of the Board's Rules and Regulations.

d. The subpoena described above in paragraph c was served on Respondent by addressing and sending it by certified mail to John Doe, superintendent of the Zenith City Division of Respondent, at the offices located at 25 Omnibus Avenue, Zenith City, Nebraska 44422. Respondent acknowledged receipt of the subpoena on December 28, 20__. Service and receipt complied with Section 11(4) of the Act and Section 102.113 of the Board's Rules and Regulations. 29 C.F.R. 102.113 A copy of the return post office receipt is attached as exhibit E.

e. Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations provide for a period of 5 days after service of a subpoena within which any person served may petition the Board to revoke the subpoena. Respondent has not at any time filed a petition to revoke the subpoena. Nevertheless, Respondent failed to appear at the hearing on January 7, 20_ or to produce the documents as required by the terms of the subpoena. At no time on or since January 7, 20__ has Respondent produced the subpoenaed documents.

f. Respondent's refusal to appear and to produce the subpoenaed documents, which are relevant to the issues in the proceeding before the Board, constitutes contumacious conduct within the meaning of Section 11(2) of the Act. Furthermore, Respondent's conduct has impeded and continues to impede the unfair labor practice proceeding before the Board and is preventing the Board from carrying out its duties and functions under the Act.

In view of Respondent's contumacious conduct, the Board requests:

1. That an order to show cause issue directing Respondent to appear before this Court on a date specified in the order and to show cause why an order should not issue directing him to appear before Administrative Law Judge Ringer S. Williams in Board Case 42–CC–233 at such time and place as ALJ Williams may designate and to produce the subpoenaed records described above, to give testimony and to answer any and all questions relevant to the matters in question at the Board's unfair labor practice hearing;

2. After considering arguments in response to the order to show cause, that this Court issue an order requiring Respondent to appear before ALJ Williams, at a time and place to be fixed by ALJ Williams, and to produce the records, give testimony and answer any and all questions relevant to the matters in question in the unfair labor practice proceedings before the Board; and

3. That the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated: February 7, 20__.

National Labor Relations Board

By: [GC's name], General Counsel
[RA's name], Regional Attorney

_____[signature of attorney]____
Attorney for Applicant
Region 42
4 Mammoth Drive
Zenith City, NE

11806 Pattern 53, Order to Show Cause

This Pattern, which applies to an application for enforcement of a subpoena duces tecum involving a corporate respondent, may be used with appropriate modification in proceedings involving other types of respondents or to enforce a subpoena ad testificandum.

Note that service on respondent of the Order to Show Cause may be made by serving any officer or agent, either by certified mail or in any manner provided for in Rule 5 of the Federal Rules of Civil Procedure.

11806.1 Pattern 53

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA

NATIONAL LABOR RELATIONS BOARD
Applicant

v. Civil No. 13579

GOODWILL R. R. CO.

Respondent

ORDER TO SHOW CAUSE

The National Labor Relations Board filed an application with this Court for an order enforcing a subpoena duces tecum properly served on Respondent Goodwill R. R. Co. and good cause appearing therefor, it is hereby

ORDERED that:

1. Respondent Goodwill R. R. Co. appear in Room 200, United States Courthouse, Federal Square, City of Zenith, State of Nebraska on the _ day of April 20__ at 9 o'clock a.m. and show cause, if any exists, why an order of this Court should not issue directing Respondent to appear before the designated administrative law judge of the Board, at such time and place as the administrative law judge may determine, and produce the books, papers, records and other data described in the subpoena duces tecum served on Respondent, and give testimony in connection with the proceeding in 42–CC–233 now pending before the Board pursuant to Section 10 of the National Labor Relations Act, as amended (29 U.S.C. 160).

2. On or before the _ day of March 20_, service be made on Respondent of a copy of this Order to Show Cause and of the Board's application. Service on Respondent may be made on any officer or agent of Respondent.

3. Respondent shall file and serve its answer to the application not later than April __ 20_.

4. Service of a copy of this order, the application and the Respondent's answer, made in any manner provided for by Rule 5 of the Federal Rules of Civil Procedure of the United States or by certified mail, shall be deemed good and sufficient service.

/s/ D. W. Brown
United States District Court Judge

Dated, Zenith City, Nebraska,
March ___, 20____.

11808 Pattern 54, Notice of Institution of Proceeding to Enforce Subpoena ad Testificandum

Section 11(2) of the Act provides that a proceeding to enforce a subpoena issued by the Board must be instituted "upon application of the Board." Sec. 102.31(d), Rules and Regulations provides that when the subpoena was issued at the request of a private party, enforcement proceedings shall be instituted by the General Counsel in the name of the Board "but on relation of such private party." The same section further provides that "neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution" of the enforcement proceedings. Pattern 54 is designed to put relators on notice that they are primarily responsible for prosecuting the case before the court and will also serve to establish their standing in the court to participate in the proceedings. This form should be issued to relators or their attorneys in every ex rel. proceeding and copies should be served on respondent and filed with the court.

11808.1 Pattern 54

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA

NATIONAL LABOR RELATIONS BOARD, ON
RELATION OF LOCAL 1, UNITED SQUIBB
WORKERS OF AMERICA, U.S.W., IND.

Applicant

v. Civil No. 13579

JOHN DOE

Respondent

To: Joan Smith, Esquire

Address

City

Attorney for Relator

Local 1, UNITED SQUIBB WORKERS

OF AMERICA, U.S.W., IND.

NOTICE OF INSTITUTION OF PROCEEDING TO ENFORCE SUBPOENA AD TESTIFICANDUM

Please take notice that the General Counsel of the National Labor Relations Board, in the name of the Board, but on behalf of Local 1, United Squibb Workers of America, U.S.W., Ind., has petitioned the Court for an order enforcing a subpoena ad testificandum issued by the Board at the request of Local 1, United Squibb Workers of America, U.S.W., Ind. Attached are copies of the order to show cause and the application for order enforcing subpoena ad testificandum, filed with the court on _____, 20 _.

This proceeding has been instituted at your request pursuant to the provisions of Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 161(2)), and of Section 102.31(d) of the Rules and Regulations, Series 8, as amended, of the National Labor Relations Board (29 C.F.R. 102.31(d)). We specifically call your attention to that portion of Section 102.31(d) of the Rules and Regulations that provides that by bringing this proceeding "neither the General Counsel nor the

Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the Court."

Dated: March 20, 20__.

National Labor Relations Board

By: [GC's name], General Counsel
[RA's name], Regional Attorney

[signature of attorney]
Attorney for Applicant
Region 42

4 Mammoth Drive
Zenith City, NE

11820–11828 DISCLOSURE OF AGENCY DOCUMENTS AND SUBPOENAS OF, AND TESTIMONY BY, AGENCY PERSONNEL

11820 Policy on Disclosure of Documents and Board Agent Testimony

Generally, it is the policy of the General Counsel to preserve the confidentiality of statements and materials contained in Agency investigatory files and to prohibit Board agents from testifying or providing information or investigative documents concerning the processing of cases. See Sec. 11824 for certain exceptions to this policy. As set forth below, this policy has been upheld in numerous cases.

It has consistently been held that the Act does not compel the Board to provide for discovery in its proceedings and that the unavailability of discovery is not a prejudicial denial of due process. See, e.g., *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214 (1978); *Wellman Industries v. NLRB,* 490 F.2d 427 (4th Cir. 1974); *NLRB v. Automotive Textile Products Co.,* 422 F.2d 1255, 1256 (6th Cir. 1970); *North American Rockwell Corp. v. NLRB,* 389 F.2d 866, 871–873 (10th Cir. 1968); *NLRB v. Movie Star, Inc.,* 361 F.2d 346 (5th Cir. 1966); *Raser Tanning Co. v. NLRB,* 276 F.2d 80 (6th Cir. 1960). In addition, the General Counsel has no obligation to disclose any exculpatory evidence contained in investigatory files. *Erie County Plastic Corp.,* 207 NLRB 564, 570 (1973), enf. mem. 505 F.2d 730 (3d Cir. 1974); *North American Rockwell,* supra.

Notwithstanding the above, pursuant to Sec. 102.118(b)(1), Rules and Regulations, upon request, certain statements and material must be made available by the General Counsel after a witness has testified at a hearing. Sec. 10394.7.

The Agency policy of restricting Board agent testimony is required since the highly sensitive and delicate role of a Board agent in processing cases would be seriously impaired if a real likelihood existed that the agent would become a witness in litigation or if confidential investigative information would become public. *Sunol Valley Golf & Recreation Co.,* 305 NLRB 493 (1991) and *G. W. Galloway Co.,* 281 NLRB 262 fn. 1 (1986). In this regard, the limited evidentiary privilege for informal deliberations of all prosecutorial agencies and branches of Government has also been recognized in the courts as applying to internal Agency documents and agent testimony. *Stephens Produce Co. v. NLRB,* 515 F.2d 1373 (8th Cir. 1975); *J. H. Rutter Rex Mfg. Co. v. NLRB,* 473 F.2d 223, 230 (5th Cir. 1973).

In addition, internal deliberative memoranda are protected from disclosure based upon the historic privilege against disclosure of intra-agency memoranda and communications. *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 149–152 (1975); *Davis v. Braswell Motor Freight Lines,* 363 F.2d 600, 603 (5th Cir. 1966). Further, such materials are privileged from disclosure as attorney work product. *Hickman v. Taylor,* 329 U.S. 495 (1947).

11822 FOIA Disclosure of Documents

Sec. 102.117, Rules and Regulations describes, generally, which Agency documents, records, and materials are open to public inspection and sets forth Agency procedures for the disclosure of information under the Freedom of Information Act (FOIA).

Additional direction with respect to FOIA and documents contained in case files is provided in the NLRB FOIA Manual that issued in November 1999. This Manual supercedes all prior GC and OM memoranda dealing with FOIA. It is available in both HTML and PDF format on the Agency's web site at www.nlrb.gov/foia/reading.html.

11824 Subpoena of Agency Documents and Personnel

Sec. 102.118, Rules and Regulations sets forth Agency procedures with respect to requests for the production of documents, other than those required under FOIA, and the testimony of Agency personnel. Sec. 102.118 provides that Board agents shall not produce any Agency documents or testify with respect to information coming to their attention in their official capacity in any court or Board hearing, whether in response to a subpoena or otherwise, without the written consent of the Board, its Chairman or the General Counsel, whoever has supervision of the Board agents or control of the documents.

11824.1 Delegation of General Counsel Authority

As set forth below and in detail in GC Memos 98-9, 98-7, and 94-14, the General Counsel has delegated the authority to permit Board agent testimony and disclosure of documents under Sec. 102.118, Rules and Regulations. In considering such requests, the appropriate General Counsel memoranda should be carefully reviewed to insure consistency with General Counsel policies and that appropriate written records are maintained. A summary of the delegation of Sec. 102.118 authority is set forth below.

(a) *Regional Director Authority:* Regional Directors may consider and decide whether or not to approve requests for authorization under Sec. 102.118 in the following circumstances, in the name of the General Counsel:

When compliance officers testify at compliance proceedings

When a party to a representation case alleges that Board agent conduct has interfered with the conduct of an election and Board agent testimony regarding the issues is necessary to develop a complete record

When Board agent testimony is necessary to authenticate the signature of a deceased or unavailable witness for whom the agent prepared an affidavit or to establish that the General Counsel made a good faith effort to locate the unavailable witness

When Board agent testimony is necessary to establish that a respondent has failed to perform an affirmative act pursuant to a court enforced Board Order or

When a request for access to Regional Office files unaccompanied by a subpoena is made by an official of a Federal, State, or local Government agency in connection with law enforcement activities

(b) *Specific Regional Director Authority to Deny:* In circumstances other than those set forth above, Sec. 102.118 requests from outside parties or counsel for nonpublic file documents or Board agent testimony, unaccompanied by a subpoena, normally should be denied by the Regional Director in the name of the General Counsel.

(c) *Associate General Counsel for Enforcement Litigation Authority:* The Associate General Counsel for the Division of Enforcement Litigation has Sec. 102.118 authority with respect to ongoing litigation in the courts and relative to bankruptcy proceedings.

(d) *Associate General Counsel for Operations-Management:* The Associate General Counsel for the Division of Operations-Management has Sec. 102.118 authority to decide any remaining requests that do not specifically fall within the above areas of previously delegated authority.

11824.2 Steps to be Taken on Receiving Subpoena

When a subpoena is received by a Regional Office, the Region should immediately:

In the case of a subpoena ad testificandum, ascertain, if possible, the nature of the testimony being sought

Notify the party on whose behalf the subpoena is being served of the existence of Sec. 102.118 and the Agency official to whom the request for authorization should be directed. The Board agent should not undertake to act as an agent in requesting the General Counsel's permission to testify

Unless the matter falls within the delegated authority of the Regional Director, the Regional Office should apprise the appropriate Agency official of the facts, so that a request for permission to testify can be properly considered

11824.3 Witness Fees and Allowances

Agency employees who testify in their official capacity in private litigation are required to collect the authorized witness fees and allowances for expenses of travel. Since the employees remain in official duty status, such funds, with covering memo and certification of service, must be forwarded to the Finance Section.

11826 Agency Motion to Quash or Petition to Revoke

Absent authorization to comply with the subpoena, the Regional Office should file a motion to quash or a petition to revoke, whichever is applicable.

