IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ASSOCIATED BUILDERS AND CONTRACTORS OF TEXAS, INC., et al., Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD, Defendant.	Case No. 1:15-CV-00026 RP

DEFENDANT NATIONAL LABOR RELATIONS BOARD'S REPLY IN SUPPORT OF ITS PARTIAL MOTION TO DISMISS AND CROSS-MOTION FOR SUMMARY JUDGMENT

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As the National Labor Relations Board (Board) has shown in its Memorandum in Support of Its Partial Motion to Dismiss and Cross-Motion for Summary Judgment (Bd. MSJ) [Dkt. 24-1], ABC's facial statutory challenges to the Board's representation case procedures rule (Rule) are not ripe. (Bd. MSJ 3-6). Even if they were ripe, they are without merit (*id.* at 12-21), as are ABC's further contentions that aspects of the Board's decisionmaking process were "arbitrary" or "capricious" under the Administrative Procedure Act (*id.* at 7-11, 22-24). As shown below, ABC's Opposition and Reply (Opp.) [Dkt. 26] does not remedy these fundamental and ultimately dispositive flaws.[1]

I. ABC's "appropriate hearing" and "time compression" claims are not ripe.

ABC fails to demonstrate the ripeness of its principal claims, namely, that the Rule does not provide for an "appropriate" pre-election hearing (Amendments (Ams.) 7-10) and impermissibly streamlines the election process (Ams. 5, 11, 15, and 17). As previously noted, the twin touchstones of ripeness are fitness for judicial review and hardship if review is denied. (Bd. MSJ 3). The amendments ABC principally challenges are not fit for review in their current posture, because they merely authorize the Board's regional directors (RDs) to exercise case-by-case discretion. Contrary to ABC's position (Opp. 2), highly discretionary standards like those at issue are ill-suited for facial challenges precisely because factual application of those standards *would* "significantly advance [the court's] ability to deal with the legal issues presented." *Texas v. United States*, 497 F.3d 491, 498 (5th Cir. 2007) (alteration in original). ABC cannot, and does not, dispute that the choices of an RD in a particular election *could* result in an election process that satisfies all of its criticisms—and under *Reno v. Flores*, that fact is fatal to a facial challenge. 507 U.S. 292, 301 (1993). ABC's rejoinder that it desires to go beyond "merely challenging individual discretionary acts" (Opp. 2) is a virtual concession that this suit is precisely the sort of "abstract disagreement over administrative policy"

[1] The parties have agreed to amend their prior stipulation [Dkt. 11] so that the Board may file the Joint Appendix on or before March 31, 2015. Citations to the Administrative Record, portions of which will appear in the Joint Appendix with pagination preserved, are preceded by "A.R. NLRB."

that the ripeness inquiry is meant to screen out. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 736 (1998).

Nor is there merit to ABC's claim (Opp. 3), that it will suffer undue hardship if it can only obtain as-applied review after it incurs the "economic costs of participation in an election process that is invalid." The Supreme Court early established that litigation costs are not the type of hardship that justifies circumventing the review procedures of the National Labor Relations Act (NLRA or Act).[2] Nor can ABC avoid that precedent by citing language in *Texas*, 497 F.3d at 499, suggesting that required "participat[ion] in an allegedly invalid process" is cognizable harm in and of itself. *Texas* dealt with a state government, and the ripeness decision in that case was informed by the state's sovereign immunity. *Id.* at 494-95.[3] Private employers have no similar immunity, and are required to present their objections to the Board's processes through the statutory procedures that Congress established for that purpose. To the extent that the procedures for obtaining review of Board election cases are a hardship, it is one "Congress was aware of" and explicitly determined was not a cognizable injury. *Boire v. Miami Herald Pub. Co.*, 343 F.2d 17, 22 (5th Cir. 1965).

ABC also asserts that employers will suffer "reputational harm" from being found to have committed an unfair labor practice. (Opp. 3). But ABC has presented no evidence that any such

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[2] *Myers v. Bethlehem Shipbldg. Corp.,* 303 U.S. 41, 51 (1938) ("[T]he rules requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage."). ABC tries to muddle this issue (Opp. at 3) by conflating litigation costs with civil penalties, the issue in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967), but the two are plainly distinguishable. *Ohio Forestry*, 523 U.S. at 735 (litigation costs are not sufficient to constitute hardship for ripeness purposes).

[3] Requiring a party clothed with sovereign immunity to submit to an invalid adjudicative process is as much a violation of that immunity as is holding it liable for damages. *See, e.g.*, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002). At issue in *Texas* was whether a state that refused to waive its immunity from being sued by an Indian tribe in federal court could nonetheless be subjected to a federal administrative process initiated by the tribe, even though that process denied the state the procedural protections Congress intended it to have, namely, a threshold judicial determination that the state had dealt with the tribe in bad faith. *Texas*, in short, does not state a general rule that any claimed defect in agency procedures constitutes a "hardship."

harm is likely to accrue to employers who test union certifications, nor is there any such evidence in the administrative record. This is unsurprising—there is no stigma attached to such a technical violation of the law because courts recognize that so refusing to bargain is precisely the means Congress prescribed for employers to test in court a decision certifying a union as bargaining representative. *See, e.g.*, *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); *NLRB v. Douglas County Elec. Membership Corp.*, 358 F.2d 125, 127 (5th Cir. 1966) (describing the case as another "where the § 8(a)(5) failure to bargain is the vehicle for testing the validity of an RC Representation Proceeding"); *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1120 (D.C. Cir. 2012) ("To preserve its ability to appeal the certification, the Company refused to bargain with the Union.").[4]

BE&K Construction Co. v. NLRB, 536 U.S. 516, 529 (2002), cited by ABC (Opp. 3), is distinguishable. There, the Board's unfair labor practice finding—that the employer had filed a baseless and retaliatory lawsuit—was a direct restraint on the employer's First Amendment right to petition the courts for relief. Far from being a comparable burden, a Board refusal-to-bargain finding is, in fact, the congressionally-sanctioned and judicially-recognized *predicate* to petitioning the courts to review the Board's application of its rules in certifying a bargaining representative.

II. The Rule does not reflect "arbitrary" or "capricious" decisionmaking.

ABC complains of the supposed onerousness of providing employee information to petitioning unions (the "voter list," in the Rule's parlance) two business days after the RD directs an election. (Opp. 8). But ABC fails to confront the Rule's detailed rebuttal of this contention. (Bd. MSJ 10-11). In reality, employers will have much more than two business days to start and complete

[4] Executive Order No. 13,673, 79 Fed. Reg. 45309 (July 31, 2014), cited by ABC as giving teeth to this abstract notion of "reputational harm" (Opp. 3), does nothing of the sort. It merely requires that employers who contract with the federal government report labor law violations to appropriate authorities, and directs the Federal Acquisition Regulatory Council to develop rules (aided by guidance to be developed by the Labor Department) to identify "serious, repeated, willful, or pervasive violations of the requirements of the labor laws" which might "demonstrate a lack of integrity or business ethics." 79 Fed. Reg. 45311-12. No such rule has yet issued.

the process. This is because employers will be placed on notice of the voter list requirement as soon as they receive the petition, which is served along with a description of election procedures. In addition, employers will have already compiled much of the information needed to comply with the voter list requirement when submitting their statement of position form, which is due one day prior to the opening of the pre-election hearing. (Bd. MSJ 11). And as the Rule explained, over the past decade, "half of all units contain[ed] 28 or fewer employees . . . meaning that even for those small employers which lack computerized records of any kind, assembling the information should not be a particularly time-consuming task." 79 Fed. Reg. 74354.[5]

In a footnote, ABC argues that *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), requires the Board to articulate a "more detailed justification" for the Rule because the Rule purportedly "rests upon factual findings that contradict those which underlay its prior policy." *Id.* at 515; (*see* Opp. 12 n.9). Yet ABC fails to identify even one specific factual finding underlying prior policy that the Rule contradicts. As previously discussed, the Board has provided reasonable justifications for each amendment (Bd. MSJ 2, 7-11) and has done all that *Fox* requires. *See Fox*, 556 U.S. at 515.

[5] The Board fully explained why it rejected ABC's allegation that two days is insufficient for construction employers, who may need to use a voting eligibility formula requiring analysis of two years of payroll records. Not only may parties stipulate not to use that formula, but also, some petitions are for units already covered by collective-bargaining agreements, resulting in employers' ready access to the necessary information. The Board further explained that not all construction industry employers have significant numbers of employees covered by the formula, and finally, that although construction employers may have many job sites, modern technology renders transmission of the necessary information practicable. *Id.* at 74354.

Nor is ABC correct in arguing that construction employers cannot prepare in advance to submit a sufficient voter list. For even though construction employers need not include two years worth of employee information in their pre-hearing statements of position, those employers may still begin to assemble the information upon receipt of the notice of hearing. *Id.* at 74378. In addition, employers who do not agree to use a different eligibility formula by the close of a pre-election hearing can begin to prepare while the RD drafts a decision—"a task that has [taken] a median of 20 days . . . over the past decade." *Id.* at 74387. Finally, parties may agree to extend the voter list production deadline, or in extraordinary circumstances, the RD may so order. *Id.* at 74480, 74486.

III. Even if ripe, ABC's "appropriate hearing" arguments are meritless.

ABC urges the Court to hold that the Board erred in basing its construction of Section 9's hearing requirements on *Inland Empire Dist., Lumber Workers v. Millis*, 325 U.S. 697, 706 (1945), which issued prior to the Taft-Hartley Amendments of 1947. (Opp. 5). As the Rule explains, however, the operative language of Section 9—that in its investigation of representation controversies, the Board "shall provide for an appropriate hearing upon due notice"—is the same in both the original and the amended statute. 79 Fed. Reg. 74386. In that circumstance, the Supreme Court's construction of that statutory language granting broad discretion to the Board remains controlling.[6]

Lacking textual support for its claim that Section 9 compels the Board to allow litigation of *all* individual eligibility or inclusion issues at the pre-election hearing, ABC urges this Court to find such a requirement in legislative history. Specifically, ABC claims that despite Congress not changing the "appropriate hearing" terminology, an individual legislator's statement in 1947 should illuminate Congress's intention in drafting that statutory language in 1935. The Supreme Court has squarely rejected this anachronistic mode of reasoning.[7] The Board was amply justified, therefore, in concluding that Senator Taft's statement is not binding law. *Id.* at 74386 n.363.