11826.1 Motion to Quash/Petition to Revoke—Non-Board Proceedings

With respect to non-Board proceedings, the Regional Office should consult the Assistant General Counsel for Special Litigation and review the rules of the local jurisdiction to prepare appropriate responsive pleadings.

11826.2 Petition to Revoke—Board Proceedings

With respect to Board hearings, a petition to revoke should be filed for either a duces tecum or ad testificandum subpoena. A supporting memorandum, consistent with Sec. 11820, should be filed. See Secs. 11782–11782.5 for details on petitions to revoke.

11826.3 Petition to Revoke Denied—Board Proceedings

If a petition to revoke in a Board proceeding is denied, a request for special permission to appeal to the Board should be made, if appropriate, after consultation with the authorizing Agency official. Sec. 11824.

If at the time of the trial or hearing, a petition to revoke has not been granted, the subpoenaed Board agent should appear, unless otherwise directed by the Board, the Chairman of the Board, or the General Counsel. The Board agent should take the oath and answer questions calling for name and occupation. In answer to further questions, the agent should respectfully decline to answer or to produce records for the reasons that were previously asserted in the petition to revoke.

Should prior consent have been procured, the Board agent should testify or produce records to the extent covered by the consent. With respect to other matters, except those clearly not arising in an official capacity, the agent should decline on the grounds on which permission was denied.

11826.4 Instructions to Testify or Produce Records Without Permission in Non-Board Proceedings

Should a motion to quash or petition to revoke be denied and not reversed on appeal, should there have been insufficient time in which to file the motion or petition or should a motion to quash or its equivalent not be applicable in the jurisdiction involved, the subpoenaed Board agent should, unless otherwise directed by the Board, the Chairman of the Board, or the General Counsel, make an appearance at the trial or hearing. The Board agent should take the oath and answer questions calling for name and occupation. In answer to further questions, the agent should respectfully decline to answer or to produce records for the reasons that were previously asserted in the motion to quash or petition to revoke or that would have been asserted therein had one been filed.

Should prior consent have been procured, the Board agent should testify or produce records to the extent covered by the consent. With respect to other matters, except those clearly not arising in an official capacity, the agent should decline on the grounds on which permission was denied.

Should the Board agent be ordered to give information or produce records in violation of Sec. 102.118, the attorney representing the Board agent should request that action be delayed for a short time in order to consult with Special Litigation Branch.

11828 Production of Documents in Formal Proceedings

The following Manual sections should be consulted with respect to motions made at hearing for the production of pretrial statements and other documents:

Sec. 10394.7—Production of witness statements

Secs. 10398 and 11820—Confidentiality of intragency documents

Sec. 10400—Request to produce affidavits, statements or documents by opposing counsel

Sec. 10622.6, Compliance Manual—Disclosure of factual information relevant to backpay computation

11840–11846 SERVICE, FILING, AND COMMUNICATIONS WITH PARTIES

11840 Service and Filing of Documents

Secs. 102.111–.114, Rules and Regulations provide comprehensive guidance for the requirements of service and acceptable methods of filing and service of documents. These Sections address the following:

Sec. 102.111—Time computation

Sec. 102.112—Date of service; date of filing

Sec. 102.113—Methods of service of process and papers by the Agency; proof of service

Sec. 102.114—Filing and service of papers by parties; form of papers; manner and proof of filing or service

The requirements for service of a particular pleading or other document are contained in the Rules and Regulations concerning that pleading or document.

Most documents may also be filed electronically at the Agency's website. To file documents electronically, on the home page of the website, click on E-File Documents. Detailed E-Filing instructions explaining how to file the documents electronically will be displayed.

11840.1 Computation of Period of Time

Sec. 102.111(a), Rules and Regulations provides that in computing time for filing or service of documents, the time period begins to run the day after the day of the triggering act, event, or default. The last day of the period so computed is included, except when it falls on a weekend or a legal holiday. In such circumstance, the period continues until the official closing time of the receiving office on the next business day. When the period of time is less than 7 days, intermediate weekends and holidays are excluded from the computation.

11840.2 Date of Service and Proof

The date of service shall be the day of personal delivery or receipt of facsimile transmission, where allowed, or day of depositing either in the mail or with a private delivery service, whichever is applicable. Sec. 102.112, Rules and Regulations. Although proof of service is desirable in all cases, failure to furnish such proof does not affect the validity of the service. Sec. 102.114(e), Rules and Regulations. With regard to electronic filings, rules of service are set forth at the appropriate office site on the Agency's website.

11840.3 Receipt of Documents and Postmark Rule

Sec. 102.111(b), Rules and Regulations sets forth requirements for the timely receipt of documents, including representation petitions and objections to elections, filed with the Agency. The Board will accept as timely documents delivered to the receiving office on or before the official closing time of the last day for filing. Also considered timely are those documents sent to the receiving office that are postmarked at least 1 day prior to the due date. Documents received late that are postmarked on or after the due date are untimely.

Sec. 102.111(c), Rules and Regulations permits a party to file a motion that briefs, answers, motions, and exceptions in ULP proceedings be filed after the filing date in the following limited circumstances:

Upon good cause shown based on excusable neglect and

When no undue prejudice would result

The party filing such a motion must strictly adhere to the procedures set forth in Sec. 102.111(c), including submitting sworn affidavits by individuals with personal knowledge of the facts setting forth the extenuating circumstances.

The Board will not permit such a late filing because of miscalculation of a filing date, inattentiveness or carelessness, absent a showing of extenuating circumstances. *Elevator Constructors Local No. 2 (Unitec Elevator Services Co.),* 337 NLRB 426 (2002).

The appropriate office site on the Agency's website sets forth the rules regarding timely receipt of electronic filings. Electronically filed documents must be received at the appropriate office site by the official closing time of the receiving office on the due date. A failure to timely file a document electronically will not be excused on the basis of the claim that transmission could not be accomplished because the receiving machine was off-line or unavailable, the sending machine malfunctioned, or for any other electronic-related reason. See Sec. 11846.4.

11840.4 Receipt of Documents—Exceptions to Postmark Rule

Sec. 102.111(b), Rules and Regulations lists four exceptions to the above rule regarding postmarked documents. Accordingly, to be timely the following documents must be delivered to the receiving office on or before the official closing time of the last day for filing:

Charges filed pursuant to Section 10(b) of the Act. See also Sec. 10052.2

Applications for awards, fees, and other expenses under the Equal Access to Justice Act (EAJA)

Petitions to revoke subpoenas

Requests for extensions of time to file any document for which such an extension may be granted

In addition to the requirement that requests for extension of time must be received no later than the due date, Sec. 102.111(b), Rules and Regulations requires that those requests filed within 3 days of the due date "must be grounded on circumstances not reasonably foreseeable in advance."

11842 Service by the Regional Offices

11842.1 Service of Charge by the Regional Office

The responsibility for proper and timely service of a charge rests with the charging party. Sec. 102.14, Rules and Regulations and Sec. 10012.8. However, the Regional Director will, as a matter of courtesy, cause charges and amended charges to be served by regular mail on the person against whom the charge is made. Sec. 10040.5. When serving a copy of the charge on the charged party by regular mail, the Regional Office should record service by an affidavit of service. This affidavit should be modeled on Form NLRB-877. The affidavit should list the names and addresses to which the charge was mailed, the date of mailing, and the name of the individual performing the mailing. Form NLRB-877 must be modified to state that the service was by regular mail. This affidavit of service should be placed in the investigative file so that the Board agent assigned to the investigation can ensure that the form has been completed. The affidavit of service could be used, if necessary and upon proper authentication, to prove service of the charge.

11842.2 Service of Other Formal Documents

Complaints, compliance specifications, amendments to either, notices of hearing in C cases, final Board Orders, Administrative Law Judge decisions, and subpoenas must be served personally, by registered or certified mail, by telegraph, or by leaving a copy at the principal office or place of business of the person on whom service is sought. Sec. 102.113(a)–(c), Rules and Regulations.

To establish necessary proof of service, return receipts must be requested when complaints, compliance specifications, and amendments thereto are served on respondents by certified mail. Subpoenas served by certified mail should also require a return receipt. Although return receipts are a practical necessity in the above circumstances, the rules do not require that return receipts be obtained. Accordingly, to save expense, return receipts should not be requested for certified mail delivery of complaints, compliance specifications, and amendments thereto to charging parties, parties to the contract, and parties of interest. Attorneys or representatives should be served by regular mail. Other documents may be served by any of the foregoing methods, as well as by regular mail or private delivery service, or, with the permission of the person receiving service, by facsimile transmission. Sec. 102.113(d), Rules and Regulations.

Note: If a party is represented by an attorney or other representative, the instructions regarding service set forth in Sec. 11842.3 must also be followed.

11842.3 Service on Attorney or Other Representative

If a party's or person's representative is an attorney, all documents and correspondence including e-mail must be addressed to and served exclusively on the attorney unless:

- Direct contact with a party or person is authorized by the attorney,[6]
- Service of documents and correspondence on the party has been authorized by the attorney, for example by checking the appropriate box on a Notice of Appearance, Form NLRB-4701 (See Sec. 10058.1(b)), or
- One of the exceptions set forth below in subparagraphs (a), (b), or (c) applies

If a party's or person's representative is not an attorney, all documents and correspondence including e-mail should be addressed and served on the representative and copies may also be sent to the party or person unless one of the situations set forth below in subparagraphs (a), (b), or (d) applies.

For oral and e-mail communications with parties, see Sec. 11844.

(a) *Service on Party or Person with Copy to Attorney or Representative:* The following documents and/or correspondence should be addressed to and served on the appropriate party(ies) or person(s) with a copy(ies) to their attorney(s) or representative(s) and, if appropriate, with copies to other parties and their attorneys or representatives:

- Charges, amended charges, and standard service letters (see Sec. 10040)
- Petitions, amended petitions, and standard service letters (see Sec. 11009)
- Correspondence confirming agreed upon election arrangements, election notices, and letters requesting and supplying *Excelsior* lists accompanied by a copy of the approved consent or stipulated election agreement
- Objections and standard service letters (see Sec. 11392.9)
- Subpoenas, related forms and instructions, and standard cover letters which do not convey substantive information or invite a response. However, if a party or person is represented by an attorney, written communications conveying substantive information or inviting a response

[6] For example, after the requirements of compliance have been agreed upon and the charged party/respondent through its attorney has advised the Regional Office of its intention to comply, documents necessary to accomplish compliance may, with the consent of the attorney, be sent directly to the party with copies to the attorney. Such documents may include notices for posting pursuant to a settlement agreement, an ALJ decision, or a Board Order; requests for a certification of posting; and instructions concerning the details of compliance.

which may accompany subpoenas must be addressed to and served exclusively on the attorney.

(b) *Service on All Parties, Persons, Attorneys or Representatives:* The following documents should be served on all parties and persons and their attorneys or representatives:

- Complaints, compliance specifications, amendments to either, notices of hearing, final Board Orders and Administrative Law Judge decisions in unfair labor practice cases and in connection with 10(k) hearings, and cover letters which do not invite a response. However, if a party or person is represented by an attorney, written communications conveying substantive information or inviting a response which may accompany any of these documents must be addressed to and served exclusively on the attorney.
- Notices of hearing, decisions, orders, reports, supplemental decisions, and certifications in representation cases

(c) *Service on Attorney with Copy to Party:* The following documents and/or correspondence should be addressed to and served on the attorney(s) of the appropriate party(ies) with a copy(ies) to such party(ies) and with copies to other parties and their attorneys or representatives:

- Dismissal and withdrawal letters
- Final *Collyer*, *Dubo*, and administrative deferral letters
- Closing compliance letters

(d) *Service on Party Represented by a Non Attorney:* The following documents and/or correspondence should be addressed to and served on the appropriate party(ies) with a copy(ies) to such party's(ies') representative and with copies to other parties and their attorneys or representatives:

- Dismissal and withdrawal letters
- Final *Collyer, Dubo,* and administrative deferral letters
- Closing compliance letters

11842.4 Service on Multiple Attorneys or Other Representatives

If a party or person is represented by more than one attorney or representative, service on any one of such attorneys or representatives in addition to the party or person, where appropriate, satisfies the requirements of Sec. 102.113(f). However, as a matter of courtesy, an effort should be made to serve all attorneys or representatives of a party or person.

11844 Oral and Electronic Communications with Parties or Persons

If a party or person is represented by an attorney, all oral and electronic communications should be directed exclusively to the attorney and copies of electronic correspondence should not be sent to the party or person unless direct contact is authorized by the attorney. If a party's or person's representative is not an attorney, all oral and electronic communications should be directed to the representative, however, copies of electronic correspondence may also be sent to the party or person. For service of documents and written communications see Sec. 11842.3. For more specific guidance regarding communications with attorney and non attorney representatives in unfair labor practice cases, see Sec. 10058.

11846 Filing and Service by Parties

Filing by hand delivery, by registered or certified mail, or by private delivery service satisfies the requirements for filing with the Board, the General Counsel, Regional Offices, or Administrative Law Judges. Sec. 102.114, Rules and Regulations. In addition, filing electronically or by facsimile transmission may be used in certain circumstances, as set forth below.