In any event, ABC's arguments based on Senator Taft's 1947 statement present an inaccurate account of the Rule's treatment of voter eligibility issues at pre-election hearings. For while the Board need not and does not decide every eligibility or inclusion issue that might arise before an election, such issues will continue to be litigated and decided as deemed necessary and

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[6] *See NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 578 (1994) (finding that Congress did not change the meaning of statutory language previously construed by the Court when it included that same language in an amended statute, notwithstanding Congress disapproved of the result reached by the Court in the prior decision).

[7] *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (legislative observations made years after a statute's passage "are in no sense part of the legislative history. It is the intent of the Congress that enacted [the section] . . . that controls.") (internal citations omitted). Even less defensible is ABC's repeated suggestion that actions taken by the current Congress under the Congressional Review Act of 1996 are a relevant consideration in this Court's statutory analysis. (Opp. 1, 6 n.3, 10 n.8).

desirable by the Agency's RDs. As the Rule recognizes, in exercising their discretion as to whether to permit pre-election litigation of voter eligibility issue, RDs will be guided, in part, by the Board's experience with the relative margins of victory in its elections. This experience suggests that deferring such litigation would result in a likely administrative savings to the parties and the Agency if the voter eligibility issues are limited to 10-20% of the unit; the eligibility of such a relatively small percentage of the electorate is unlikely to be determinative of the election results in the "vast majority of cases." *Id.* at 74387 n.370, 74388 & n.373. In contrast, if the voting eligibility of more than 40% of the unit were unresolved, it is much less likely that the election would be decided by a sufficiently wide margin as to moot the need to resolve all of the challenges before the election.

In short, ABC errs in alleging that an "extraordinary circumstances" standard governs whether voting eligibility issues may be litigated prior to the election. (Opp. 4, 6). Rather, "regional directors will not be mandated to follow any particular course of decision-making as to the taking of evidence on individual eligibility issues, but will instead retain discretion to use their judgment as to what evidentiary structure will result in the most efficient use of party and agency resources." 79 Fed. Reg. 74391-92. Granting that kind of discretion, as the Rule does, is well within the Board's Section 9 authority.

IV. Even if ripe, ABC's "time compression" arguments are meritless.

As the Board has shown, employers will continue to have ample meaningful opportunities to express their views on unions even if the Rule generally results in more expeditious elections. The Rule gave several reasons why this is so. (Bd. MSJ 18-19 & n.26). ABC challenges only one of them.

Specifically, ABC disputes the basis for the Board's finding that employers typically know about union organizing campaigns prior to the filing of a petition. (Opp. 11). But the Rule explains that pre-petition employer knowledge of union organizing activity has long been the norm. As the Supreme Court observed in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), a union "[n]ormally . . .

will inform the employer of its organization drive early in order to subject the employer to the unfair labor practice provisions of the Act." *Id.* at 603. Indeed, as the facts of *Gissel* itself confirm, employers are typically aware of organization drives occurring at their facilities "whether informed by the union or not." *Id.* "[B]ased on its own experience," 79 Fed. Reg. 74321 n.56, which was supported by precedent, *id.* at 74321, an empirical study conducted by academic scholars, *id.* at 74321 n.56, and relevant practitioner feedback, *id.* at 74321 n.57, the Board appropriately concluded that "[w]hat was true at the time of *Gissel* is still true today," *id.* at 74320.

Even if, as ABC claims, some comments challenged the empirical study's methodology or the statistical value of the practitioner feedback, *id.* at 74321 nn. 56 & 57, it remains the case that these data points "are consistent with the Board's experience, and no contrary study was presented to the Board," *id.* at 74321. Nothing more is necessary to support the Board's finding. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1140 (D.C. Cir. 1984) (per curiam) (agency may "rely upon its historical experience and expertise" in considering "a set of evidentiary facts less desirable or complete than one which would exist in some regulatory utopia").

Moreover, ABC's argument overlooks the Rule's discussion of why employers will still have a meaningful opportunity to campaign even if, contrary to the Board's informed judgment, "employer ignorance of an organizing campaign is the norm." 79 Fed. Reg. 74322. In support of this conclusion, the Board relied upon a variety of factors, including employers' "control [over] the quantum of work time which is used in conveying their message," *id.* at 74323, the "small size" of most bargaining units, *id.* at 74322, and the speech-facilitating features of "modern communications technology," *id.* at 74323. ABC does not challenge any of these considerations or the conclusion which they support.[8]

[8] Even if ABC had done so, such arguments would be better suited for an as-applied challenge, in which a specific period of time for speech is crystallized in the record so that a reviewing court could judge whether such time period did, in fact, infringe a party's speech rights.

In addition, as the Board has explained, nothing in the Act establishes an across-the-board minimum permissible campaign period. (Bd. MSJ 20). While ABC maintains that the Rule "shortens" that period "to a degree that is inconsistent with Congressional intent" (Opp. 9-10), it lacks any textual support for its claim. Instead, ABC contends that Congress implicitly endorsed a minimum campaign period of at least 30 days when it passed the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), which amended the NLRA in several respects. Terming these targeted amendments a "re-enactment" of the NLRA, ABC argues that Congress thereby ratified extant Board rules that, according to ABC, had "interpreted the Act as requiring substantially more than 30 days between a petition and an election, absent waiver by the parties." (Opp. 10).

Among the deficiencies of this "re-enactment" theory is that ABC cites no authority for the proposition that the Board's 1959 election rules required campaign periods in contested cases to last "substantially more than 30 days." (*Id.*) Board counsel have not been able to identify any such provision in the pertinent subparts of the Board's then-extant rules or statements of procedure. *See* 23 Fed. Reg. 3254, 3256-58, 3266-69 (May 14, 1958) (attached hereto as NLRB Exhibit A). Thus, ABC's "[c]ongressional re-enactment" argument suffers from a faulty premise. (Opp. 10). And even if ABC meant to argue instead that application of the Board's pre-LMRDA election procedures generally resulted in campaign periods greater than 30 days in contested cases, there is no evidence that this figure was expressive of any Board judgment that the Act sets a minimum length for election campaigns in such cases. Nor is there any evidence that in the 1959 amendments, Congress intended to legislatively enshrine the collateral timing consequences of the Board's pre-LMRDA election procedures. To the contrary, because of its concern over delays in the processing of election cases, Congress amended Section 3(b) of the NLRA, 29 U.S.C. § 153(b), "*to expedite final disposition of cases* by the Board, by turning over part of its caseload to its regional directors for final

determination." *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141 (1971) (emphasis added) (quoting 105 Cong. Rec. 19770 (1959); A.R. NLRB 168396).[9]

V. The Rule reasonably modernizes the procedures surrounding employer disclosure of employee information.

ABC objects to the Rule's updating the existing requirement that the names and home addresses of bargaining unit employees be disclosed prior to the election to include, where available, email addresses and phone numbers as well. If employers have such additional contact information on file, it is because they recognize, as the Rule does, that this is how people communicate today, notwithstanding the known risks. Contrary to ABC's claim (Opp. 7-9), the Board reasonably determined that these risks are worth taking in election cases to better ensure that employees have the information they need to make a free choice in the election. In particular, the Board reasonably relied on the nearly 50-year absence of evidence of misuse of the rule requiring disclosure of names and addresses. 79 Fed. Reg. 74342. While ABC claims that the Board ignored contrary evidence, the one case it cites concerns a union campaign misrepresentation, not a misuse of an employee's personal information. *Goffstown Truck Ctr., Inc.*, 356 NLRB No. 33 (2010). And in relying on an example of abuse unrelated to the Board election process, *Pulte Homes, Inc. v. Laborer's Int'l Union*, 648 F.3d 295 (6th Cir. 2011), ABC ignores the Board's reasoned judgment that unions seeking to win support in a secret ballot election have a practical incentive to avoid conduct that would alienate potential voters. 79 Fed. Reg. at 74336, 74342. In any event, if misuse should occur in the future, the

[9] As the Board has previously discussed, the version of the LMRDA ultimately enacted into law omitted a provision—championed by then-Senator John F. Kennedy—that would have authorized the Board to return to its pre-Taft-Hartley Act practice of dispensing with pre-election hearings in certain cases. (*See* Bd. MSJ 20). When House Education and Labor Committee Chairman Graham Barden declared that the LMRDA did not "reinstate authority or procedure for a quicky election," he was referring to this previously-proscribed procedure and was not implying that representation campaigns should have a minimum length. 105 Cong. Rec. 18128 (1959) (statement of Rep. Barden); A.R. NLRB 168390. ABC errs in suggesting otherwise. (Opp. 10 & n.7).

Board stands ready to fashion appropriate remedies, using its authority to rule on election objections or unfair labor practice charges and to discipline the parties before it. *Id.* at 74359.

ABC also objects to the Rule's requirement that employers include with the statement of position form (filed the day before the pre-election hearing), a list of names, shifts, work locations, and job classifications of the employees in the petitioned-for unit, as well as any other employees the employer seeks to add to the unit. *Id.* at 74309. ABC's claim that the Board failed to justify this new requirement overlooks the Board's explanation that disclosure of this information will facilitate the resolution of disputes over the contours of an appropriate unit and the eligibility of voters. *Id.* at 74366-67. ABC's claim (Opp. 9) that unions will "game the system" by filing a "deficient petition" merely to obtain the initial list takes no account of the fact that the disclosure requirement is only triggered after the RD has determined that there is reasonable cause to believe that a question of representation affecting commerce exists, 79 Fed. Reg. 74480, and that the petition is supported by at least 30% of employees in the unit, *id.* at 74371, 74421. Further, as the Board noted in addressing this concern, if a union should withdraw its petition after receiving this information, the RD may limit a petitioner's ability to refile a petition as a condition of approving the withdrawal, and the RD and the Board may reject a petitioner's request to withdraw the petition, "if the request would run counter to the purposes of the Act." *Id.* at 74368.

VI. Conclusion

For these reasons, and for those previously given, ABC's NLRA-based challenges to the Rule should be dismissed as unripe, ABC's remaining challenges should be denied, and summary judgment on those claims should be entered in favor of the Board.[10]

[10] ABC's fleeting reference (Opp. 4) to Amendment 6 (pre-election hearing will continue from day-to-day until completed) and Amendment 16 (RD will specify the election details in the direction of election) cannot be understood as proper challenges to the Rule, as ABC has never raised these provisions previously in either its complaint or its motion for summary judgment.