11846.1 Facsimile Filing Permitted

Parties may file unfair labor practice charges, representation petitions, objections to elections, and requests for extension of time by facsimile transmission, if transmitted to the facsimile machine of the appropriate office of the Agency. Receipt of such facsimile transmission by the Agency constitutes filing. Sec. 102.114(f), Rules and Regulations.

11846.2 Facsimile Filing Permitted only with Consent

The filing by facsimile transmission of documents other than those set forth above, except those specifically prohibited as set forth in Sec. 11846.3, will be accepted by the appropriate office of the Agency, only with the advance permission of the receiving office. Sec. 102.114(g), Rules and Regulations.

11846.3 Facsimile Filing Prohibited

Sec. 102.114(g), Rules and Regulations prohibits the filing by facsimile of a showing of interest, requests for review, and appeals from dismissal of petitions in representation cases; appeals from dismissal of unfair labor practice charges; objections to settlements; answers to complaints; exceptions, cross-exceptions and briefs; Equal Access to Justice Act (EAJA) applications and a variety of motions. See Sec. 102.114(g) for a complete list of exclusions from filing by facsimile transmission.

11846.4 Electronic Filing and Service

Sec. 102.114(i), Rules and Regulations provides that certain documents may be filed with the Agency electronically notwithstanding any contrary provisions elsewhere

in the Board's Rules and Regulations. The rules governing such filings are set forth at the Agency's website at www.nlrb.gov.

(a) *Electronic Filings with the Agency:* As noted in Sec. 11840, most documents may be filed electronically at the Agency's website. To file documents electronically, on the home page of the website, click on E-File Documents. Detailed E-Filing instructions explaining how to file the documents electronically will be displayed.

(b) *Service on the Regional Director, Hearing Officer or Counsel for the General Counsel:* The General Counsel's policy outlined in OM Memo 07-07 (Revised) dated November 15, 2006, provides that documents may be served on a Regional Director, Hearing Officer, or Counsel for the General Counsel by utilizing the E-Filing form on the Agency's website. However, service on other parties to the case must still be accomplished by means allowed under the Board's Rules and Regulations. See Sec. 102.114(i), Rules and Regulations and Sec. 11846.5.

(c) *Receipt of Electronically Filed Documents:* Electronically filed documents must be received at the appropriate office site by the official closing time of the receiving office on the due date. A failure to timely file a document electronically will not be excused on the basis of the claim that transmission could not be accomplished because the receiving machine was offline or unavailable, the sending machine malfunctioned, or for any other electronic-related reason. See Sec. 11840.3.

(d) *Electronic Filing Prohibited:* The following documents may not be filed electronically with any Agency office:

- Unfair Labor Practice Charges
- Representation Petitions
- Petitions for Advisory Opinions

11846.5 Service by Party on Other Parties

Where service of documents by a party on other parties is required, such service may be made personally or by registered mail, certified mail, regular mail, or by private delivery service. Service of documents by a party on other parties by any other means, including facsimile or electronic transmission, is permitted only with the consent of the party being served. In general, service on all parties shall be in the same manner as that utilized in filing the document with the Board or in a more expeditious manner. See Secs. 102.114(a) and (h), and (i) Rules and Regulations for specific applications.

11850–11860 CASE FILES AND DOCUMENTARY EVIDENCE

11850 Case Files

The case file should reflect all action taken in the investigation and be kept up to date. It must be sufficiently complete and current to permit appropriate supervisory review on an ongoing basis and, if necessary, to allow another agent to continue the investigation with a minimum of duplication.

11850.1 Organization of Files

Files should be so organized that specific material may be easily found. No special sectional breakdown is required. The need for organization will often depend on the case and on the extent of the work already done, but a desirable breakdown would consist of sections devoted to the (1) formal (public) documents, (2) memos and correspondence, (3) affidavits and statements, and (4) other documents. Normally, the affidavits and statements should be arranged alphabetically and other documents chronologically.

11850.2 File Should Contain Complete History of Case

There should be no gaps in the case file. Where an item inserted in the file speaks for itself, it is unnecessary to recite the surrounding facts in a memo, but, for example, an unsuccessful interview attempt should be documented in a memo; in this way, the file will show the point has not been overlooked.

From time to time, if the case is long and involved, the Board agent assigned should, by memo, bring the circumstances up to date and signify further steps to be taken.

11860 Documentary Evidence

The term documentary evidence means any paper whether in written, printed, graphic, or other visual form, containing facts germane to the case that might be necessary to introduce at a hearing. Documentary evidence includes correspondence to the Regional Office, other letters, records, charts, pictures, affidavits, and other signed statements.

All documentary evidence should be retained in the original form if possible; otherwise, such evidence should be photocopied.

Unless the source and circumstances of receipts of a document are self-explanatory, they should be recited in a file memorandum.

No marks should be made on documentary evidence. Notes, questions, remarks, or instructions should be inserted on separate sheets and not on the face of the document. This is particularly applicable to the practice that sometimes exists of writing on the document the name(s) of the person(s) in the Regional Office to whom it is to be routed; separate routing slips should be used for this purpose.

11870 REPORTING SERVICE

11870 Official Reporting Service

Contracts, based on competitive bids, are awarded annually for reporting the Agency's hearings. Regional Directors and officers-in-charge are notified in advance of the beginning of the fiscal year as to the selected contractor for the coming year and the rates and fees stipulated under the contract. The contractor notifies Agency field offices of its designated local subcontractor or agent for reporting service in each field office.

11870.1 Notification of Hearing Schedule

Notification of all hearing schedules must be sent to both the contractor and the local subcontractor. It is very important that this information be issued promptly and accurately in every case. The current contract should be consulted for time limitations for notification of hearing schedules.

11870.2 Coordination with the Local Reporter

Regional Offices should cooperate with the reporting service to the extent possible to coordinate the number and locations of hearings in order to permit the economic use of the service's resources without sacrificing the Agency's commitment to quality and timely service to the public.

11870.3 Scheduling Hearings

Although there are other considerations relative to the scheduling of hearings, the Regional Office should make an effort to schedule hearings in the Regional, Subregional, or Resident Office city since this usually results in better delivery time of the transcript, savings in staff time and travel expense and, under some contracts, a lower reporting rate.

11870.4 Timely Notification of Cancellations or Postponements

Pursuant to the court reporting contract, the Agency is charged a cancellation fee if the reporting service is not notified of the cancellation or postponement of a hearing sufficiently in advance of the hearing date. These fees can usually be avoided by notification to the reporting service by a designated time on the last business day before the hearing date. Since these fees constitute a significant expense, all staff members, particularly those involved in obtaining election stipulations, must be alert to notify the appropriate Regional Office personnel of any cancellations or postponements.

The reporting service and/or subcontractor should be notified of such action by telephone as soon as possible. The current reporting contract should be consulted for time limitations for notification of cancellations or postponements.

11870.5 Report of Obligated Cost of Hearing, Form NLRB-4237

It is the responsibility of the hearing officer in an R case and the trial attorney in a C case to complete this form immediately upon the close of the hearing or as of the last day of the month, if the hearing continues into the subsequent month. Likewise, if the hearing is postponed or canceled at the hearing site, this form must be completed by the respective hearing officer or trial attorney.

A hearing that is adjourned for 5 or more calendar days is considered a complete hearing for purposes of attendance fees. Therefore, in such situations, this form must be completed and submitted to the Regional Office immediately upon such adjournment. A new Form NLRB-4237 should be completed for the reopened hearing. If the hearing officer or trial attorney is away from the Regional Office on the last day of the month, he/she should inform the Regional Office of the estimated cost of hearing through that date.

11870.6 Sales of Copies of Transcript

A party seeking a copy of the transcript should order it from the reporting service. Such copy must be provided to the party at the actual cost of duplication. Pub. L. 92-463. Care must be exercised with respect to the use by the parties of Regional Office copies of the transcript. Although the transcript is part of the formal file and as such is accessible to the public, use of the transcript should not be volunteered. When a request is received to read or hand copy the Regional Office copy, it should be made promptly available under such circumstances as will not delay Board personnel in processing the case. Loan of the transcript for use outside the office is not permitted.

11870.7 Reporting Service Compliance with Contract

Inasmuch as the service provided by the court reporter is vital to many of the most important aspects of Agency work, it is imperative that the quality of the reporting service's performance be carefully monitored. Records should be maintained as to late arrival of reporters, poor or inaccurate transcripts and inappropriate or unprofessional behavior by reporters. Any such deficiencies should be relayed promptly to Division of Administration, Facilities and Services Branch.

11870.8 Other Contract Provisions

The current reporting service contract contains information relating to other provisions, such as:

Fees—attendance fees, cancellation fees (for cancellations and postponements), and additional service fees

Delivery of transcripts, appropriately formatted diskettes and copies—ordinary copy, expedited copy, prompt copy, and daily copy

Timely delivery of transcripts

Liquidated damages for delay in delivery of transcripts

Receipt and processing of transcripts and exhibits

Retention of stenographic notes and transcripts

11880–11886 COMMUNICATIONS AND TRAVEL

11880 Communication with Headquarters

If a direct communication is received by a Regional Office from another part of the Agency on a matter that should properly be routed through the Division of Operations-Management, answers addressed to the individual initiating the communication should be sent through Operations-Management, along with copies of the original communication.

In submitting other than routine material to Operations-Management, such material should be identified.

Each of the Assistant General Counsels in Operations-Management is the focal point of contact between Washington and the Regional Offices assigned to the Assistant General Counsel. Serving as the General Counsel's representative, the Assistant General Counsel exercises general supervision over the Regional Office's casehandling, performance, personnel, and administration. The Assistant General Counsel participates in Washington agendas involving regional cases and assists in handling matters or problems involving the Assistant General Counsel's Regional Offices.

11881 Communication with the Board

All communications that are sent directly to the Board should be addressed to the Office of the Executive Secretary.

11882 Travel Beyond Regional Boundaries

Board agents are authorized to travel within their Region and to geographic areas in adjoining Regions in the performance of official duties.

11884 Communication With Other Agencies

Normally, a Regional Office's contacts with other agencies need not be cleared through the Division of Operations-Management. Thus, the Regional Office may directly contact field offices of other agencies in order to procure information (such as, in connection with an actual case) that is available through such offices. Likewise, Regional Offices, within the limitations of Secs. 102.117 and .118 of the Rules and Regulations and Secs. 11820–11828, should cooperate in furnishing to offices of other

Government agencies such information as may be requested by them. With respect to possible violations of other Federal statutes, see Sec. 10070.

However, in limited circumstances, Regional Offices must seek clearance from Operations-Management before referral to other agencies, such as when the potential violation concerns possible criminal conduct related to Board proceedings (e.g., fraudulent authorization cards, perjury, or obstruction of justice in connection with NLRB proceedings). See Sec. 10070. Similarly, the clearance requirement applies prior to referral when alleged unethical conduct of attorneys is involved. See Secs. 10058.6 and 11754.2(a).

For more specific guidance pertaining to Occupational Safety and Health Act matters, refer to GC Memos 75-29, 76-14, and 79-4. With respect to the Mine Safety and Health Act, see GC Memo 80-10. See also Sec. 10070.2.

11886 Congressional Inquiries

11886.1 Reply by Regional Directors

Regional Directors have the authority to respond directly to members of Congress concerning inquiries about a status of a case or questions concerning the handling of a case. Courtesy copies of such letters are forwarded to the Division of Operations-Management so that Headquarters might be fully apprised of all matters in which congressional interest has been expressed.

11886.2 Reply by the Division of Operations-Management

Congressional inquiries concerning the following matters are referred to the Division of Operations-Management for consideration and response:

Multiregional cases

Regional or general operations casehandling procedures

Cases pending in the Division of Advice

Cases of national importance or widespread interest

Proposed legislation with respect to changes in our Act

The establishment of new Regional, Subregional, or Resident Offices

The relocation of regional boundaries

A change in the status of an existing office

Any congressional inquiries of such a nature that a reply should be more appropriately made by the General Counsel

15004 REGIONAL AND SUBREGIONAL OFFICES

15004 Alphabetical List

Alphabetical list of States showing location in relation to Regions and Subregions. (Note that respective Region number follows Subregion number to facilitate locating areas serviced.)

Alabama 10, 15
Alaska 19
Arizona 28
Arkansas 16, 26
California 20, 21, 31, 32
Colorado 27
Connecticut 34
Delaware 4, 5
District of Columbia 5
Florida 12, 15
Georgia 10, 12
Hawaii S-37 (20)
Idaho 19, 27
Illinois 13, 14, SR-33 (14)
Indiana 9, 13, 25
Iowa 17, 18, SR-33 (14)
Kansas 17
Kentucky 9, 25, 26
Louisiana 15
Maine 1
Maryland 5
Massachusetts 1
Michigan 7, 30
Minnesota 18
Mississippi 15, 26
Missouri 14, 17, 26
Montana 19, 27
Nebraska 17, 27
Nevada 28, 32
New Hampshire 1
New Jersey 4, 22
New Mexico 28
New York 2, 3, 29
North Carolina 11
North Dakota 18
Ohio 8, 9
Oklahoma 17
Oregon SR-36 (19)

Pennsylvania 4, 5, 6
Rhode Island 1
South Carolina 11
South Dakota.....18
Tennessee.....10, 11, 26
Texas.....16, 28
Utah.....27
Vermont 1
Virginia 5, 11
Washington 19, SR-36 (19)
West Virginia.....5, 6, 9, 11
Wisconsin.....18, 30
Wyoming.....27
Puerto Rico.....24
U.S. Virgin Islands.....24

15010 Areas Served By Regional and Subregional Offices

(Listed in numerical order except that Subregions appear directly under respective Regions.)