Respectfully submitted,

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Dated: March 27, 2015
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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2015, the foregoing was served on the following via electronic ECF filing:

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TITLE 29—LABOR

Chapter I—National Labor Relations Board

REVISION OF CHAPTER

Chapter I of Title 29, Code of Federal Regulations, is revised to read as set forth below.

FRANK M. KLEILER,
Executive Secretary.

AUTHORITY: §§ 101.1 to 101.34 issued under sec. 6, 49 Stat. 452, as amended; 29 U. S. C. 156.

SUBPART A—GENERAL STATEMENT

§ 101.1 *General statement.* By virtue of the authority vested in it by the National Labor Relations Act, 49 Stat. 449, as amended by the Labor Management Relations Act, 1947, Public Law 101, Eightieth Congress, first session, the National Labor Relations Board hereby issues and causes to be published in the FEDERAL REGISTER Series 7 of its Statements of Procedure, which are promulgated to carry out the provisions of the act. Said series shall become effective upon the signing of the original by the members of the Board and the publication thereof in the FEDERAL REGISTER. The Statements of Procedure, Series 7, shall be in force and effect until amended or rescinded by the Board.

SUBPART B—UNFAIR LABOR PRACTICE CASES UNDER SECTION 10 (a) TO (i) OF THE ACT AND TELEGRAPH MERGER ACT CASES

§ 101.2 *Initiation of unfair labor practice cases.* The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge, which must be in writing and signed, and must either be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. The charge is filed with the regional director for the region in which the alleged violations have occurred or are occurring. A blank form for filing such charge is supplied by the regional office upon request. The charge contains the name and address of the person against whom the charge is made and a statement of the facts constituting the alleged unfair labor practices. Any person may file a charge, but no complaint will be issued upon a charge filed by a labor organization unless that labor organization is in compliance with section 9 (f), (g), and (h) of the act. (See § 101.3.)

§ 101.3 *Compliance with section 9 (f), (g), and (h) of the act.* (a) If a charge (or petition) is filed by a labor organization, that labor organization and every national or international labor organization of which it is an affiliate or constituent unit must have complied with section 9 (f) (B) (2) of the act. At the time of filing the charge (or petition) or prior thereto, or within a reasonable period of time thereafter not to exceed 10 days, the labor organization must present the duplicate copy of a letter from the United States Department of Labor showing that it has filed the material required under section 9 (f) and (g) of the act and a declaration executed by an authorized agent stating the labor organization has complied with section 9 (f) (B) (2) and setting forth the method by which compliance was made.

(b) In addition, the labor organization and every national or international labor organization of which it is an affiliate or constituent unit must have complied with section 9 (h) of the act as follows: At the time of filing the charge (or petition) or prior thereto, or within a reasonable period not to exceed 10 days thereafter, the national or international labor organization shall have on file with the general counsel in Washington, D. C., and the local labor organization shall have on file with the regional director in the region in which the proceeding is pending, or in which it customarily files cases, a declaration by an authorized agent executed contemporaneously or within the preceding 12-month period listing the titles of all offices of the filing organization and stating the names of the incumbents, if any, in each such office and the date of expiration of each incumbent's term, and an affidavit from each such officer, executed contemporaneously or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party and that he does not believe in, and is not a member of, nor supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

(c) In determining who is occupying an office and must, therefore, file an affidavit as an "officer," the Board will normally rely upon the designation of offices appearing in the constitution of the labor organization. Where, however, the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9 (h) of the act, the Board may require affidavits from additional persons.

(d) Whenever all the requirements have been met, the Board in Washington, D. C., or the regional director, whichever is appropriate, issues to the labor organization appropriate notice of such compliance.

§ 101.4 *Investigation of charges.* When the charge is received in the regional office it is filed, docketed, and assigned a case number. The regional director will, on request of the charging party, and may in any case cause a copy of the charge to be served upon the person against whom the charge is made, but timely service of a copy of the charge within the meaning of the proviso to section 10 (b) of the act is the exclusive responsibility of the charging party and not of the general counsel or his agents. The regional director requests the person filing the charge to submit evidence in its support. The person against whom the charge is filed, hereinafter called the respondent, is asked to submit a written statement of his position in respect to the allegations. The case is then assigned to a member of the field staff for investigation, who interviews representatives of all parties and those persons who have knowledge as to the charges. In the investigation and in all other stages of the proceedings, charges alleging violation of section 8 (b) (4) (A), (B), and (C) are given priority over all other cases in the office in which they are pending except cases of like character, and charges alleging violation of section 8 (b) (4) (D) are given priority over all cases except section 8 (b) (4) (A), (B), and (C) cases and other cases alleging violation of section 8 (b) (4)

(D). After full investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, and settlement; or, the case may necessitate formal methods of disposition. Some of the informal methods of handling unfair labor practice cases will be stated first.

§ 101.5 *Withdrawal of charges.* If investigation reveals that there has been no violation of the National Labor Relations Act or the evidence is insufficient to substantiate the charge, the regional director recommends withdrawal of the charge by the person who filed. The complainant may also, on its own initiative, request withdrawal. If the complainant accepts the recommendation of the director or requests withdrawal on its own initiative, the respondent is immediately notified of the withdrawal of the charge.

§ 101.6 *Dismissal of charges and appeals to general counsel.* If the complainant refuses to withdraw the charge as recommended, the regional director dismisses the charge. The regional director thereupon informs the parties of his action, together with a simple statement of the grounds therefor, and the complainant of his right of appeal to the general counsel in Washington, D. C., within 10 days. If the complainant appeals to the general counsel, the entire file in the case is sent to Washington, D. C., where the case is fully reviewed by the general counsel with the assistance of his staff. Following such review, the general counsel may sustain the regional director's dismissal, stating the grounds of his affirmance, or may direct the regional director to take further action.

§ 101.7 *Settlements.* Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel, as described in § 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

§ 101.8 *Complaints.* If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the regional director institutes formal action by issuance of a complaint and notice of hearing. In certain types of cases, involving novel and complex issues, the regional director, at the discretion of the general counsel, must submit the case for advice from the general counsel before issuing complaint. The complaint, which is served on all parties, sets forth the facts upon which the Board bases its jurisdiction and the facts relating to the alleged violations of law by the respondent. The respondent must file an answer to the complaint within 10 days of its receipt, setting forth a statement of its defense.

§ 101.9 *Settlement after issuance of complaint.* (a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b) All settlement stipulations which provide for the entry of an order by the Board are subject to the approval of the Board in Washington, D. C. If the settlement provides for the entry of an order by the Board, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the adjustment. Usually the settlement stipulation also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(c) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition that court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board order, the Board may petition the court for enforcement of its order, pursuant to section 10 of the National Labor Relations Act.

§ 101.10 *Hearings.* (a) Except in extraordinary situations the hearing is open to the public and usually conducted in the region where the charge originated. A duly designated trial examiner presides over the hearing. The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint. The rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling. Counsel for the general counsel, all parties to the proceeding, and the trial examiner have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the trial examiner. The attendance and testimony of witnesses and the production of evidence material to any matter under investigation may be compelled by subpena.

(b) The functions of all trial examiners and other Board agents or employees participating in decisions in conformity with section 8 of the Administrative Procedure Act are conducted in an impartial manner and any such trial examiner, agent, or employee may at any time withdraw if he deems himself disqualified because of bias or prejudice The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act and section 222 (f) of the Telegraph Merger Act. In connection with hearings subject to the provisions of section 7 of the Administrative Procedure Act:

(1) No sanction is imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the preponderance of the reliable, probative, and substantial evidence;

(2) Every party has the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts; and

(3) Where any decision rests on official notice of a material fact not appearing in the evidence in the record, any party is on timely request afforded a reasonable opportunity to show the contrary.

§ 101.11 *Intermediate report (recommended decision).* (a) At the conclusion of the hearing the trial examiner prepares an intermediate report (recommended decision) stating findings of fact and conclusions, as well as the reasons for his determinations on all material issues, and making recommendations as to action which should be taken in the case. The trial examiner may recommend dismissal or sustain the complaint, in whole or in part, and recommend that the respondent cease and desist from the unlawful acts found and take action to remedy their effects.

(b) The intermediate report is filed with the Board in Washington, D. C., and copies are simultaneously served on each of the parties. At the same time the Board, through its executive secretary, issues and serves on each of the parties an order transferring the case to the Board. The parties may accept and comply with the recommendations of the trial examiner, and thus normally conclude the entire proceedings at this point. Or, the parties or counsel for the Board may file exceptions to the intermediate report with the Board and may also request permission to appear and argue orally before the Board in Washington, D. C. They may also submit proposed findings and conclusions to the Board. Oral argument is very frequently granted.

§ 101.12 *Board decision and order.* (a) If any party files exceptions to the intermediate report, the Board, with the assistance of the legal assistants to each

Board member who function in much of the same manner as law clerks do for judges, reviews the entire record, including the trial examiner's report and recommendations, the exceptions thereto, the complete transcript of evidence, and the exhibits, briefs, and arguments. The Board does not consult with members of the trial examining staff or with any agent of the general counsel in its deliberations. It then issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the trial examiner. The decision and order contains detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised, and an order either dismissing the complaint in whole or in part or requiring the respondent to cease and desist from its unlawful practices and to take appropriate affirmative action.

(b) If no exceptions are filed to the intermediate report, and the respondent does not comply with its recommendations, the Board adopts the report and recommendations of the trial examiner. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes.

(c) If no exceptions are filed to the intermediate report and its recommendations and the respondent complies therewith, the case is normally closed but the Board may, if it deems necessary in order to effectuate the policies of the act, adopt the report and recommendations of the trial examiner.

§ 101.13 *Compliance with Board decision and order.* (a) Shortly after the Board's decision and order is issued the director of the regional office in which the charge was filed communicates with the respondent for the purpose of obtaining compliance. Conferences may be held to arrange the details necessary for compliance with the terms of the order.

(b) If the respondent effects full compliance with the terms of the order, the regional director submits a report to that effect to Washington, D. C., after which the case may be closed. Despite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order; and in some cases it is deemed desirable, notwithstanding compliance, to implement the order with an enforcing decree. Subsequent violations of the order may become the basis of further proceedings.

§ 101.14 *Judicial review of Board decision and order.* If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court decree, the Board may petition the appropriate Federal court for enforcement. Or, the respondent may petition the circuit court of appeals to review and set aside the Board's order. Upon such review or enforcement proceedings, the court reviews the record and the Board's findings and order and sustains them if they are in accordance with the requirements of law. The court may enforce, modify, or set aside in whole or in part the Board's findings and order, or it may remand the case to the Board for further proceedings as directed by the court. Following the court's decree, either the Government or the private party may petition the Supreme Court for review upon writ of certiorari. Such applications for review to the Supreme Court are handled by the Board through the Solicitor General of the United States.