Region 1. Boston, Massachusetts. Services *Maine, New Hampshire, Vermont, Massachusetts,* and *Rhode Island*.

Region 2. New York, New York. In *New York*, services the boroughs of Manhattan and the Bronx in New York City; and Orange, Putnam, Rockland, and Westchester Counties.

Region 3. Buffalo, New York. Services all *New York* State Counties except the New York City metropolitan area counties serviced by Regions 2 and 29.

Persons may also obtain service at the Resident Office located in Albany, New York.

Region 4. Philadelphia, Pennsylvania. In *Pennsylvania*, services Berks, Bucks, Carbon, Chester, Delaware, Dauphin, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Monroe, Montgomery, Northampton, Perry, Philadelphia, Pike, Schuylkill, Susquehanna, Wayne, and Wyoming Counties; in *New Jersey*, services Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Ocean, and Salem Counties; in *Delaware* services New Castle County.

Region 5. Baltimore, Maryland. Services *Maryland; Delaware,* with the exception of New Castle County; the *District of Columbia*; in *Pennsylvania*, services Adams, Cumberland, Franklin, and York Counties; in *Virginia*, services Accomack, Albemarle, Amelia, Arlington, Augusta, Brunswick, Buckingham, Caroline, Charles City, Chesterfield, Clarke, Culpeper, Cumberland, Dinwiddie, Essex, Fairfax, Fauquier, Fluvanna, Frederick, Gloucester, Goochland, Greene, Greensville, Hanover, Henrico, Highland, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenberg, Madison, Mathews, Middlesex, Nelson, New Kent, Northampton, Northumberland, Nottoway, Orange, Page, Powhatan, Prince Edward, Prince George, Prince William, Rappahannock, Richmond, Rockingham, Shenandoah, Southampton, Spotsylvania, Stafford, Surry, Sussex, Warren, Westmoreland, and York Counties, and the independently incorporated Virginia cities not part of, but located within or adjacent to, the territory defined by these Virginia counties; and in *West Virginia*, services Berkeley, Grant, Hampshire, Hardy, Jefferson, Mineral, Morgan, and Pendleton Counties.

Persons may also obtain service at the Resident Office located in Washington, D.C.

Region 6. Pittsburgh, Pennsylvania. In *Pennsylvania*, services Allegheny, Armstrong, Beaver, Bedford, Blair, Bradford, Butler, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Columbia, Crawford, Elk, Erie, Fayette, Forest, Fulton, Greene, Huntingdon, Indiana, Jefferson, Lawrence, Lycoming, McKean, Mercer, Mifflin, Montour, Northumberland, Potter, Snyder, Somerset, Sullivan, Tioga, Union, Venango, Warren, Washington, and Westmoreland Counties; and in *West Virginia*, services

Barbour, Braxton, Brooke, Calhoun, Doddridge, Gilmer, Hancock, Harrison, Lewis, Marion, Marshall, Monongalia, Ohio, Pleasants, Pocahontas, Preston, Randolph, Ritchie, Taylor, Tucker, Tyler, Upshur, Webster, Wetzel, Wirt, and Wood Counties.

Region 7. Detroit, Michigan. In *Michigan*, services Alcona, Allegan, Alpena, Antrim, Arenac, Barry, Bay, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Cheboygan, Chippewa, Clare, Clinton, Crawford, Eaton, Emmet, Genesee, Gladwin, Grand Traverse, Gratiot, Hillsdale, Huron, Ingham, Ionia, Iosco, Isabella, Jackson, Kalamazoo, Kalkaska, Kent, Lake, Lapeer, Leelanau, Lenawee, Livingston, Luce, Mackinac, Macomb, Manistee, Mason, Mecosta, Midland, Missaukee, Monroe, Montcalm, Montmorency, Muskegon, Newaygo, Oakland, Oceana, Ogemaw, Osceola, Oscoda, Otsego, Ottawa, Presque Isle, Roscommon, Saginaw, St. Clair, St. Joseph, Sanilac, Schoolcraft, Shiawassee, Tuscola, Van Buren, Washtenaw, Wayne, and Wexford Counties.

Persons may also obtain service at the Resident Office located in Grand Rapids, Michigan.

Region 8. Cleveland, Ohio. In *Ohio*, services Allen, Ashland, Ashtabula, Auglaize, Belmont, Carroll, Columbiana, Coshocton, Crawford, Cuyahoga, Defiance, Delaware, Erie, Fulton, Geauga, Guernsey, Hancock, Hardin, Harrison, Henry, Holmes, Huron, Jefferson, Knox, Lake, Licking, Logan, Lorain, Lucas, Mahoning, Marion, Medina, Monroe, Morgan, Morrow, Muskingum, Noble, Ottawa, Paulding, Portage, Putnam, Richland, Sandusky, Seneca, Stark, Summit, Trumbull, Tuscarawas, Union, Van Wert, Washington, Wayne, Williams, Wood, and Wyandot Counties.

Region 9. Cincinnati, Ohio. In *Ohio*, services Adams, Athens, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Fairfield, Fayette, Franklin, Gallia, Greene, Hamilton, Highland, Hocking, Jackson, Lawrence, Madison, Meigs, Mercer, Miami, Montgomery, Perry, Pickaway, Pike, Preble, Ross, Scioto, Shelby, Vinton, and Warren Counties; in *Indiana*, services Clark, Dearborn, and Floyd Counties; in *West Virginia*, services Boone, Cabell, Clay, Fayette, Jackson, Kanawha, Lincoln, Logan, McDowell, Mason, Mingo, Nicholas, Putnam, Raleigh, Roane, Wayne, and Wyoming Counties; and in *Kentucky*, services Anderson, Bath, Bell, Boone, Bourbon, Boyd, Boyle, Bracken, Breathitt, Bullitt, Campbell, Carroll, Carter, Casey, Clark, Clay, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Gallatin, Garrard, Grant, Greenup, Hardin, Harlan, Harrison, Henry, Jackson, Jefferson, Jessamine, Johnson, Kenton, Knott, Knox, Larue, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Marion, Martin, Mason, Meade, Menifee, Mercer, Montgomery, Morgan, Nelson, Nicholas, Oldham, Owen, Owsley, Pendleton, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Scott, Shelby, Spencer, Taylor, Trimble, Washington, Whitley, Wolfe, and Woodford Counties.

Region 10. Atlanta, Georgia. In *Georgia*, services Baker, Baldwin, Banks, Barrow, Bartow, Ben Hill, Berrien, Bibb, Bleckley, Bryan, Bulloch, Burke, Butts, Calhoun, Candler, Carroll, Catoosa, Chatham, Chattahoochee, Chattooga, Cherokee, Clarke, Clay, Clayton, Cobb, Colquitt, Columbia, Cook, Coweta, Crawford, Crisp, Dade, Dawson, De Kalb, Dodge, Dooly, Dougherty, Douglas, Early, Effingham, Elbert, Emanuel, Evans, Fannin, Fayette, Floyd, Forsyth, Franklin, Fulton, Gilmer, Glascock,

Gordon, Greene, Gwinnett, Habersham, Hall, Hancock, Haralson, Harris, Hart, Heard, Henry, Houston, Irwin, Jackson, Jasper, Jefferson, Jenkins, Johnson, Jones, Lamar, Laurens, Lee, Liberty, Lincoln, Long, Lumpkin, McDuffie, McIntosh, Macon, Madison, Marion, Meriwether, Miller, Mitchell, Monroe, Montgomery, Morgan, Murray, Muscogee, Newton, Oconee, Oglethorpe, Paulding, Peach, Pickens, Pike, Polk, Pulaski, Putnam, Quitman, Rabun, Randolph, Richmond, Rockdale, Schley, Screven, Spalding, Stephens, Stewart, Sumter, Talbot, Taliaferro, Tattnall, Taylor, Telfair, Terrell, Tift, Toombs, Towns, Treutlen, Troup, Turner, Twiggs, Union, Upson, Walker, Walton, Warren, Washington, Webster, Wheeler, White, Whitfield, Wilcox, Wilkes, Wilkinson, and Worth Counties; in *Tennessee*, services Anderson, Blount, Bradley, Campbell, Carter, Claiborne, Cocke, Grainger, Greene, Hamblen, Hamilton, Hancock, Hawkins, Jefferson, Johnson, Knox, Loudon, McMinn, Meigs, Monroe, Morgan, Polk, Rhea, Roane, Scott, Sevier, Sullivan, Unicoi, Union, and Washington Counties; and in *Alabama*, services Autauga, Bibb, Blount, Calhoun, Chambers, Cherokee, Chilton, Clay, Cleburne, Colbert, Coosa, Cullman, De Kalb, Elmore, Etowah, Fayette, Franklin, Greene, Hale, Jackson, Jefferson, Lamar, Lauderdale, Lawrence, Lee, Limestone, Madison, Marion, Marshall, Morgan, Perry, Pickens, Randolph, St. Clair, Shelby, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker, and Winston Counties. Persons may also obtain service at the Resident Office in Birmingham, Alabama.

Region 11. Winston-Salem, North Carolina. Services *North Carolina* and *South Carolina*; in *Tennessee*, services the city of Bristol in Sullivan County; in *Virginia*, services Alleghany, Amherst, Appomattox, Bath, Bedford, Bland, Botetourt, Buchanan, Campbell, Carroll, Charlotte, Craig, Dickenson, Floyd, Franklin, Giles, Grayson, Halifax, Henry, Lee, Mecklenburg, Montgomery, Patrick, Pittsylvania, Pulaski, Roanoke, Rockbridge, Russell, Scott, Smyth, Tazewell, Washington, Wise, and Wythe Counties, and the independently incorporated Virginia cities not part of, but located within or adjacent to, the territory by these Virginia counties; and *in West Virginia*, services Greenbriar, Mercer, Monroe, and Summers Counties.

Region 12. Tampa, Florida. In *Florida*, services Alachua, Baker, Bradford, Brevard, Broward, Charlotte, Citrus, Clay, Collier, Columbia, Dade, De Soto, Dixie, Duval, Flagler, Gadsden, Gilchrist, Glades, Hamilton, Hardee, Hendry, Hernando, Highlands, Hillsborough, Indian River, Jefferson, Lafayette, Lake, Lee, Leon, Levy, Madison, Manatee, Marion, Martin, Monroe, Nassau, Okeechobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Putnam, St. Johns, St. Lucie, Sarasota, Seminole, Sumter, Suwannee, Taylor, Union, Volusia, and Wakulla Counties; and in *Georgia*, services Appling, Atkinson, Bacon, Brantley, Brooks, Camden, Charlton, Clinch, Coffee, Decatur, Echols, Glynn, Grady, Jeff Davis, Lanier, Lowndes, Pierce, Seminole, Thomas, Ware, and Wayne Counties.

Persons may also obtain service at the Resident Offices in Miami and Jacksonville, Florida.

Region 13. Chicago, Illinois. Services Cook, Du Page, Kane, Lake, and Will Counties in *Illinois*, and Lake County in *Indiana*.

Region 14. St. Louis, Missouri. In *Illinois* services Adams, Alexander, Bond, Brown, Calhoun, Christian, Clark, Clay, Clinton, Coles, Crawford, Cumberland, Edgar,

Edwards, Effingham, Fayette, Franklin, Gallatin, Greene, Hamilton, Hardin, Jackson, Jasper, Jefferson, Jersey, Johnson, Lawrence, Macoupin, Madison, Marion, Massac, Monroe, Montgomery, Perry, Pike, Pope, Pulaski, Randolph, Richland, St. Clair, Saline, Scott, Shelby, Union, Wabash, Washington, Wayne, White, and Williamson Counties; and in *Missouri*, services Audrain, Bollinger, Butler, Callaway, Cape Girardeau, Carter, Clark, Crawford, Dent, Franklin, Gasconade, Iron, Jefferson, Knox, Lewis, Lincoln, Madison, Maries, Marion, Monroe, Montgomery, Oregon, Osage, Perry, Phelps, Pike, Ralls, Reynolds, Ripley, St. Charles, St. Francois, St. Louis, St. Genevieve, Scotland, Scott, Shannon, Shelby, Stoddard, Warren, Washington, and Wayne Counties, and the Independent City of St. Louis.

Subregion 33. Peoria, Illinois. In *Illinois*, services Boone, Bureau, Carroll, Cass, Champaign, De Kalb, De Witt, Douglas, Ford, Fulton, Grundy, Hancock, Henderson, Henry, Iroquois, Jo Daviess, Kankakee, Kendall, Knox, La Salle, Lee, Livingston, Logan, Macon, Marshall, Mason, McDonough, McHenry, McLean, Menard, Mercer, Morgan, Moultrie, Ogle, Peoria, Piatt, Putnam, Rock Island, Sangamon, Schuyler, Stark, Stephenson, Tazewell, Vermilion, Warren, Whiteside, Winnebago, and Woodford Counties; and in *Iowa*, services Clinton, Des Moines, Dubuque, Jackson, Lee, Louisa, Muscatine, and Scott Counties.

Region 15. New Orleans, Louisiana. Services *Louisiana*; in *Mississippi*, services Adams, Amite, Claiborne, Clarke, Copiah, Covington, Forrest, Franklin, George, Greene, Hancock, Harrison, Hinds, Issaquena, Jackson, Jasper, Jefferson, Jefferson Davis, Jones, Kemper, Lamar, Lauderdale, Lawrence, Leake, Lincoln, Madison, Marion, Neshoba, Newton, Pearl River, Perry, Pike, Rankin, Scott, Sharkey, Simpson, Smith, Stone, Walthall, Warren, Wayne, Wilkinson, and Yazoo Counties; in *Alabama*, services Baldwin, Barbour, Bullock, Butler, Choctaw, Clarke, Coffee, Conecuh, Covington, Crenshaw, Dale, Dallas, Escambia, Geneva, Henry, Houston, Lowndes, Macon, Marengo, Mobile, Monroe, Montgomery, Pike, Russell, Washington, and Wilcox Counties; and in *Florida*, services Bay, Calhoun, Escambia, Franklin, Gulf, Holmes, Jackson, Liberty, Okaloosa, Santa Rosa, Walton, and Washington Counties.

Region 16. Fort Worth, Texas. Services *Texas* with the exception of Culbertson, El Paso, and Hudspeth Counties; in *Arkansas*, services Miller County.

Persons may also obtain service at the Resident Offices located in Houston and San Antonio, Texas.

Region 17. Kansas City, Kansas. Services *Oklahoma* and *Kansas*; in *Missouri*, services Adair, Andrew, Atchison, Barry, Barton, Bates, Benton, Boone, Buchanan, Caldwell, Camden, Carroll, Cass, Cedar, Chariton, Christian, Clay, Clinton, Cole, Cooper, Dade, Dallas, Daviess, De Kalb, Douglas, Gentry, Greene, Grundy, Harrison, Henry, Hickory, Holt, Howard, Howell, Jackson, Jasper, Johnson, Laclede, Lafayette, Lawrence, Linn, Livingston, McDonald, Macon, Mercer, Miller, Moniteau, Morgan, Newton, Nodaway, Ozark, Pettis, Platte, Polk, Pulaski, Putnam, Randolph, Ray, St. Clair, Saline, Schuyler, Stone, Sullivan, Taney, Texas, Vernon, Webster, Worth, and Wright Counties; in *Iowa*, services Fremont, Mills, and Pottawattamie Counties; and in *Nebraska*, services Adams, Antelope, Arthur, Blaine, Boone, Boyd, Brown, Buffalo, Burt, Butler, Cass, Cedar, Chase, Cherry, Clay, Colfax, Cuming, Custer, Dakota,

Dawson, Dixon, Dodge, Douglas, Dundy, Fillmore, Franklin, Frontier, Furnas, Gage, Garfield, Gosper, Grant, Greeley, Hall, Hamilton, Harlan, Hayes, Hitchcock, Holt, Hooker, Howard, Jefferson, Johnson, Kearney, Keith, Keya Paha, Knox, Lancaster, Lincoln, Logan, Loup, McPherson, Madison, Merrick, Nance, Nemaha, Nuckolls, Otoe, Pawnee, Perkins, Phelps, Pierce, Platte, Polk, Red Willow, Richardson, Rock, Saline, Sarpy, Saunders, Seward, Sherman, Stanton, Thayer, Thomas, Thurston, Valley, Washington, Wayne, Webster, Wheeler, and York Counties.

Persons may also obtain service at the Resident Office in Tulsa, Oklahoma.

Region 18. Minneapolis, Minnesota. Services *North Dakota*, *South Dakota*, and *Minnesota*; in *Iowa*, services Adair, Adams, Allamakee, Appanoose, Audubon, Benton, Black Hawk, Boone, Bremer, Buchanan, Buena Vista, Butler, Calhoun, Carroll, Cass, Cedar, Cerro Gordo, Cherokee, Chickasaw, Clarke, Clay, Clayton, Crawford, Dallas, Davis, Decatur, Delaware, Dickinson, Emmet, Fayette, Floyd, Franklin, Greene, Grundy, Guthrie, Hamilton, Hancock, Hardin, Harrison, Henry, Howard, Humboldt, Ida, Iowa, Jasper, Jefferson, Johnson, Jones, Keokuk, Kossuth, Linn, Lucas, Lyon, Madison, Mahaska, Marion, Marshall, Mitchell, Monona, Monroe, Montgomery, O'Brien, Osceola, Page, Palo Alto, Plymouth, Pocahontas, Polk, Poweshiek, Ringgold, Sac, Shelby, Sioux, Story, Tama, Taylor, Union, Van Buren, Wapello, Warren, Washington, Wayne, Webster, Winnebago, Winneshiek, Woodbury, Worth, and Wright Counties; and in *Wisconsin*, services Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Douglas, Dunn, Eau Claire, Iron, Jackson, Pepin, Pierce, Polk, Price, Rusk, St. Croix, Sawyer, Taylor, Trempealeau, and Washburn Counties.

Persons may also obtain service at the Resident Office located in Des Moines, Iowa.

Region 19. Seattle, Washington. Services *Alaska* and all counties in *Washington* except Clark; in *Idaho*, services Adams, Benewah, Bonner, Boundary, Clark, Clearwater, Custer, Fremont, Idaho, Kootenai, Latah, Lemhi, Lewis, Nez Perce, Shoshone, and Valley Counties; and in *Montana*, services Beaverhead, Broadwater, Cascade, Deer Lodge, Flathead, Gallatin, Glacier, Granite, Jefferson, Lake, Lewis and Clark, Liberty, Lincoln, Madison, Meagher, Mineral, Missoula, Pondera, Powell, Ravalli, Sanders, Silver Bow, Teton, and Toole Counties.

Subregion 36. Portland, Oregon. Services *Oregon* and Clark County in *Washington*.

Persons may also obtain service at the Resident Office located in Anchorage, Alaska.

Region 20. San Francisco, California. In *California*, services Butte, Colusa, Del Norte, Glenn, Humboldt, Lake, Lassen, Marin, Mendocino, Modoc, Napa, Nevada, Placer, Plumas, Sacramento, San Francisco, San Mateo, Shasta, Sierra, Siskiyou, Solano, Sonoma, Sutter, Tehama, Trinity, Yolo, and Yuba Counties.

Subregion 37. Honolulu, Hawaii. Services *Hawaii,* American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands.

Region 21. Los Angeles, California. In *California*, services Imperial, Orange, Riverside, and San Diego Counties and that portion of Los Angeles County lying east of Harbor Freeway and South Gaffey Street, south and east of Pasadena Freeway and Arroyo Parkway, and south of Foothill Freeway and Baseline Road (State Route 30).

Persons may also obtain service at the Resident Office located in San Diego, California.

Region 22. Newark, New Jersey. In *New Jersey*, services Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Passaic, Somerset, Sussex, Union and Warren Counties.

Region 24. Hato Rey, Puerto Rico. Services *Puerto Rico* and the *U.S. Virgin Islands*.

Region 25. Indianapolis, Indiana. Services *Indiana*, with the exception of Clark, Dearborn, Floyd, and Lake Counties; and in *Kentucky*, services Daviess and Henderson Counties.

Region 26. Memphis, Tennessee. Services all of *Arkansas* except for Miller County; in *Tennessee*, services Bedford, Benton, Bledsoe, Cannon, Carroll, Cheatham Chester, Clay, Coffee, Crockett, Cumberland, Davidson, Decatur, De Kalb, Dickson, Dyer, Fayette, Fentress, Franklin, Gibson, Giles, Grundy, Hardeman, Hardin, Haywood, Henderson, Henry, Hickman, Houston, Humphreys, Jackson, Lake, Lauderdale, Lawrence, Lewis, Lincoln, Marion, McNairy, Macon, Madison, Marshall, Maury, Montgomery, Moore, Obion, Overton, Perry, Pickett, Putnam, Robertson, Rutherford, Sequatchie, Shelby, Smith, Stewart, Sumner, Tipton, Trousdale, Van Buren, Warren, Wayne, Weakley, White, Williamson, and Wilson Counties; in *Mississippi*, services Alcorn, Attala, Benton, Bolivar, Calhoun, Carroll, Chickasaw, Choctaw, Clay, Coahoma, De Soto, Grenada, Holmes, Humphreys, Itawamba, Lafayette, Lee, Leflore, Lowndes, Marshall, Monroe, Montgomery, Noxubee, Oktibbeha, Panola, Pontotoc, Prentiss, Quitman, Sunflower, Tallahatchie, Tate, Tippah, Tishomingo, Tunica, Union, Washington, Webster, Winston, and Yalobusha Counties; and in *Kentucky*, services Adair, Allen, Ballard, Barren, Breckinridge, Butler, Caldwell, Calloway, Carlisle, Christian, Clinton, Crittenden, Cumberland, Edmonson, Fulton, Graves, Grayson, Green, Hancock, Hart, Hickman, Hopkins, Livingston, Logan, Lyon, Marshall, McCracken, McLean, Metcalfe, Monroe, Muhlenberg, Ohio, Russell, Simpson, Todd, Trigg, Union, Warren, Wayne, and Webster Counties; in *Missouri* services Dunklin, Mississippi, New Madrid, and Pemiscot Counties.

Persons may also obtain service at the Resident Offices in Little Rock, Arkansas and in Nashville, Tennessee.

Region 27. Denver, Colorado. Services *Wyoming*, *Colorado*, and *Utah*; in *Nebraska*, services Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux Counties; in *Idaho*, services Ada, Bannock, Bear Lake, Bingham, Blaine, Boise, Bonneville, Butte, Camas, Canyon, Caribou, Cassia, Elmore, Franklin, Gem, Gooding, Jefferson, Jerome, Lincoln, Madison, Minidoka, Oneida, Owyhee, Payette, Power, Teton, Twin Falls, and Washington Counties; and in *Montana*, services Big Horn, Blaine, Carbon, Carter, Chouteau, Custer, Daniels, Dawson,

Fallon, Fergus, Garfield, Golden Valley, Hill, Judith Basin, McCone, Musselshell, Park, Petroleum, Phillips, Powder River, Prairie, Richland, Roosevelt, Rosebud, Sheridan, Stillwater, Sweet Grass, Treasure, Valley, Wheatland, Wilbaux, and Yellowstone Counties.

Region 28. Phoenix, Arizona. Services *Arizona* and *New Mexico*; in *Nevada*, services Clark, Lincoln, and Nye Counties; in *Texas* services Culbertson, El Paso, and Hudspeth Counties.

Persons may also obtain service at the Resident Offices in Albuquerque, New Mexico and in Las Vegas, Nevada.

Region 29. Brooklyn, New York. In *New York*, services the boroughs of Brooklyn, Queens, and Staten Island in New York City; and Kings, Nassau, Queens, Richmond, and Suffolk Counties.

Region 30. Milwaukee, Wisconsin. In *Wisconsin*, services Adams, Brown, Calumet, Columbia, Crawford, Dane, Dodge, Door, Florence, Fond du Lac, Forest, Grant, Green, Green Lake, Iowa, Jefferson, Juneau, Kenosha, Kewaunee, La Crosse, Lafayette, Langlade, Lincoln, Manitowoc, Marathon, Marinette, Marquette, Menominee, Milwaukee, Monroe, Oconto, Oneida, Outagamie, Ozaukee, Portage, Racine, Richland, Rock, Sauk, Shawano, Sheboygan, Vernon, Vilas, Walworth, Washington, Waukesha, Waupaca, Waushara, Winnebago, and Wood Counties; and in *Michigan*, services Alger, Baraga, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Marquette, Menominee, and Ontonagon Counties.

Region 31. Los Angeles, California. In *California*, services Inyo, Kern, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura Counties and that portion of Los Angeles County lying west of Harbor Freeway and South Gaffey Street, north and west of Pasadena Freeway and Arroyo Parkway, and north of Foothill Freeway and Baseline Road (State Route 30).

Region 32. Oakland, California. In *California*, services Alameda, Alpine, Amador, Calaveras, Contra Costa, El Dorado, Fresno, Kings, Madera, Mariposa, Merced, Mono, Monterey, San Benito, San Joaquin, Santa Clara, Santa Cruz, Stanislaus, Tulare, and Tuolumne Counties; and in *Nevada*, services Churchill, Douglas, Elko, Esmeralda, Eureka, Humboldt, Lander, Lyon, Mineral, Ormsby, Pershing, Storey, Washoe, and White Pine Counties.

Region 34. Hartford, Connecticut. Services *Connecticut*.