§ 101.15 *Compliance with court decree.* After a Board order has been enforced by a court decree, the Board has the responsibility of obtaining compliance with that decree. Investigation is made by the regional office of the respondent's efforts to comply. If it finds that the respondent has failed to live up to the terms of the court's decree, the general counsel may, on behalf of the Board, petition the court to hold him in contempt of court. The court may order immediate remedial action and impose sanctions and penalties.

§ 101.16 *Back-pay proceedings.* After a Board order directing the payment of back pay has been enforced by a court order, the regional office computes the amount of back pay due each employee. If informal efforts to dispose of the matter prove unsuccessful, the regional director is then authorized to issue a "back-pay specification" in the name of the Board and a notice of hearing before a trial examiner, both of which are served on the parties involved. The specification sets forth the computations showing how the regional director arrived at the net back pay due each employee. The respondent must file an answer within 15 days of the receipt of the specification, setting forth a particularized statement of its defense. The procedure before the trial examiner or the Board is substantially the same as that described in §§ 101.10 to 101.14, inclusive.

SUBPART C—REPRESENTATION CASES UNDER SECTION 9 (c) OF THE ACT

§ 101.17 *Initiation of representation case.* The investigation of the question as to whether a union represents a majority of an appropriate grouping of employees is initiated by the filing of a petion by any person or labor organization acting on behalf of a substantial number of employees or by an employer when one or more individuals or labor organizations present to him a claim to be recognized as the exclusive bargaining representative. If there is a certified or currently recognized representative, any employee, or group of employees, or any individual or labor organization acting in their behalf may also file decertification proceedings to test the question of whether the certified or recognized agent is still the representative of the employees. The petition must be in writing and signed, and either must be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. It is filed with the regional director for the region in which the proposed or actual bargaining unit exists. Petition forms, which are supplied by the regional office upon request, provide, among other things, for a description of the contemplated or existing appropriate bargaining unit, the approximate number of employees involved, and the names of all labor organizations which claim to represent the employees. If the petition is filed by a labor organization, no investigation will be made of any question of representation raised by such labor organization unless such labor organization is in compliance with section 9 (f), (g), and (h) of the act. (See § 101.3.) If a petition is filed by a labor organization or in the case of a petition to decertify a certified or recognized bargaining agent, the petitioner must supply, within 48 hours after filing but in no event later than the last day on which the petition might timely be filed, evidence of representation. Such evidence is usually in the form of cards authorizing the labor organization to represent the employees or authorizing the petitioner to file a decertification proceeding.

§ 101.18 *Investigation of petition.* (a) Upon receipt of the petition in the regional office, it is docketed and assigned to a member of the staff, usually a field examiner, for investigation. He conducts an investigation to ascertain (1) whether the employer's operations affect commerce within the meaning of the act, (2) the appropriateness of the unit of employees for the purposes of collective bargaining and the existence of a bona fide question concerning representation within the meaning of the act, (3) whether the election would effectuate the policies of the act and reflect the free choice of employees in the appropriate unit, and (4) whether, if the petitioner is a labor organization seeking recognition, there is a sufficient probability, based on the evidence of representation of the petitioner, that the employees have selected it to represent them. The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees. However, in the case of a petition by an employer, no proof of representation on the part of the labor organization claiming a majority is required and the regional director proceeds with the case if other factors require it unless the labor organization withdraws its claim to majority representation. The field examiner, or other member of the staff, attempts to ascertain from all interested parties whether or not the grouping or unit of employees described in the petition constitutes an appropriate bargaining unit.

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that no question of representation exists within the meaning of the statute, because, among other possible reasons, the

unit is not appropriate, or a written contract precludes further investigation at that time, or where the petitioner is a labor organization or a person seeking decertification and the showing of representation among the employees is insufficient to warrant an election under the 30-percent principle stated in paragraph (a) of this section.

(c) For the same or similar reasons the regional director may request the petitioner to withdraw its petition. If, despite the regional director's recommendations, the petitioner refuses to withdraw the petition, the regional director then dismisses the petition stating the grounds for his dismissal and informing the petitioner of his right of appeal to the Board in Washington, D. C. The petitioner may within 10 days appeal from the regional director's dismissal by filing such request with the Board in Washington, D. C. After a full review of the file with the assistance of its staff, the Board may sustain the dismissal, stating the grounds of its affirmance, or may direct the regional director to take further action.

§ 101.19 *Consent adjustments before formal hearing.* The Board has devised and makes available to the parties two types of informal consent procedures through which representation issues can be resolved without recourse to formal procedures. These informal arrangements are commonly referred to as (a) consent-election agreement, followed by regional director's determination, and (b) consent-election agreement, followed by Board certification. Forms for use in these informal procedures are available in the regional offices.

(a) (1) The consent-election agreement followed by the regional director's determination of representatives is the most frequently used method of informal adjustment of representation cases. The terms of the agreement providing for this form of adjustment are set forth in printed forms, which are available upon request at the Board's regional offices. Under these terms the parties agree with respect to the appropriate unit, the payroll to be used as the basis of eligibility to vote in an election, and the place, date, and hours of balloting. A Board agent arranges the details incident to the mechanics and conduct of the election. For example, he usually arranges preelection conferences in which the parties check the list of voters and attempt to resolve any questions of eligibility. Also, prior to the date of election, official notices of election are, whenever possible, posted conspicuously in the plant. These notices reproduce a sample ballot and outline such election details as location of polls, time of voting, and eligibility rules.

(2) The actual polling is always conducted and supervised by Board agents. Appropriate representatives of each party may assist them and observe the election. As to the mechanics of the election, a ballot is given to each eligible voter by the Board's agents. The ballots are marked in the secrecy of a voting booth. The Board agents and authorized observers have the privilege of challenging for reasonable cause employees who apply for ballots.

(3) Customarily the Board agents, in the presence and with the assistance of the authorized observers, count and tabulate the ballots immediately after the closing of the polls. A complete tally of the ballots is served upon the parties upon the conclusion of the count.

(4) If challenged ballots are sufficient in number to affect the results of the count, the regional director conducts an investigation and rules on the challenges. Similarly, if objections to the conduct of the election are filed within 5 days of the issuance of the tally of ballots, the regional director likewise conducts an investigation and rules upon the objections. If, after investigation, the objections are found to have merit, the regional director may void the election results and conduct a new election.

(5) This form of agreement provides that the rulings of the regional director on all questions relating to the election (for example, eligibility to vote and the validity of challenges and objections) are final and binding. Also, the agreement provides for the conduct of a runoff election, in accordance with the provisions of Part 102 of this chapter (the Board's rules and regulations), if two or more labor organizations appear on the ballot and no one choice receives the majority of the valid votes cast.

(6) The regional director issues to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board.

(b) The consent-election agreement followed by a Board determination provides that disputed matters following the agreed-upon election, if determinative of the results, shall be the basis of a formal decision by the Board instead of an informal determination by the regional director. Thus, it is provided that the Board, rather than the regional director, makes the final determination of questions raised concerning eligibility, challenged votes, and objections to the conduct of the election. Thus, if challenged ballots are sufficient in number to affect the results of the count, the regional director conducts an investigation and issues a report on the challenges instead of ruling thereon. Similarly, if objections to the conduct of the election are filed within 5 days after issuance of the tally of ballots, the regional director likewise conducts an investigation and issues a report instead of ruling upon the validity of the objections. In either event, the regional director's report is served upon the parties, who may file exceptions thereto within 10 days with the Board in Washington, D. C. The Board then reviews the entire record made and may, if a substantial issue is raised, direct a hearing on the challenged ballots or the objections to the conduct of the election. Or, the Board may, if no substantial issues are raised, affirm the regional director's report and take appropriate action in termination of the proceedings. If a hearing is held upon the challenged ballots or objections, all parties are heard and, if directed by the Board, a report containing findings of fact and recommendations as to the disposition of the challenges or objections, or both, and resolving issues of credibility is issued by the hearing officer and served upon the parties, who may file exceptions thereto within 10 days with the Board in Washington, D. C. The record made on the hearing is reviewed by the Board with the assistance of its legal assistants and a final determination made thereon. If the objections are found to have merit, the election results may be voided and a new election conducted under the supervision of the regional director. If the union has been selected as the representative, the Board or the regional director, as the case may be, issues its certification, and the proceeding is terminated. If upon a decertification or employer petition the union loses the election, the Board or the regional director, as the case may be, certifies that the union is not the chosen representative.

§ 101.20 *Formal hearing.* If no informal adjustment of the question concerning representation has been effected and it appears to the regional director that formal action is necessary, the regional director will institute formal proceedings by issuance of a notice of hearing on the issues, which is followed by Board decision and direction of election or dismissal of the case. In certain types of cases, involving novel or complex issues, the regional director may submit the case for advice to the general counsel before issuing notice of hearing.

§ 101.21 *Hearing; procedure after hearing.* (a) The notice of hearing, together with a copy of the petition, is served upon the unions and employer filing or named in the petition and upon other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

(b) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case by the Board. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

(c) Upon the close of the hearing, the entire record in the case is forwarded to the Board in Washington, D. C. The hearing officer also transmits an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute. All parties may file briefs with the Board within 7 days after the close of the hearing and may also request to be heard orally by the Board. Because of the nature of the proceedings, however, permission to argue orally is rarely granted. After re-

view of the entire case, the Board issues its decision either dismissing the petition or directing that an election be held. In the latter event, the election is conducted under the supervision of the regional director in the manner already described in § 101.19.

(d) The parties have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots, as has already been described in connection with the postelection procedures in cases involving consent elections to be followed by Board certifications.

(e) If the election involves two or more labor organizations and if the election results are inconclusive because no choice on the ballot received the majority of valid votes cast, a runoff election is held as provided in Part 102 of this chapter (the Board's rules and regulations).