INDEX

A

Absentee Ballots (Not Permitted) 11302.4
Abeyance Cases, Resumption of Processing……11734
AC (Amendment of Certification) Petition
Procedures.....11490-11498
Additional Distribution/Notice of
Election ..... 11314.7(b)
Additional Showing/Enlarged Unit..... 11031.2
Check of Additional Showing 11031.3
Adjournments.....Also See Postponements
Hearing..... 11208
Administrative Investigation
Postelection..... 11364, 11394
Or Processing by Hearing 11361.1, 11391.1
Preelection 11010-11016
Showing of Interest 11021
Administrative Law Judge 11424.1
Admissibility Problems, Special, at Hearing
(Jurisdiction; Unfair Labor Practices; Alleged
Violations of Other Statutes by Labor
Organizations; Election Arrangements; Limitations
on Intervenors' Participation in
the Hearing) 11228
Advice to Regional Office 11754
Affidavit
Form at Election..... 11328.1
Postelection Investigation 11364.1, 11394.1
Witness/Production at Postelection
Hearing..... 11426.1(b), 11429.2
AFL-CIO No-Raiding
Procedure 11017-11018
Age of Showing of Interest 11027.4
Agreement..... See Election Agreement
Amendment
Certification 11490-11498
Petition 11014, 11198.2, 11204
Answers to Motions 11264
Appeals
Also see Exceptions *and* Request for Review
Hearing Officer Rulings..... 11188.2, 11203
Appendix to Subpoena .....11313.1(a)
Approval of Election Agreement 11094
Armour-Globe Election..... 11091.2
Arrangements/Election
Conduct 11301
Hearing/Evidence..... 11228, 11301.4
Article
XX—Preexisting Relationships 11018.1
XXI—Initial Organizing Activities 11018.2
Assignment of Case 11004
Assistance
Drafting Language of RD and UD Showings
of Interest..... 11001.7
Preparation of Petition 11001.6
Remedying Defects..... 11001.8
Authentication; Identification/Voir Dire 11224.1
Authorization to Regional Office 11754
Authorizations in Support of
Petition..... See Showing of Interest

B

Badges/Election 11318.1
Bag or Box/Ballot..... 11304.4, 11322.4
Ballot .....Also See Impounded Ballots
Election..... 11306
Interpretation 11340.7
Spoiled..... 11322.3
Void 11340.4, 11340.7
Withdrawal From..... 11098
Bargaining Unit ..... See Unit
Bifurcated Proceedings
Challenges 11367
Objections..... 11397
Blocking Charge
Policy..... See Concurrent R and C Cases
Board Agent
Challenges by .....11338.2(b)
Testimony by 11429.1
Booths, Voting..... 11304.3
Briefs
Postelection..... 11428.2, 11430
Preelection 11190.1, 11244

C

Canceled Elections .....11302.1(b), 11314.8
Carlson Waiver ..... 11731.1(c)(1)
Case Files and Documentary
Evidence ..... ……..11850-11860
Certifications 11470-11478
Amendments.....11490-11498
FLSA 11540
Revocation.....11122-11124
UD 11516
Challenge
Board Agent Interpretation/Ballot .....11340.7(a)
Showing of
Interest 11028-11029, 11730.3, 11733.2
Challenged Ballot Procedure/Election..... 11338
Clearing Challenges at Count 11340.3
Determinative (Sufficient) 11340.8
Rerun Election 11456.1
Runoff Election..... 11350.5

Challenged Ballots
Postelection Processing.....11360-11367
Count/Overruled Challenges.....11378
Prior to Resolution 11361.4
Securing/Storage..... 11340.8(b), 11340.9, 11344
Unfair Labor Practice Charge Also
Involved 11407, 11420.1
Charge..... See Unfair Labor Practice
Check of Preelection Eligibility List.....11312.4
Check of Showing of Interest.....11030-11035
Intervenor Showing.....11194.3
Request for, by Employer .....11009.2(a), 11020
Checking Table at Election..... 11322.1, 11328.2
Checklist
Election End.....11342
Hearing
Conduct.....11189
End.....11248
Posthearing.....11252.2
Clearance to Regional Office.....11754
Cleared Challenges at Count.....11340.3
Close of Election.....11342-11344
Close of Polls.....11324
Multiple Polling Places.....11334.3
Close of Hearing 11240-11248
Closing Statement/Hearing 11246
Color of Ballot 11306.5
Commerce.....11086.2, 11228, 11702.1-11705
Common Issues in R and C Cases 11731.3
Communicating With Parties and Their
Representatives 11006
Complete and Concise Record 11188.1
Complete and Correct Name of Labor Organi-
zation 11086.1, 11198, 11272, 11306.3
Complex and Large Elections 11312.4
Concurrent R and C Cases ..... 11730, 11733.2(b)
AC or UC Petition.....11490.3
UD Petition 11506.3
Conduct of Hearing
Postelection.....11428-11430
Preelection 11190-11248
Conference
Preelection 11318
Prehearing .....11008, 11009.2(g), 11012, 11180
Consent Election..... See Election Agreement
Consolidated Representation and Unfair
Labor Practice Cases
..... 11407, 11420.1, 11452.4, 11720, 11716
Contract as Bar (UD Petition).....11506.7
Cooperation.....11012.1
Copies
Exhibits 11224.3
Statements of Witnesses 11429.3
Correct and Complete Name of Labor
Organization 11086.1, 11198, 11272, 11306.3
Correcting
Certifications 11478.1
Transcript 11258
Counsel..... 11008.6, 11207.1
Count of Ballots 11340
Mail Ballots .....11336.5(b)
Overruled Challenged Ballots 11378
Pooling Votes 11091
Cross-Petitioner Interest 11023.2
Custody of Exhibits 11224.5

D

Date
Election
Eligibility.....11086.3, 11189(i), 11312.1
Extension of Time to Hold 11284
Initial..... 11302.1
Rerun 11452.1
Runoff..... 11350.3
Hearing
Postelection 11365.3, 11395.4
Preelection 11082.3
Showing of Interest..... 11027.3
Date-Stamping of Showing of Interest 11024.3
Deadline for Return of Mail Ballots .....11336.2(d)
Decision
Postelection (Supplemental
Decision)..... 11364, 11366.2, 11394,
..... 11396.2, 11436-11438
Preelection 11273-11284
Degree of Participation..... 11023
Designation
Observers..... 11310.2
Representative as Agent for Service of
Documents..... 11008.7
Determinative (Sufficient) Challenged
Ballots..... 11340.8
Disclaimer..... 11088, 11120-11124
Dismissal Of Petition.. 11100-11104, 11280.1, 11733.2
Challenged Showing of
Interest 11028.2, 11029.3
Unfair Labor
Practice 11730.3, 11730.7, 11733.2
Disposition
Eligibility List..... 11312.11
Payroll List 11035
Showing of Interest..... 11034
Distribution
Literature at Election 11326.5
Notice of Election..... 11314.7
Additional Distribution.....11314.7(b)
Observer Badges at Election..... 11318.1
Tally of Ballots 11340.11
Docket/Case Filing 11007

Documents, Filing and Service of 11840-11846
Duplicate Kit/Mail Ballot Election 11336.4

E

8(b)(7)(C)..... 11003.1, 11312.1(k)
Election Agreement 11084-11098
Approval Letter .....11312.1(a)
Efforts to Obtain ..... 11008, 11012, 11082.1, ... 11084.2, 11180
Election Date..... See Date, Election
Elections 11300-11350
Arrangements/Hearing 11228, 11301.4
Professional Employees 11091.1
Residual 11091.2
Scheduled When Charge Filed..... 11731.4
Severance 11091.3
UD..... 11512
Electioneering 11326
Electronic Filing of Documents 11840-11846
Eligibility
Date/Election ..... 11086.3, 11189(i), 11312.1
Runoff..... 11350.5
List 11312
Separate.....11312.1(g), 11334.1, 11335.3
Strikers 11008.4, 11025.1, 11314.4
Employer
Initial Communications.....11008-11009
Premises for Election 11302.2
Time For Voting 11330
Enjoin
Election 11300.1
Processing of Petition 11000.1
Enlarged Unit in Direction of Election
Showing of Interest 11031
Contingent Upon Showing..... 11312.1(d)
Showing Sufficient.....11312.1(c)
Envelopes/Mail Ballot
Dispatch by Regional Office..... 11336.2(b)
Late .....11336.5(c)
Receipt by Regional Office.....11336.4(a)
Unsigned ..... 11336.4(b), 11336.5(c)
Equipment for Election 11304
Evidence
Duty to Timely Furnish/Objections 11392.6
Preelection
Hearing.....11216-11228
Investigation.....11010-11012
Postelection
Hearing.....11428-11429
Investigation..... 11361.1, 11362.2, 11363, 11364, ... 11391.1, 11392.6, 11392.10, 11392.11, ... 11393, 11394
Excelsior List 11312
Exceptions, Filed
Hearing Officer Report 11434
Regional Director Report on Challenges/Objections 11364.5, 11394.5
Treated as Motion for Reconsideration 11364.8, 11394.8
Exceptions to Blocking Charge Policy 11731
Exclusion in Decision/Provision of Ballot at Election 11338.7
Execution of Tally of Ballots..... 11340.10
Exhibits..... 11224
Expedited Election.....See 8(b)(7)(C)
Extension of Time
Briefs/File 11244.2
Election/Hold..... 11284
Eligibility List/Submit 11312.5
Objections
Evidence/Furnish 11392.6
Submit.....11392.2(a)
Showing/Provide 11003.1, 11024, 11026

F

Fair Labor Standards Act (FLSA)/Certification of Representative 11540
File: Introduction of Material in Regional File at Hearing 11216.1
Filing
Briefs .....See Briefs
Exceptions .....See Exceptions
Petition.....11000-11007
Requirements/Objections..... 11392.8
FOIA Disclosure of Documents 11822
Foreign Language
At Election..... 11315
Witnesses..... 11187.3, 11221, 11426.1(c), 11429.4
Forgery/Showing of Interest 11029
Formal Count Method/Election..... 11340.4, 11340.6
Formal Papers.....11192, 11426.1(a)
Formality of Hearing 11182
Fraud/Showing of Interest 11028-11029
Free Choice/Blocking Charge Policy..... 11730.2, 11731.2
Freedom of Information Act (FOIA) 11034
Full Intervenor 11023.3
Full Consent Election .....See Election Agreement

G

Good Cause/Prejudice Period..... 11118, 11124.3

H

Hearing
Postelection.....11420-11430
Processing By 11365-11366, 11395-11396
Administrative Investigation/Alternative 11361.1, 11391.1

Preelection 11180-11248
Scheduled When Charge Filed.....11731.4
Hearing Officer
Duties/Responsibilities
Postelection.....11424.3, 11428
Preelection 11185, 11187-11188
Report
Postelection.....11432
Preelection 11250-11252
Hours/Election 11302.2, 11330

I

Identification; Authentication/Voir Dire 11224.1
Impounded Ballots.....
Objections Period.....11392.2(a)(4)
Pending Board Ruling on Request for
Review .....11302.1(a), 11338.8
Securing/Storage 11340.9, 11344
Unfair Labor Practice Charge 11731.5, 11732
Inclusion In Decision/Challenged Ballot
at Election 11338.7
Informal Count Method/
Election 11340.4, 11340.5
Informing Parties of Determination
Blocking Charge 11730.7
Challenges/Objections
Investigation.....11364.2, 11394.2
Manual or Mail Ballot Election 11301.5
Injunction
Election 11300.1
Processing of Petition 11000.1
Insignia
Employees.....11326.3
Observers 11326.1
Instructions on Ballot.....11306.6
Interest ..... See Showing of Interest *and* Disclaimer
Interested Parties.....11008.1
Interpretation of Ballots 11340.7
Postelection Objections to Interpretation
or Validity of Ballots .....11340.8(b)(1)
Interregional Assistance Program……..11714.2
Intervention..... 11023, 11024.2, 11026.2
At Hearing.....11194
Limited Intervenor Participation.....11228
Levels.....11194.5
Prejudice Period.....11118.2
Introduction.....Also see Identification
Formal Papers at Hearing
Postelection.....11428.3
Preelection 11192
Material in Regional File at Hearing.....11216.1
Investigation, Administrative
Postelection.....11364, 11394
Or Processing by Hearing 11361.1, 11391.1
Preelection 11010-11016
Showing of Interest..... 11021
Investigative Subpoenas……...11770

J

Joint/Single Parties 11198.3
Jurisdiction 11228, 11700-11711
Jurisdiction, Railway Labor Act 11711

K

Kit/Mail Ballot Election .....11336.2(c)
Duplicate Kit..... 11336.4

L

Labor Organization/Complete and Correct
Name..... 11086.1, 11198, 11272, 11306.3
Large and Complex Elections 11312.4
Last-Offer Elections 11520
Late-Arriving Employees at Polls..... 11324.1
Late Envelopes/Mail Ballot Election.....11336.5(c)
Late Filed
Eligibility List..... 11312.5
Evidence of Interest 11026
Objections..... 11392.3
Evidence 11392.6
Unfair Labor Practice Charge/
Election..... 11731.5
Letter/Initial
All Parties 11008
Employer 11009
Levels of Intervention..... 11194.5
List
Eligibility 11312
Payroll..... 11025
Separate Voting .....11312.1(g), 11334.1, 11335.3
Loss of Majority Support by Incumbent Union,
Tainted.....11730.3(c), 11733.2(a)(3)

M

Mail Ballot Election..... 11336
Challenged Ballots..... 11338.9
Determination to Conduct..... 11301.2
Eligibility List.....11312.1(h)
Majority Support, Tainted Loss of, by
Incumbent Union .....11730.3(c), 11733.2(a)(3)
Manual Election.....11302-11335
Challenged Ballots..... 11338
Determination to Conduct..... 11301.2
Mixed Manual-Mail Election 11335
Material in Regional File, Introduction
at Hearing 11216.1
Merit of Unfair Labor Practice
Charge.....11732-11733

Misconduct
Hearing.....11182.1
Showing of Interest.....11028.1
Mixed Manual-Mail
Election.....See Manual Election
Motions
During Hearing.....11225
Intervention.....11194
Posthearing.....11262
Prehearing.....11141
Reconsideration.....11282
Request for Review or Exceptions Treated as Motion for Reconsideration..... 11100.3, 11274, 11364.8, 11394.8
Motions (or request for) Petitions to revoke
Subpoenas.....11782, 11826
Quash subpoenas, To.....11826
Multiple Polling Places.....11302.2(a), 11334
Separate Voting Lists..... 11312.1(g)

N

Name/Labor Organization..... 11198.1, 11272, 11306.3
Newspaper Publicity/Election..... 11314.7(b)
Nonspecific Objections..... 11392.5, 11395.3
No-Raiding Procedures Among Labor Organizations.....11017-11019
Notation of Potential Challenges.....11338.4
Notice of Appearance; Counsel.....11008.6
Notice of Election.....11314-11315
Mail Ballot Election.....11336.2(c), 11336.3
Rerun Election.....11452.3
Notice of Employee Voting Rights.....11008.5
Notice of Hearing
Postelection..... 11365-11366, 11395-11396
Preelection.....11082

O

Objections.....11390-11397
Unfair Labor Practice Charge Involved.....11407, 11420.1
Objective Considerations in RM Petition.....11042
Observers.....11310
Challenges.....11338.2(a), 11338.4
Electioneering Prohibited.....11326.2
Insignia.....11326.1
Instructions.....11318.2
Mail Ballot Election.....11336.5(a)
Offer of Proof.....11226
Off-Schedule Voters.....11330.5
Opening of Challenged Ballots.....11364.9
Opening of Polls.....11320
Employees Who Arrive Before Opening of Polls.....11318.5
Opening Statement at Hearing
Postelection..... 11428.2
Preelection..... 11192
Oral Argument..... 11242
Order of Presentation
Postelection Hearing..... 11428.4
Preelection Hearing..... 11218
Other Statutes/Violations by Labor Organizations..... 11228
Outstanding Exhibits/Provision for Receipt..... 11224.6

P

Partial Resolution
Challenges..... 11361.3, 11361.4
Objections..... 11391.3
Participating Intervenor..... 11023.4
Parties
Initial Communications.....11008-11009
Joint/Single..... 11198.3
Party
In Interest..... 11733.2
Single/Joint..... 11198.3
Payroll List
Preparation of..... 11025.1
Request for.....11009.1(c)
Submission
At Hearing..... 11183
Timely.....11009.2(a), 11020, 11030.2
Payroll Period for Election.....11086.3, 11189(i), 11312.1
Permission, Special, to Appeal From Hearing Officer Ruling..... 11203
Person/Petitioner..... 11022.5
Petition to Revoke Subpoena..... 11212, 11772
Place
Election..... 11302.2
Hearing..... 11082.4
On Ballot..... 11086.3
Polling..... See Polling Place
Polling Place..... 11302.2, 11316-11335
Pooling Votes..... 11091
Postelection Challenges and Objections.....11360-11438
Posthearing Matters
Postelection.....11432-11438
Preelection.....11250-11284
Posting of Notice of Election..... 11314.7
Mail Ballot Election.....11336.2(c), 11336.3
Postponed Election.....11302.1(b), 11314.8
Postponement Requests/Hearing
Postelection..... 11365.3, 11395.3, 11427
Preelection..... 11143, 11207, 11246.2
Prefiling Assistance..... 11001
Prehearing Matters
Preelection.....11140-11148

Preparation of Stipulations 11187.2
Postelection 11420-11427
Prejudice Period 11118
Premises, Employer, for Election 11302.2
Presentation of Evidence ..... See Evidence
Preservation of Ballots ..... See Storage
Production of Statements of
Witnesses ..... 11426.1(b), 11429.2
Professional Employees/Election 11091.1
Progress of Voters 11322

Q

Quash Subpoena, Petition to 11212
Question Concerning Representation
Conditioned/Precluded; Unfair Labor
Practice..... 11730.3, 11730.3(b), 11733.2(a)(2)
Necessary for Processing R Petition 11011
Precludes Processing of UD Petition 11506.2
Questioned Interpretation Ballots ..... 11340.7(a)
Postelection Objec-
tions..... 11340.8(b)(1), 11392.1(a)
Securing/Storage 11340.9, 11344
Question on Ballot 11306.2

R

Raiding ..... See No-Raiding
Refusal to Furnish
Eligibility List 11312.6
List of Voter Names 11312.7
Reinstatement of Petition 11733.2
Rejected Exhibits 11224.4
Related Units/Employee Representative 11023.5
Releasing Voters 11330.4
Remand/Hearing
Postelection ..... 11424.4(c)
Preelection 11280.2
Report
Postelection
After Investigation 11364, 11394
Hearing Officer 11432-11434
Preelection
Hearing Officer 11250-11252
Showing of Interest 11032
Reporting Service 11190.1, 11428.1, 11870-11870.8
Representative of Employees/Related
Units 11023.5
Representative of Regional Director/
Functions and Duties 11424.4
Request for Review
Pending Before Board/Voters Challenged or
Ballots Impounded 11338.8
Regional Director
Administrative Dismissal 11104
Decision 11274
Prehearing Determinations 11148
Supplemental Decision 11364.5, 11364.7,
.....11366.2, 11394.5, 11394.7, 11396.2
Treated as Motion for Reconsidera-
tion.....11100.3, 11274, 11364.8, 11394.8
Request to Proceed 11730.2, 11731.1
Rescission .....11731.1(b)
Rerun Election 11450-11456
Rescheduled Election 11314.8, 11351
Rescission/Request to Proceed .....11731.1(b)
Residual Election 11091.2
Resumption of Processing of Petition Upon
Disposition of Unfair Labor Practice 11734
Review ..... See Request for Review
Revised Tally of Ballots 11378.1
Revocation
Certification 11122-11124, 11478.3
Election Agreement Approval 11095
Subpoenas, Petition to Revoke 11212
Role of Observers 11310.3
Rulings by Hearing Officer 11188.2
Attempts to Appeal 11203
Runoff Election 11350

S

Schedule, Voting/Employer Time 11330
Sealing of Ballot Box 11318.4
Securing Determinative Challenged, Questioned
Interpretation and Impounded Ballots at
Conclusion of Election 11340.9
Selection
Board Agent/Election 11308
Date/Election 11302.1
Hearing Officer
Postelection 11424.2
Preelection 11185
Hours/Election 11302.3
Place/Election 11302.2
Self-Determination Election 11091
Eligibility List ..... 11312.1(f)
Notice of Election 11314.5
Separate Check of Showing/Each Unit 11030.5
Separate Eligibility Lists/
Election ..... 11312.1(g), 11334.1, 11335.3
Severance Election 11091.3
Service of Subpoenas……11778
Service and Filing of Papers……..11840-11840.4
Severing Consolidated C and R Cases.....11718, 11720
Shortened Name/Labor Organiza-
tion.....11086.1, 11198.1, 11272, 11306.3
Showing of Interest 11020-11042
Hearing/Raised 11184
Language/RD and UD Petitions 11001.7
Prejudice Period 11118.3

Unfair Labor Practice
Impact ..... 11730.3(a), 11730.3(c), 11733.2(a)(1), ... 1733.2(a)(3)
Single/Joint Parties 11198.3
Size and Arrangement of Polling Place 11316
Sonotone Election ..... See Self-Determination
Sound Truck/Electioneering 11326.5
Special Admissibility Problems at Hearing (Jurisdiction; Unfair Labor Practices; Alleged Violations of Other Statutes by Labor Organizations; Election Arrangements; Limitations on Intervenors' Participation in the Hearing) 11228
Special Permission to Appeal
Hearing Officer Ruling 11203
Postelection Notice of Hearing..... 11366.1, 11396.1
Specificity/Objections..... 11392.5, 11395.3
Split-Session Election 11332
Spoiled Ballots..... 11322.3
Spot Check/Showing of Interest 11030.4
Statements of Witnesses at Postelection Hearing; Copies and Production .....11426.1(b), 11429.2, 11429.3
Stipulated Election ..... See Election Agreement
Stipulations
Hearing..... 11222
Prehearing Preparation..... 11187.2
Storage
Determinative Challenged, Questioned Interpretation and Impounded Ballots 11344
Non-Determinative Challenged and Voided Ballots ..... 11340.8(b)
Strikes/Striking Employees..... 11008.4, 11023.1, 11025.1, 11301.2, ... 11302.1, 11314.4
Subpoenas 11142, 11210-11214, 11770-11780
Investigative Subpoenas ……..11770
To Compel Production of Election Eligibility List 11312.9, 11313
Enforcement Problems..... 11312.10
To Permit Board Agent Testimony 11824-11826.4
Sufficient Challenged Ballots 11340.8
Suit to Enjoin
Election 11300.1
Processing of Petition 11000.1
Supervisory Taint/Showing of Interest .....11028, 11730.3(a), 11733.2(a)(1)
Supplemental Decision ..... See Decision
Support; Tainted Loss of Majority, by Incumbent Union.....11730.3(c), 11733.2(a)(3)

T

Taint
Of Incumbent Union's Loss of Majority Support .....11730.3(c), 11733.2(a)(3)
Supervisory/Showing of Interest .. 11028, 11042.311730.3(a), 11733.2(a)(1)
Tally of Ballots 11340.8
Distribution..... 11340.9
Execution 11340.10
Revised 11378.1
Time
Election..... 11086.3
Employer/for Voting..... 11330
Timely Filing
Eligibility List 11312.5
Evidence/Objections 11392.6
Objections..... 11392.2
Payroll List ..... 11009.2(a), 11020, 11030.2
Transcript
Corrections 11258
Ordering by Parties..... 11190.1, 11428.2
Translations/Election 11315
Traveling Election 11334.2

U

UC (Unit Clarification) Petition 11490-11498
UD (Union Deauthorization) Petition..... 11500-11516
Unalleged Objectionable Conduct..... 11392.11, 11395.3
Unfair Labor
Practice .....Also See Blocking Charge Policy
Evidence, at Hearing..... 11228
With Postelection Matters 11361.4, 11407, 11420.1
Union Deauthorization Petition 11500-11516
Unit, Bargaining
Check/Each..... 11030
Clarification 11490-11498
Election Agreement 11084.3, 11086.3
Enlarged..... 11031
UD 11506.8
Unit Clarification Petition..... 11490-11498
Unsigned Ballot Envelopes/Mail Ballot Election..... 11336.4(b), 11336.5(c)
Unspecific (Nonspecific) Objections..... 11392.5, 11395.3
Untimely ..... See Timely
Objective Considerations in RM Petition 11042

V

Valid
Ballots ..... 11340.8(b)(1)
Showing of Interest 11027.1
Violations of Other Statutes by Labor
Organizations 11228
Void Ballots 11340.4, 11340.7
Postelection Objec-
tions..... 11340.8(b)(1), 11392.1(a)
Securing/Storage ..... 11340.8(b)
Voir Dire/Authentication; Identification..... 11224.1
Voluntary Resolution
Challenges..... 11361.2
Objections 11391.2
Voters
By Affidavit 11328
Challenged Pending Board Ruling on
Request for Review..... 11338.8
Eligibility List 11312
Separate.....11312.1(g), 11334.1, 11335.3
Employer Time 11330
Insignia..... 11326.3
Kit/Mail Ballot.....11336.2(c)
Release Schedule/Employer Time 11330
Voting Booth 11304.3, 11322.2
Voting Lists ..... See Eligibility List
Voting Procedures 11316-11335

W

Waiver (*Carlson*)..... 11731.1(c)(1)
Withdrawal of Petition..... 11110-11118
After Election Invalidated..... 11438
At Hearing 11209
Challenges Pending 11116.2
Objections Pending..... 11116.3
Runoff Election..... 11350.4
Withdrawal
From Ballot..... 11098
From Election Agreement..... 11097
Withdrawn Charge/Attempted
Reinstatement ..... 11731.1(c)(2)
Witnesses
Foreign Lan-
guage..... 11187.3, 11221, 11426.1(c), 11429.4
Posthearing .....11426.1(b), 11429
Prehearing..... 11220

TABLE OF CASES

A

Air Control Products of St. Petersburg, Inc.; NLRB v., 335 F.2d 245 (5th Cir. 1964).....11394.3
Alabaster Lime Co., 190 NLRB 396 (1971).....11338.1
Amax Aluminum Extrusion Products, 172 NLRB 1401 (1968).....11308
American Safety Equipment Corp., 234 NLRB 501 (1978).....11392.11
Anchor-Harvey Components, LLC, 352 NLRB 1219 (2008).....11362.2
Armour & Co., 40 NLRB 1332 (1942).....11091.2
Atlantic Richfield Co., 208 NLRB 142 (1974).....11014, 11204
Avondale Industries, v. NLRB, 180 F.3d 633 (5th Cir. 1999).....11312.4