SUBPART D—REFERENDUM CASES UNDER SECTION 9 (e) (1) AND (2) OF THE ACT

§ 101.22 *Initiation of recission of authority cases.* The investigation of the question as to whether the authority of a labor organization to make an agreement requiring membership in a labor organization as a condition of employment is to be rescinded is initiated by the filing of a petition by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization. The petition must be in writing and signed, and either must be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. It is filed with the regional director for the region in which the alleged appropriate bargaining unit exists or, if the bargaining unit exists in two or more regions, with the regional director for any such regions. The blank form, which is supplied by the regional office upon request, provides, among other things, for a description of the bargaining unit covered by the agreement, the approximate number of employees involved, and the names of any other labor organizations which claim to represent the employees. Petitioner must supply with the petition, or within 48 hours after filing, its evidence of authorization from the employees.

§ 101.23 *Investigation of petition; withdrawals and dismissals.* (a) Upon receipt of the petition in the regional office, it is filed, docketed, and assigned to a member of the staff, usually a field examiner, for investigation. He conducts an investigation to ascertain (1) whether the employer's operations affect commerce within the meaning of the act, (2) whether there is in effect an agreement requiring as a condition of employment membership in a labor organization, (3) whether petitioner has been authorized by at least 30 percent of the employees to file such a petition, and (4) whether an election would effectuate the policies of the act by providing for a free expression of choice by the employees. The evidence of designation submitted by petitioner, usually in the form of cards signed by individual employees authorizing the filing of such a petition, is checked to determine the proportion of employees who desire rescission.

(b) Petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that an election is inappropriate, because, among other possible reasons, petitioner's card-showing is insufficient to meet the 30-percent statutory requirement referred to in paragraph (a) of this section.

(c) For the same or similar reasons the regional director may request the petitioner to withdraw its petition. If petitioner, despite the regional director's recommendation, refuses to withdraw the petition, the regional director then dismisses the petition, stating the grounds for his dismissal and informing petitioner of his right of appeal to the Board in Washington, D. C. The petitioner may within 10 days appeal from the regional director's dismissal by filing such request with the Board in Washington, D. C. The request shall contain a complete statement setting forth the facts and reasons upon which the request is made. After a full review of the file, the Board, with the assistance of its staff, may sustain the dismissal, stating the grounds for its affirmance, or may direct the regional director to take further action.

§ 101.24 *Consent agreements providing for election.* The Board makes available to the parties two types of informal consent procedures through which authorization issues can be resolved without resort to formal procedures. These informal agreements are commonly referred to as (a) consent-election agreement, followed by regional director's determination, and (b) consent-election agreement, followed by Board certification. Forms for use in these informal procedures are available in regional offices. The procedures to be used in connection with a consent-election agreement providing for regional director's determination and a consent-election agreement providing for Board certification are the same as those already described in Subpart C of this part in connection with representation cases under section 9 (c) of the act, except that no provision is made for runoff elections.

§ 101.25 *Procedure respecting election conducted without hearing.* If the regional director determines that the case is an appropriate one for election without formal hearing, an election is conducted as quickly as possible among the employees and upon the conclusion of the election the regional director furnishes to the parties a tally of the ballots. The parties, however, have an opportunity to make appropriate challenges and objections to the conduct of the election and they have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots, as has already been described in Subpart C of this part in connection with the postelection procedures in representation cases under section 9 (c) of the act, except that no provision is made for a runoff election. If no such objections are filed within 5 days and if the challenged ballots are insufficient in number to affect the results of the election, the regional director issues to the parties a certification of the results of the election, with the same force and effect as if issued by the Board.

§ 101.26 *Formal hearing and procedure respecting election conducted after hearing.* (a) If the preliminary investigation indicates that there are substantial issues which require Board determination before an appropriate election may be held, the regional director will institute formal proceedings by issuance of a notice of hearing on the issues which, after hearing, is followed by Board decision and direction of election or dismissal. The notice of hearing together with a copy of the petition is served upon petitioner, the employer, and upon any other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

(b) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case by the Board. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

(c) Upon the close of the hearing, the entire record in the case is then forwarded to the Board in Washington, D. C., together with an informal analysis by the hearing officer of the issues and the evidence but without recommendations. All parties may file briefs with the Board within 7 days after the close of the hearing and may also request to be heard orally by the Board. Because of the nature of the proceedings, however, permission to argue orally is rarely granted. After review of the entire case, the Board issues its decision either dismissing the petition or directing that an election be held. In the latter event, the election is conducted under the supervision of the regional director in the manner already described in § 101.19.

(d) The parties have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots as has already been described in connection with the postelection procedures in cases involving consent elections to be followed by Board certifications.

SUBPART E—JURISDICTIONAL DISPUTE CASES UNDER SECTION 10 (k) OF THE ACT

§ 101.27 *Initiation of proceedings to hear and determine jurisdictional dis-*

putes under section 10 (k). The investigation of a jurisdictional dispute under section 10 (k) is initiated by the filing of a charge, as described in § 101.2, by any person alleging a violation of paragraph (4) (D) of section 8 (b).

§ 101.28 *Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.* These matters are handled as described in §§ 101.3 to 101.7, inclusive. Cases involving violation of paragraph (4) (D) of section 8 (b) are given priority over all other cases in the office except cases under paragraphs (4) (A), (4) (B), and (4) (C) of section 8 (b).

§ 101.29 *Initiation of formal action; settlement.* If, after investigation, it appears to the regional director that the Board should determine the dispute under section 10 (k) of the act, he issues a notice of filing of the charge together with a notice of hearing which includes a simple statement of issues involved in the jurisdictional dispute and which is served on all parties to the dispute out of which the unfair labor practice is alleged to have arisen. The hearing is scheduled for not less than 10 days after service of the notice of hearing. If the parties present to the regional director satisfactory evidence that they have adjusted the dispute, the regional director withdraws the notice of hearing and either permits the withdrawal of the charge or dismisses the charge. If the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if issued. The parties may agree on an arbitrator, a proceeding under section 9 (c) of the act, or any other satisfactory method to resolve the dispute.

§ 101.30 *Hearing.* If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.

§ 101.31 *Procedure before the Board.* The parties have 7 days after the close of the hearing, subject to any extension that may have been granted, to file briefs with the Board and to request oral argument which the Board may or may not grant. The Board then considers the evidence taken at the hearing and the hearing officer's analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination of the labor organization or the particular trade, craft, or class of employees which shall perform the particular work tasks in issue or make other disposition of the matter.

§ 101.32 *Compliance with determination; further proceedings.* After the issuance of determination by the Board, the regional director in the region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conferences may be held for the purpose of working out details. If the regional director is satisfied that the parties are complying with the determination, he dismisses the charge. If the regional director is not satisfied that the parties are complying, he issues a compliant and notice of hearing, charging violation of section 8 (b) (4) (D) of the act, and the proceeding follows the procedure outlined in §§ 101.8 to 101.15, inclusive.

SUBPART F—PROCEDURE UNDER SECTION 10 (j) AND (l) OF THE ACT

§ 101.33 *Application for temporary relief or restraining orders.* Whenever the regional director deems it advisable to seek temporary injunctive relief under section 10 (j), or whenever he determines that complaint should issue alleging violation of section 8 (b) (4) (A), (B), or (C), or whenever he deems it appropriate to seek temporary injunctive relief for a violation of section 8 (b) (4) (D), the officer or regional attorney to whom the matter has been referred will make application for appropriate temporary relief or restraining order in the district court of the United States within which the unfair labor practice is alleged to have occurred or within which the party sought to be enjoined resides or transacts business.

§ 101.34 *Change of circumstances.* Whenever a temporary injunction has been obtained pursuant to section 10 (j) and thereafter the trial examiner hearing the complaint, upon which the determination to seek such injunction was predicated, recommends dismissal of such complaint, in whole or in part, the officer or regional attorney handling the case for the Board suggests to the district court which issued the temporary injunction the possible change in circumstances arising out of the findings and recommendations of the trial examiner.

PART 102—RULES AND REGULATIONS, SERIES 7

Subpart A—Definitions

Subpart B—Procedure Under Section 10 (a) to (i) of the Act for the Prevention of Unfair Labor Practices

CHARGE

COMPLAINT

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INTERVENTION

WITNESSES, DEPOSITIONS, AND SUBPENAS

TRANSFER, CONSOLIDATION, AND SEVERANCE

HEARINGS

INTERMEDIATE REPORT AND TRANSFER OF CASE TO THE BOARD

AUTHORITY: §§ 102.1 to 102.102 issued under sec. 6, 49 Stat. 452, as amended; 29 U. S. C. 156.

SUBPART A—DEFINITIONS

§ 102.1 *Terms defined in section 2 of the act.* The terms "person," "employer," "employee," "representative," "labor organization," "commerce," "affecting commerce," and "unfair labor practice," as used in this part, shall have the meanings set forth in section 2 of the National Labor Relations Act, as amended by title I of the Labor Management Relations Act, 1947.

§ 102.2 *Act; Board; Board agent.* The term "act" as used in this part shall mean the National Labor Relations Act, as amended. The term "Board" shall mean the National Labor Relations Board and shall include any group of three or more members designated pursuant to section 3 (b) of the act. The term "Board agent" shall mean any member, agent, or agency of the Board, including its general counsel.

§ 102.3 *General counsel.* The term "general counsel" as used in this part shall mean the general counsel under section 3 (d) of the act.

§ 102.4 *Region.* The term "region" as used in this part shall mean that part of the United States or any Territory thereof fixed by the Board as a particular region.

§ 102.5 *Regional director; regional attorney.* The term "regional director" as used in this part shall mean the agent designated by the Board as regional director for a particular region. The term "regional attorney" as used in this part shall mean the attorney designated by the Board as regional attorney for a particular region.

§ 102.6 *Trial examiner; hearing officer.* The term "trial examiner" as used in this part shall mean the agent of the Board conducting the hearing in an unfair labor practice or Telegraph Merger Act proceeding. The term "hearing officer" as used in this part shall mean the agent of the Board conducting the hearing in a proceeding under section 9 or in a dispute proceeding under section 10 (k) of the act.

§ 102.7 *State.* The term "State" as used in this part shall include the District of Columbia and all States, Territories, and possessions of the United States.

§ 102.8 *Party.* The term "party" as used in this part shall mean the regional director in whose region the proceeding is pending and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8 (a) (1) or 8 (a) (2) of the act; but nothing in this part shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

SUBPART B—PROCEDURE UNDER SECTION 10 (a) TO (i) OF THE ACT FOR THE PREVENTION OF UNFAIR LABOR PRACTICES [1]

CHARGE

§ 102.9 *Who may file; withdrawal and dismissal.* A charge that any person

[1] Procedure under sec. 10 (j) to (l) of the act is governed by Subparts E and F of this part.

has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person: *Provided,* That if such charge is filed by a labor organization, no complaint will be issued pursuant thereto, unless such labor organization is in compliance with the requirements of section 9 (f), (g), and (h) of the act, within the meaning of § 102.13. Any such charge may be withdrawn, prior to the hearing, only with the consent of the regional director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to § 102.45, upon motion, with the consent of the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to § 102.45, upon motion, with the consent of the Board. Upon withdrawal of any charge, any complaint based thereon shall be dismissed by the regional director issuing the complaint, the trial examiner designated to conduct the hearing, or the Board.