B

Banner Bedding, Inc., 214 NLRB 1013 (1974).....11084.4
Barrett Co.; NLRB v., 120 F.2d 583 (7th Cir. 1941).....11794.3
Bennett Industries, 313 NLRB 1363 (1994).....11217
Bernel Foam prodcuts Co., 146 NLRB 1277 (1964).....11730.4(d)
Big Three Industries, 201 NLRB 197 (1973).....11730.3(b)
BOC Group, Inc., 323 NLRB 1100 (1997).....11733.2(a)(2)
Boeing Airplane Co., 86 NLRB 368 (1949).....11023.2
Bosart Co., 314 NLRB 245 (1994).....11310.2
Breman Steel Co., 115 NLRB 247 (1956).....11310.1
Brown & Root; NLRB v., (D.C. Tex., unreported, decided May 19, 1949).....11792.4
Brown; NLRB v., 5 LC ¶ 60,986 (D.C. Ala. 1942).....11792.4
Brown v. U.S., 276 U.S. 134 (1928).....11798
Browning-Ferris Industries of California, 327 NLRB 704 (1999).....11310.1
Builders Insulation, Inc., 338 NLRB 793 (2003).....11314.8, 11351.1, 11351.2
Burns Security Services, 256 NLRB 959 (1981).....11392.2(a)(2), 11392.11
Butera Finer Foods, 334 NLRB 43 (2001).....11310.2

C

California Furniture Shops, Ltd., 115 NLRB 1399 (1956).....11118.2
Campos Dairy Products, Ltd., 107 NLRB 715 (1954).....11124.1
Canter's Fairfax Restaurant, Inc., 309 NLRB 883 (1992).....11028.2, 11733.2(a)(1)
Carlson Furniture Industries, 157 NLRB 851 (1966).....11731.1(c)
Carson Pirie Scott & Co., 69 NLRB 935 (1946).....11730, 11730.2
Cedar Tree Press, Inc.; *NLRB v.,* 169 F.3d 794 (3d Cir. 1999).....11302.4
Celebrity, Inc., 284 NLRB 688 (1987).....11730.3(b)
Clyde J. Merris, 77 NLRB 1375 (1948).....11002.2
Columbia Pictures Corp., 81 NLRB 1313 (1949).....11730.2
Communications Workers v. Beck, 487 U.S. 735 (1988).....11001.7, 11500
Community Affairs, Inc., 326 NLRB 311 (1998).....11020
Corn Products Refining Co., 87 NLRB 187 (1949).....11023.3
Craftmatic Comfort Mfg. Corp., 299 NLRB 514 (1990).....11392.6
*Croft Metals, Inc.,*337 NLRB 688 (2002).....11082.3

D

Daniel Construction Co., 133 NLRB 264 (1961).....11027.5, 11084.3
Dart Container Corp., 294 NLRB 798 (1989).....11027.3

E

Embassy Suites Hotel, 313 NLRB 302 (1993).....11310.2
Empresas Inabon, Inc., 309 NLRB 291 (1992).....11730.3(b)
Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943).....11794.3
Excelsior Underwear Inc., 156 NLRB 1236
(1966)..... 11312.1, 11312.1(a), 11312.1(d), 11312.1(k), 11313, 11508.3

F

F.T.C. v. American Tobacco Co., 264 U.S. 298 (1924).....11798
Fernandes Supermarkets, 203 NLRB 568 (1973)..... 11730.4(d), 11731.1(d)
Forstmann Woolen Co., 108 NLRB 1439 (1954).....11023.2
Fred Wilkinson Associates, 297 NLRB 737 (1990).....11361.2
Freedom WNLE-TV, 295 NLRB 634 (1989).....11733.2(a)(2)

G

Galli Produce Co., 269 NLRB 478 (1984).....11338.2(b)
Garden Manor Farms, Inc., 341 NLRB 192 (2004).....11116.1
Gaylord Bag Co., 313 NLRB 306 (1993).....11028.4
*General Dynamics Corp.***,** 213 NLRB 851 (1974).....11028.1
General Motors Corp., 17 NLRB 467 (1939).....11026.2(c), 11350.5, 11452.1, 11452.2
Gissel Packing Co.; *NLRB v.*, 395 US 575 (1969).....11730.3(b)
Globe Iron Foundry, 112 NLRB 1200 (1955).....11028.1, 11029.1
Globe Machine & Stamping Co., 3 NLRB 294 (1937).....11091.2
Government Employees, *Local 888 (Bayley-Seton Hospital),* 323 NLRB 717 (1997).....11122
Graham Architectural Products v. NLRB, 697 F.2d 534 (3d Cir. 1983).....11452.4

H

Hale v. Kenkel, 201 U.S. 43 (1906).....11798
Halliburton Services, 265 NLRB 1154 (1982).....11228, 11301.4
Harborside Healthcare, Inc., 343 NLRB 906 (2004).....11028.2
Holladay Corp., 266 NLRB 621 (1983).....11392.6
Holt Bros., 146 NLRB 383, 384 (1964).....11730.2
Hondo Drilling Co., N.S.L., 164 NLRB 416 (1967).....11027.5
Howard Mfg. Co., 231 NLRB 731 (1977).....11780

I

Ideal Electric Mfg. Co., 134 NLRB 1275 (1961).....11392.2(a)(1)
International Aluminum Corp., 117 NLRB 1221 (1957).....11112.2
Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894).....11794.1
Iowa Lamb Corp., 275 NLRB 185 (1985).....11424.3(b)

J

Jeld-Wen of Everett, Inc., 285 NLRB 118 (1987) .....11026.2(c), 11314.4, 11350.5, 11452.1, 11452.2
John I. Haas, Inc., 301 NLRB 300 (1991) .....11392.2(a)(2)
John W. Galbreath & Co., 288 NLRB 876 (1988).....11392.11

K

Kelley & Hueber, 309 NLRB 578 (1992).....11310.2
Kerrville Bus Co., 257 NLRB 176 (1981)..... 11336.5(c)
Kimco Auto Products, 184 NLRB 599 (1970).....11308
Kingsport Press, Inc., 146 NLRB 1111 (1964) 11302.1
Kraft, Inc., 273 NLRB 1484 (1985) .....11315.2(b)
KRCA-TV, 271 NLRB 1288 (1984).....11302.4
Krist Gradis, 121 NLRB 601 (1958).....11731.4

L

Ladies Garment Workers Union, 137 NLRB 1681 (1962).....11361.4
Laidlaw Transit, Inc., 327 NLRB 315 (1999) 11324.1, 11429.1
Laurel Associates, Inc., 325 NLRB 603 (1998) 11217
Laymon Candy Co., 199 NLRB 547 (1972) 11084.4
Levitz Furniture Co. of the Pacific, Inc., 333 NLRB 717
(2001) ..... 11003.1(b), 11042, 11042.1, 11042.2, 11250
Little Rock Road Machinery Co., 107 NLRB 715 (1954) 11124.2
Lufkin Foundry & Machine Co., 83 NLRB 768 (1949) .....11026.2(a)(2)
Lufkin Rule Co., 147 NLRB 341 (1964).....11452.3

M

Mallinckrodt Chemical Workers, 162 NLRB 387 (1967) 11091.3
Manchester Knitted Fashions, 108 NLRB 1366 (1954).....11228, 11301.4
Mariah, Inc., 322 NLRB 586 (1996).....11217
Marquez v. Screen Actors Guild, 119 S.Ct. 292 (1998) 11001.7
Mayfair Industries, 126 NLRB 223 (1960) 11027.2
Metal Sales Mfg., 310 NLRB 597 (1993).....11027.3
Millsboro Nursing & Rehabilitation Center, 327 NLRB 879 (1999).....11028.2
Mohawk Business Machines Corp., 118 NLRB 168 (1957).....11027.2
Monfort, Inc., 318 NLRB 209 (1995).....11322.1
Monmouth Medical Center, 247 NLRB 508 (1980).....11027.2
Monte Vista Disposal Co., 307 NLRB 531 (1992).....11324.1
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) 11794.3

N

Newport News Shipbuilding & Dry Dock Co., 239 NLRB 82 (1978) 11322.1
Norris-Thermador Corp., 119 NLRB 1301 (1958) 11084.4,11324
North American Aviation, Inc., 109 NLRB 269 (1954).....11026.2(a)(1)
North American Plastics Corp., 326 NLRB 835 (1998) 11302.2
North Jersey Newspapers Co., 322 NLRB 394 (1996) 11100.3, 11274,11364.8, 11394.8
North Macon Health Care Facility, 315 NLRB 359
(1994) .....11312.1, 11312.1(a), 11312.1(b), 11312.1(d), 11312.7, 11508.3
Northern Trust Co.; NLRB v., 56 F.Supp. 355 (D.C. Ill. 1944), affd. 148 F.2d 24 (7th Cir.1945).....11794.3

O

Odebrecht Contractors of Florida, 326 NLRB 33 (1998).....11301.5
Oklahoma Press Publishing v. Walling, 327 U.S. 186 (1946) 11794.1, 11794.3, 11796, 11798
Oregon Washington Telephone Co., 123 NLRB 339 (1959).....11336.2(b)
Osram Sylvania, Inc., 325 NLRB 758 (1998) 11340.7

P

Panda Terminals, 161 NLRB 1215 (1966) 11731.4
Paprikas Fono, 273 NLRB 1326 (1984) 11344.1
Peerless Plywood, 107 NLRB 427 (1953) .....11335.4, 11336.2(b)
Penn-Keystone Realty Corp., 191 NLRB 800 (1971) 11091.2
Perdue Farms, Inc., 328 NLRB 909 (1999).....11021, 11028.1, 11029.1
Pike Co., 314 NLRB 691 (1994) 11025.1, 11027.5
Pratt & Whitney, 327 NLRB 1213 (1999).....11091.1
Precise Castings, 294 NLRB 1164 (1989), enfd. 915 F.2d 1160 (7th Cir. 1990), cert denied
499 U.S. 959 (1991) ..... 11315.2(c)
Precision Products Group, Inc., 319 NLRB 640 (1995).....11424.3(b)
President v. Skeen, 118 F.2d 58 (5th Cir. 1941).....11794.3

R

Rhone-Poulenc, Inc., 271 NLRB 1008 (1984) .....11392.11, 11392.2(a)(2)
Rolligon Corp., 254 NLRB 22 (1981).....11142
Ron Tirapelli Ford, 304 NLRB 576 (1991).....11028.4

S

Saint Gobain Abrasives, Inc., 342 NLRB 434 (2004) ..... 11730.3(c), 11731.3
San Diego Gas & Electric, 325 NLRB 1143 (1998) 11301.2, 11301.5, 11302.2
Shop Rite Foods, Inc., 195 NLRB 133 (172).....11335.4
Sears, Roebuck & Co., 107 NLRB 716 (1954)..... 11112.1(a)
Siemons Mailing Service, 124 NLRB 594, 595 (1959) 11112.2
Singer Co., 161 NLRB 956 (1966)..... 11392.2(b)(1), 11456.3
Solar International Shipping Agency, 327 NLRB 369 (1999) 11221, 11429.4
Sonotone Corp., 90 NLRB 1236 (1950).....11091.1
Sprague Electric Co., 81 NLRB 410 (1949) .....11026.2(a)(2)
Star Brush Mfg., 100 NLRB 679 (1952) 11002.2
Star Video Entertainment L.P., 290 NLRB 1010 (1988).....11392.6
Steiny & Co., 308 NLRB 1323 (1992) 11027.5, 11084.3
Stock Building Supply, 337 NLRB 440 (2002).....11113
Stockton Roofing Co., 304 NLRB 699 (1991).....11022.1
Strickland; NLRB v., 220 F.Supp. 661 (D.C.W. Tenn. 1962), affd. 321 F.3d 811 (6th Cir. 1963) 11782.4
Sunnyvale Medical Clinic, 241 NLRB 1156 (1979).....11097
Superior of Missouri, Inc., 327 NLRB 248 (1998)..... 11084.3, 11302.1(b), 11314.8, 11351.1

T

Terrace Garden Plaza, Inc., 313 NLRB 571, 572 (1993) ..... 11314.7(b), 11336.3
Texas Meat Packers, 130 NLRB 279 (1961).....11407.1
Thompson Roofing, Inc., 291 NLRB 742 (1988)..... 11336.5(c)
Transportation Maintenance Services, L.L.C., 328 NLRB 691 (1999).....11116.1
Tropicana Products, 122 NLRB 121 (1959).....11228, 11708.3
Truserv Corp., 349 NLRB No. 23 (2007) .....11733.2(a)(1), 11733.2(a)(2), 11733.2(a)(3)

U

Union Carbide & Carbon Corp., 89 NLRB 460 (1950).....11023.4
Union de la Construccion v. NLRB, 10 F.3d 14 (1st Cir. 1993).....11730.3(b)
United Boat Service Corp., 55 NLRB 671 (1944).....11026.2(a)(2)
United States Coal & Coke Co., 3 NLRB 398, 399 (1937).....11730.2

W

Walling v. Benson, 137 F.2d 501 (8th Cir. 1943).....11794.3
Waste Management of New York, 326 NLRB 1126 (1999)..... 11026.2(c), 11350.5, 11452.2
Waumbec Dyeing & Finishing Co., 101 NLRB 1069 (1952).....11110
White Plains Lincoln Mercury, 288 NLRB 1133 (1988).....11392.11
Whitney Museum of American Art; NLRN v.,, 636 F.2d 19 (2d Cir. 1980).....11394.3
Williams Enterprises, 312 NLRB 937, 939 (1993) . 11730.3(c), 11733.2(a)(1), 11733.2(a)(2), 11733.2(a)(3)
Wilson & Co., 37 NLRB 944 (1941).....11302.4
Wyman-Gordon Co.; NLRB v., 394 U.S. 759 (1969) . 11312.1, 11312.1(a), 11312.1(b), 11312.1(d), 11508.3