§ 102.10 *Where to file.* Except as provided in § 102.33 such charge shall be filed with the regional director for the region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more regions may be filed with the regional director for any of such regions.

§ 102.11 *Forms; jurat; or declaration.* Such charge shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. Three additional copies of such charge shall be filed together with one additional copy for each named party respondent.[2]

§ 102.12 *Contents.* Such charge shall contain the following:

(a) The full name and address of the person making the charge.

(b) If the charge is filed by a labor organization, the full name and address of any national or international labor organization of which it is an affiliate or constituent unit.

(c) The full name and address of the person against whom the charge is made (hereinafter referred to as the "respondent").

(d) A clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce.

§ 102.13 *Compliance with section 9 (f), (g), and (h) of the act.* (a) For the purpose of the rules and regulations in this part, compliance with section 9 (f) and (g) of the act means (1) that the Secretary of Labor has issued to the labor organization, pursuant to the rules of the Department of Labor, a letter showing that the labor organization has filed the material required under section 9 (f) and (g) of the act; (2) that the labor organization has filed with the general counsel in Washington, D. C., or with the regional director, either as part of the charge (or petition) or otherwise, the duplicate copy of such compliance letter; and (3) that the labor organization has filed with the general counsel or with the regional director for the region in which the proceeding is pending or in which it customarily files cases, either as part of the charge (or petition) or otherwise, a declaration executed by an authorized agent stating that the labor organization has complied with section 9 (f) (B) (2) of the act requiring that it furnish to all of its members copies of the financial report filed with the Department of Labor, and setting forth the method by which such compliance was made.

(b) For the purpose of the rules and regulations in this part, compliance with section 9 (h) of the act means that, in the case of a national or international labor organization, it has filed with the general counsel in Washington, D. C., and, in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:

(1) A declaration by an authorized representative of the labor organization, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and the date of expiration of each incumbent's term.

(2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

(3) The term "officer" as used in subparagraph (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization; except, however, that where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9 (h) of the act, the Board may, upon appropriate notice, conduct an investigation to determine the facts in that regard, and where the facts appear to warrant such action the Board may require affidavits from persons other than incumbents of positions identified by the constitution as offices before the labor organization will be recognized as having complied with section 9 (h) of the act.

§ 102.14 *Service of charge.* Upon the filing of a charge, the charging party shall be responsible for the timely and proper service of a copy thereof upon the person against whom such charge is made. The regional director will, as a matter of course, cause a copy of such charge to be served upon the person against whom the charge is made, but he shall not be deemed to assume responsibility for such service.

Complaint

§ 102.15 *When and by whom issued; contents; service.* After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before a trial examiner at a place therein fixed and at a time not less than 10 days after the service of the complaint.

§ 102.16 *Hearing; extension.* Upon his own motion or upon proper cause shown by any other party, the regional director issuing the complaint may extend the date of such hearing.

§ 102.17 *Amendment.* Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to § 102.45, upon motion, by the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to § 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

§ 102.18 *Withdrawal.* Any such complaint may be withdrawn before the hearing by the regional director on his own motion.

§ 102.19 *Review by the general counsel of refusal to issue.* If, after the charge has been filed, the regional director declines to issue a complaint, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds. The person making the charge may obtain a review of such action by filing a request therefor with the general counsel in Washington, D. C., and filing a copy of the request with the regional director, within 10 days from the service of the notice of such refusal by the regional director. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based.

Answer

§ 102.20 *Answer to complaint; time for filing; contents; allegations not denied deemed admitted.* The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer

[2] A blank form for making a charge will be supplied by the regional director upon request.

is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

§ 102.21 *Where to file; service upon the parties; form.* An original and four copies of the answer shall be filed with the regional director issuing the complaint. Immediately upon the filing of his answer, respondent shall serve a copy thereof on each of the other parties. An answer of a party represented by counsel shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his answer and state his address. Except when otherwise specifically provided by rule or statute, an answer need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the answer; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If an answer is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the answer had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

§ 102.22 *Extension of time for filing.* Upon his own motion or upon proper cause shown by any other party the regional director issuing the complaint may by written order extend the time within which the answer shall be filed.

§ 102.23 *Amendment.* The respondent may amend his answer at any time prior to the hearing. During the hearing or subsequent thereto, he may amend his answer in any case where the complaint has been amended, within such period as may be fixed by the trial examiner or the Board. Whether or not the complaint has been amended, the answer may, in the discretion of the trial examiner or the Board, upon motion, be amended upon such terms and within such periods as may be fixed by the trial examiner or the Board.

MOTIONS

§ 102.24 *Motions; where to file prior to hearing and during hearing; contents; service on other parties.* All motions made prior to the hearing shall be filed in writing with the regional director issuing the complaint, and shall briefly state the order or relief applied for and the grounds for such motion. The moving party shall file an original and four copies of all such motions and immediately serve a copy thereof upon each of the other parties. All motions made at the hearing shall be made in writing to the trial examiner or stated orally on the record.

§ 102.25 *Ruling on motions; where to file motions after hearing and before transfer of case to Board.* The trial examiner designated to conduct the hearing shall rule upon all motions (except as provided in §§ 102.16, 102.22, 102.29, and 102.47). The trial examiner may, before the hearing, rule on motions filed prior to the hearing, and shall cause copies of his ruling to be served upon all the parties. All motions filed subsequent to the hearing, but before the transfer of the case to the Board pursuant to § 102.45, shall be filed with the trial examiner, care of the chief trial examiner in Washington, D. C., or associate chief trial examiner, San Francisco, California, as the case may be, and a copy thereof shall be served on each of the parties. Rulings by the trial examiner on motions, and any orders in connection therewith, if announced at the hearing, shall be stated orally on the record; in all other cases such rulings and orders shall be issued in writing. The trial examiner shall cause a copy of the same to be served upon each of the other parties, or shall make his ruling in the intermediate report. Whenever the trial examiner has reserved his ruling on any motion, and the proceeding is thereafter transferred to and continued before the Board pursuant to § 102.50, the Board shall rule on such motion.

§ 102.26 *Motions; rulings and orders part of the record; rulings not to be appealed directly to Board without special permission; requests for special permission to appeal.* All motions, rulings, and orders shall become part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved thereby, as provided in § 102.31. Unless expressly authorized by the rules and regulations in this part, rulings by the regional director and by the trial examiner on motions, by the trial examiner on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record, if exception to the ruling or order is included in the statement of exceptions filed with the Board, pursuant to § 102.46. Requests to the Board for special permission to appeal from such rulings of the regional director or the trial examiner shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.

§ 102.27 *Review of granting of motion to dismiss entire complaint; reopening of record.* If any motion in the nature of a motion to dismiss the complaint in its entirety is granted by the trial examiner before filing his intermediate report, any party may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., stating the grounds for review and immediately on such filing shall serve a copy thereof on the regional director and the other parties. Unless such request for review is filed within 10 days from the date of the order of dismissal, the case shall be closed.

§ 102.28 *Filing of answer or other participation in proceedings not a waiver of rights.* The right to make motions or to make objections to rulings upon motions shall not be deemed waived by the filing of an answer or by other participation in the proceedings before the trial examiner or the Board.

INTERVENTION

§ 102.29 *Intervention; requisites; rulings on motions to intervene.* Any person desiring to intervene in any proceeding shall file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest. Prior to the hearing, such a motion shall be filed with the regional director issuing the complaint; during the hearing such motion shall be made to the trial examiner. An original and four copies of written motions shall be filed. Immediately upon filing such motion, the moving party shall serve a copy thereof upon each of the other parties. The regional director shall rule upon all such motions filed prior to the hearing, and shall cause a copy of said rulings to be served upon each of the other parties, or may refer the motion to the trial examiner for ruling. The trial examiner shall rule upon all such motions made at the hearing or referred to him by the regional director, in the manner set forth in § 102.25. The regional director or the trial examiner, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper.

WITNESSES, DEPOSITIONS, AND SUBPENAS

§ 102.30 *Examination of witnesses; depositions.* Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post office address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the "officer"). Such application shall be made to the regional director prior to the hearing, and to the trial examiner during and subsequent to the hearing but before transfer of the case to the Board pursuant to § 102.45 or § 102.50. Such application shall be served upon the regional director or the trial examiner, as the case may be, and upon all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The regional director or trial examiner, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make and serve upon the parties an order which will specify the

name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order shall be served upon all the other parties by the regional director or upon all parties by the trial examiner.

(b) Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, including any agent of the Board authorized to administer oaths. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in said order the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all the parties appearing, and his testimony shall be reduced to typewriting by the officer or under his direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objections but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn by him, that the deposition is a true record of the testimony and exhibits given by the witness, and that said officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver an original and two copies of said transcript, together with his certificate, in person or by registered mail to the regional director or the trial examiner, care of the chief trial examiner in Washington, D. C., or associate chief trial examiner, San Francisco, California, as the case may be.

(d) The trial examiner shall rule upon the admissibility of the deposition or any part thereof.

(e) All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

§ 102.31 *Issuance of subpenas; petitions to revoke subpenas; right to inspect or copy data.* (a) Any member of the Board shall, on the written application of any party, forthwith issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents in their possession or under their control. Applications for subpenas, if filed prior to the hearing, shall be filed with the regional director. Applications for subpenas filed during the hearing shall be filed with the trial examiner. Either the regional director or the trial examiner, as the case may be, shall grant the application, on behalf of any member of the Board. Applications for subpenas may be made *ex parte*. The subpena shall show on its face the name and address of the party at whose request the subpena was issued.

(b) Any person served with a subpena, whether *ad testificandum* or *duces tecum*, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena upon him, petition in writing to revoke the subpena. All petitions to revoke subpenas shall be served upon the party at whose request the subpena was issued. Such petition to revoke, if made prior to the hearing, shall be filed with the regional director and the regional director shall refer the petition to the trial examiner or the Board for ruling. Petitions to revoke subpenas filed during the hearing shall be filed with the trial examiner. Notice of the filing of petitions to revoke shall be promptly given by the regional director or the trial examiner, as the case may be, to the party at whose request the subpena was issued. The trial examiner or the Board, as the case may be, shall revoke the subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpena is otherwise invalid. The trial examiner or the Board, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the official record except upon the request of the party aggrieved by the ruling.

(c) Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them. Persons compelled to submit data or evidence in the nonpublic investigative stages of proceedings may, for good cause, be limited by the regional director to inspection of the official transcript of their testimony, but shall be entitled to make copies of documentary evidence or exhibits which they have produced.

(d) Upon the failure of any person to comply with a subpena issued upon the request of a private party, the general counsel shall, in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof, unless in the judgment of the Board the enforcement of such subpena would be inconsistent with law and with the policies of the act. 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.

§ 102.32 *Payment of witness fees and mileage; fees of persons taking depositions.* Witnesses summoned before the trial examiner shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear and the person taking the deposition shall be paid by the party at whose instance the deposition is taken.

TRANSFER, CONSOLIDATION, AND SEVERANCE

§ 102.33 *Transfer of charge and proceeding from region to region; consolidation of proceedings in same region; severance.* Whenever the general counsel deems it necessary in order to effectuate the purposes of the act or to avoid unnecessary costs or delay, he may permit a charge to be filed with him in Washington, D. C., or may, at any time after a charge has been filed with a regional director pursuant to § 102.10, order that such charge and any proceeding which may have been initiated with respect thereto:

(a) Be transferred to and continued before him for the purpose of investigation or consolidation with any other proceeding which may have been instituted in a regional office or with him; or

(b) Be consolidated with any other proceeding which may have been instituted in the same region; or

(c) Be transferred to and continued in any other region for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such other region.

The provisions of §§ 102.9 to 102.32, inclusive, shall, insofar as applicable, govern proceedings before the general counsel pursuant to this section, and the powers granted to regional directors in such provisions shall, for the purpose of this section, be reserved to and exercised by the general counsel. After the transfer of any charge and any proceeding which may have been instituted with respect thereto from one region to another pursuant to this section, the provisions of this subpart shall, insofar as applicable, govern such charge and such proceeding as if the charge had originally been filed in the region to which the transfer is made. Motions to sever proceedings may be filed before hearing, with the regional director, and during the hearing, with the trial examiner. The regional director shall refer all such motions filed with him to the trial examiner for ruling. Rulings by the trial examiner on motions to sever may be appealed to the Board in accordance with § 102.26.

HEARINGS

§ 102.34 *Who shall conduct; to be public unless otherwise ordered.* The hearing for the purpose of taking evidence upon a complaint shall be conducted by a trial examiner designated by the chief trial examiner in Washington, D. C., or the associate chief trial examiner, San Francisco, California, as the case may be, unless the Board or any member thereof presides. At any time a trial examiner may be designated to take the place of the trial examiner previously designated to conduct the hearing. Such hearings shall be public unless otherwise ordered by the Board or the trial examiner.

§ 102.35 *Duties and powers of trial examiners.* It shall be the duty of the trial examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. The trial examiner shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the rules and regulations of the Board and within its powers:

(a) To administer oaths and affirmations;

(b) To grant applications for subpenas;

(c) To rule upon petitions to revoke subpenas;

(d) To rule upon offers of proof and receive relevant evidence;

(e) To take or cause depositions to be taken whenever the ends of justice would be served thereby;

(f) To regulate the course of the hearing and, if appropriate or necessary, to exclude persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question;

(g) To hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases;

(h) To dispose of procedural requests or similar matters, including motions referred to the trial examiner by the regional director and motions to amend pleadings; also to dismiss complaints or portions thereof, and to order hearings reopened prior to issuance of intermediate reports (recommended decisions);

(i) To make and file intermediate reports in conformity with section 8 of the Administrative Procedure Act;

(j) To call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence;

(k) To take any other action necessary under the foregoing and authorized by the published rules and regulations of the Board.

§ 102.36 *Unavailability of trial examiners.* In the event the trial examiner designated to conduct the hearing becomes unavailable to the Board after the hearing has been concluded and before the filing of his intermediate report, the Board may transfer the case to itself for purposes of further hearing or issuance of an intermediate report or both on the record as made, or may request the chief trial examiner in Washington, D. C., or associate chief trial examiner, San Francisco, California, as the case may be, to designate another trial examiner for such purposes.

§ 102.37 *Disqualification of trial examiners.* A trial examiner may withdraw from a proceeding whenever he deems himself disqualified. Any party may request the trial examiner, at any time following his designation by the chief trial examiner or associate chief trial examiner and before filing of his intermediate report, to withdraw on ground of personal bias or disqualification, by filing with him promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification. If, in the opinion of the trial examiner, such affidavit is filed with due diligence and is sufficient on its face, he shall forthwith disqualify himself and withdraw from the proceeding. If the trial examiner does not disqualify himself and withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling and proceed with the hearing, or if the hearing has closed, he shall proceed with issuance of his intermediate report, and the provisions of § 102.26, with respect to review of rulings of trial examiners, shall thereupon apply.

§ 102.38 *Rights of parties.* Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the trial examiner: *And provided further,* That documentary evidence shall be submitted in duplicate.

§ 102.39 *Rules of evidence controlling so far as practicable.* Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).

§ 102.40 *Stipulations of fact admissible.* In any such proceeding stipulations of fact may be introduced in evidence with respect to any issue.

§ 102.41 *Objection to conduct of hearing; how made; objections not waived by further participation.* Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

§ 102.42 *Filing of briefs and proposed findings with the trial examiner and oral argument at the hearing.* Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party shall be entitled, upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the trial examiner who may fix a reasonable time for such filing, but not in excess of 35 days from the close of the hearing. Requests for further extensions of time shall be made to the chief trial examiner in Washington, D. C., or associate chief trial examiner, San Francisco, California, as the case may be. No request will be considered unless received at least 3 days prior to the expiration of the time fixed for the filing of briefs or proposed findings and conclusions. Notice of the request for any extension shall be immediately served upon all other parties, and proof of service shall be furnished. Three copies of the brief or proposed findings and conclusions shall be filed with the trial examiner, and copies shall be served upon each of the other parties, and proof of such service shall be furnished.

§ 102.43 *Continuance and adjournment.* In the discretion of the trial examiner, the hearing may be continued from day to day, or adjourned to a later date or to a different place, by announcement thereof at the hearing by the trial examiner, or by other appropriate notice.

§ 102.44 *Misconduct at hearing before trial examiner or the Board; refusal of witness to answer questions.* (a) Misconduct at any hearing before a trial examiner or before the Board shall be ground for summary exclusion from the hearing.

(b) Such misconduct of an aggravated character, when 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 due notice and hearing.

(c) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper shall, in the discretion of the trial examiner, be ground for striking all testimony previously given by such witness on related matters.

INTERMEDIATE REPORT AND TRANSFER OF CASE TO THE BOARD

§ 102.45 *Intermediate report and recommended order; contents; service; transfer of the case to the Board; contents of record in case.* (a) After hearing for the purpose of taking evidence upon a complaint, the trial examiner shall prepare an intermediate report and recommended order, but the initial decision shall be made by the Board. Such report shall contain findings of fact, conclusions, and the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record, and the recommended order shall contain recommendations as to what disposition of the case should be made, which may include, if it be found that the respondent has engaged in or is engaging in the alleged unfair labor practices, a recommendation for such affirmative action by the respondent as will effectuate the

policies of the act. The trial examiner shall file the original of the intermediate report and recommended order with the Board and cause a copy thereof to be served upon each of the parties. Upon the filing of the report and recommended order, the Board shall enter an order transferring the case to the Board and shall serve copies of the order, setting forth the date of such transfer, upon all the parties. Service of the intermediate report and of the order transferring the case to the Board shall be complete upon mailing.

(b) The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the intermediate report and recommended order and exceptions, shall constitute the record in the case.

EXCEPTIONS TO THE RECORD AND PROCEEDINGS

§ 102.46 *Exceptions or supporting briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.* (a) Within 20 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to § 102.45, any party may (in accordance with section 10 (c) of the act and §§ 102.90 and 102.91) file with the Board in Washington, D. C., 7 copies of a statement in writing setting forth exceptions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motions or objections), together with 7 copies of a brief in support of said exceptions and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the same period, file 7 copies of a brief in support of the intermediate report and recommended order. Copies of such exceptions and briefs shall immediately be served on each of the other parties. Statements of exceptions and briefs shall designate by precise citation of page and line the portions of the record relied upon. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose. Requests for such leave or for extension of the time in which to file exceptions or briefs under authority of this section shall be in writing and copies thereof shall be immediately served on each of the other parties. Requests for an extension must be received by the Board 3 days prior to the due date.

(b) No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceeding.

(c) Should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board simultaneously with the statement of any exceptions filed pursuant to the provisions of paragraph (a) of this section with proof of service on all other parties furnished with such request. The Board shall notify the parties of the time and place of oral argument, if such permission is granted.

(d) Oral arguments are limited to 30 minutes for each party entitled to participate. No request for additional time will be granted unless timely application is made in advance of oral argument.

(e) Exceptions to intermediate reports and recommended orders, or to the record, briefs in support of exceptions, and briefs in support of intermediate reports and recommended orders shall be legibly printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

§ 102.47 *Filing of motion after transfer of case to Board.* All motions filed after the case has been transferred to the Board pursuant to § 102.45 shall be filed with the Board in Washington, D. C., by transmitting seven copies thereof, together with an affidavit of service, upon each of the parties. Such motions shall be legibly printed or otherwise duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

PROCEDURE BEFORE THE BOARD

§ 102.48 *Action of Board upon expiration of time to file exceptions to intermediate report.* (a) In the event no statement of exceptions is filed as provided in this part, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order shall be adopted by the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes. However, the Board may, in its discretion, order such case closed upon compliance.

(b) Upon the filing of a statement of exceptions and briefs, as provided in § 102.46, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may close the case upon compliance with recommendations of the intermediate report, or may make other disposition of the case.

§ 102.49 *Modification or setting aside of order of Board before record filed in court; action thereafter.* Within the limitations of the provisions of section 10 (c) of the act, and § 102.48, until a transcript of the record in a case shall have been filed in a court, within the meaning of section 10 of the act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it. Thereafter, the Board may proceed pursuant to § 102.50, insofar as applicable.

§ 102.50 *Hearings before Board or member thereof.* Whenever the Board deems it necessary in order to effectuate the purpose of the act or to avoid unnecessary costs or delay, it may, at any time after a complaint has issued pursuant to § 102.15 or § 102.33, order that such complaint and any proceeding which may have been instituted with respect thereto be transferred to and continued before it or any member of the Board. The provisions of this subpart shall, insofar as applicable, govern proceedings before the Board or any member pursuant to this section, and the powers granted to trial examiners in such provisions shall, for the purpose of this section, be reserved to and exercised by the Board or the member thereof who shall preside.

§ 102.51 *Settlement or adjustment of issues.* At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have opportunity to submit to the regional director, with whom the charge was filed, for consideration facts, arguments, offers of settlement, or proposals of adjustment.

BACK-PAY PROCEEDINGS

§ 102.52 *Initiation of proceedings.* After the entry of a court decree enforcing an order of the Board directing the payment of back pay, if it appears to the regional director that there has arisen a controversy between the Board and a respondent concerning the amount of back pay due which cannot be resolved without a formal proceeding, the regional director shall issue and cause to be served upon the respondent a back-pay specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before a trial examiner at a place therein fixed and at a time not less than 15 days after the service of the specification.

§ 102.53 *Contents of back-pay specification.* The specification shall specifically and in detail show, for each employee, the back-pay periods broken down by calendar quarters, the specific figures and basis of computation as to gross back pay and interim earnings, the expenses for each quarter, the net back pay due, and any other pertinent information.

§ 102.54 *Answer to back-pay specification*—(a) *Filing and service of answer.* The respondent shall, within 15 days from the service of the specification, file an answer thereto; an original and 4 copies shall be filed with the regional director issuing the specification, and a copy thereof shall immediately be served on any other respondent jointly liable.

(b) *Contents of the answer.* The answer shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations denied. When a respondent intends to deny only a part of an allega-

tion, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross back pay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail.* If the respondent fails to file any answer within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

§ 102.55 *Extension of time for filing.* Upon his own motion or upon proper cause shown by any respondent, the regional director issuing the specification may by written order extend the time within which the answer shall be filed.

§ 102.56 *Extension of date of hearing.* Upon his own motion or upon proper cause shown, the regional director issuing the specification may extend the date of hearing.

§ 102.57 *Amendment.* After the issuance of the notice of hearing, the specification and the answer may be amended upon leave of the trial examiner or the Board, as the case may be, good cause therefor appearing.

§ 102.58 *Withdrawal.* Any such specification may be withdrawn before the hearing by the regional director on his own motion.

§ 102.59 *Hearing; posthearing procedure.* After the issuance of a notice of hearing, the procedures provided in §§ 102.24 to 102.51, inclusive, shall be followed insofar as applicable.

SUBPART C—PROCEDURE UNDER SECTION 9 (c) OF THE ACT FOR THE DETERMINATION OF QUESTIONS CONCERNING REPRESENTATION OF EMPLOYEES

§ 102.60 *Petition for certification or decertification; who may file; where to file; withdrawal.* A petition for investigation of a question concerning representation of employees under paragraphs (1) (A) (i) and (1) (B) of section 9 (c) of the act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1) (A) (ii) of section 9 (c) of the act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. When any such petition is filed by a labor organization, no investigation shall be made of any question of representation raised by such labor organization unless such labor organization is in compliance with the requirements of section 9 (f), (g), and (h) of the act, within the meaning of § 102.13. Petitions under this section shall be in writing and signed,[3] and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. Four copies of the petition shall be filed. Except as provided in § 102.72, such petitions shall be filed with the regional director for the region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more regions, with the regional director for any of such regions. Prior to the close of the hearing, pursuant to § 102.63, the petition may be withdrawn only with the consent of the regional director with whom such petition was filed. After the close of the hearing, the petition may be withdrawn only with the consent of the Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

§ 102.61 *Contents of petition for certification; contents of petition for decertification.* (a) A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

(1) The name of the employer.

(2) The address of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.

(6) The number of employees in the alleged appropriate unit.

(7) A statement that the employer declines to recognize the petitioner as the representative within the meaning of section 9 (a) of the act or that the labor organization is currently recognized but desires certification under the act.

(8) The name, affiliation, if any, and address of the petitioner.

(9) Any other relevant facts.

(b) A petition for certification, when filed by an employer, shall contain the following:

(1) The name and address of the petitioner.

(2) The general nature of the petitioner's business.

(3) A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.

(4) The name or names, affiliation, if any, and addresses of the individuals or labor organizations making such claim for recognition.

(5) A statement whether the petitioner has contracts with any labor organization or other representatives of employees and, if so, their expiration date.

(6) Any other relevant facts.

(c) Petitions for decertification shall contain the following:

(1) The name of the employer.

(2) The address of the establishments and a description of the bargaining unit involved.

(3) The general nature of the employer's business.

(4) Name and address of the petitioner and affiliation, if any.

(5) Name or names of the individuals or labor organizations, who have been certified or are being currently recognized by the employer and who claim to represent any employees in the unit involved, and the expiration date of any contracts covering such employees.

(6) An allegation that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative in the appropriate unit as defined in section 9 (a) of the act.

(7) The number of employees in the unit.

(8) Any other relevant facts.

§ 102.62 *Consent-election agreements.* (a) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into a consent-election agreement leading to a determination by the regional director of the facts ascertained after such consent election. Such agreement shall include a description of the appropriate unit, the time and place of holding the election, and the payroll to be used in determining what employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such consent election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70 except that the rulings and determinations by the regional director

[3] Blank forms for filing such petitions will be supplied by the regional office upon request.

of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary. Such agreement shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll to be used in determining which employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the post-election procedure shall be consistent with that followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70.

§ 102.63 *Investigation of petition by regional director; notice of hearing; service of notice; withdrawal of notice.* After a petition has been filed, if no agreement such as that provided in § 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in the appropriate unit, he shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

§ 102.64 *Conduct of hearing.* (a) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board may discharge its duties under section 9 (c) of the act.

(b) The hearing officer may, in his discretion, continue the hearing from day to day, or adjourn it to a later date or to a different place, by announcement thereof at the hearing or by other appropriate notice.

§ 102.65 *Motions; interventions.* (a) All motions, including motions for intervention pursuant to paragraph (b) of this section, shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. An original and four copies of written motions shall be filed and a copy thereof immediately shall be served upon each of the other parties to the proceeding. Motions made prior to the hearing shall be filed with the regional director, and motions made during the hearing shall be filed with the hearing officer. After the close of the hearing all motions shall be filed with the Board. Such motions to the Board shall be legibly printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Seven copies of such motions shall be filed with the Board. The regional director may rule upon all motions filed with him, causing a copy of said ruling to be served upon each of the parties, or he may refer the motion to the hearing officer: *Provided,* That if the regional director grants a motion to dismiss the petition the petitioner may obtain a review of such ruling in the manner prescribed in § 102.71. The hearing officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to him as hereinabove provided, except that he shall refer to the Board for appropriate action all motions to dismiss petitions, at such time as the Board considers the entire record.

(b) Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The regional director or the hearing officer, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper, and such intervenor shall thereupon become a party to the proceeding.

(c) All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved, as provided in § 102.66 (c). Unless expressly authorized by the rules and regulations in this part, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board when it reviews the entire record. Requests to the Board for special permission to appeal from such rulings of the regional director or the hearing officer shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.

(d) The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.

§ 102.66 *Introduction of evidence; rights of parties at hearing; subpenas.* (a) Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

(b) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

(c) Any party may file applications for subpenas in writing with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpenas may be made *ex parte.* The regional director or the hearing officer, as the case may be, shall forthwith grant the subpenas requested. Any person served with a subpena, whether *ad testificandum* or *duces tecum,* if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however,* That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpena is otherwise invalid. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

(d) (1) Misconduct at any hearing before a hearing officer or before the Board shall be ground for summary exclusion from the hearing.

(2) Such misconduct of an aggravated character, when 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 due notice and hearing.

(3) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper shall, in the discretion of the hearing officer, be ground for striking all testimony previously given by such witness on related matters.

(e) Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing.

(f) The hearing officer may submit an analysis of the record to the Board but he shall make no recommendations.

(g) Witness fees and mileage shall be paid by the party at whose instance the witness appears.

§ 102.67 *Record; what constitutes; transmission to Board.* Upon the close of the hearing the regional director shall forward to the Board in Washington, D. C., the petition, notice of hearing, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which shall constitute the record in the proceeding.

§ 102.68 *Proceedings before the Board; further hearing; briefs; Board direction of election; certification of results.* The Board shall thereupon proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to direct a secret ballot of the employees or to make other disposition of the matter. Should any party desire to file a brief with the Board, 7 copies thereof shall be filed with the Board in Washington, D. C., within 7 days after the close of the hearing: *Provided, however,* That prior to the close of the hearing and for good cause, the hearing officer may grant an extension of that time not to exceed an additional 14 days. Such brief shall be legibly printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Copies shall be served on all other parties to the proceeding, and proof of such service shall be filed with the Board at the time the briefs are filed. Requests for extension of time in which to file a brief under authority of this section not addressed to the hearing officer during the hearing shall be in writing and copies thereof shall immediately be served on each of the other parties. Requests for extension of time shall be made not later than 3 days before the date such briefs are due in Washington, D. C. No reply brief may be filed except upon special leave of the Board.

§ 102.69 *Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.* (a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot: *Provided, however,* That in a proceeding involving an employer filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties, including the regional director, disclaiming any representation interest among the employees in the unit. Any party may be represented by observers of his own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election, the regional director shall cause to be furnished to the parties a tally of the ballots. Within 5 days after the tally of ballots has been furnished, any party may file with the regional director 4 copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served upon each of the other parties by the party filing them, and proof of service shall be made.

(b) If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the result of the election, and if no runoff election is to be held pursuant to § 102.70, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both, and shall prepare and cause to be served upon the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D. C. Within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow upon written request to the Board for an extension made not later than 3 days before such exceptions are due in Washington, D. C., with copies of such request served on each of the other parties, any party may file with the Board in Washington, D. C., 7 copies of exceptions to such report which shall be legibly printed or otherwise legibly duplicated. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the regional director. Proof of service shall be made to the Board. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases.

(d) If exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served upon the parties a notice of hearing on said exceptions before a hearing officer. The hearing shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable. Upon the close of the hearing the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served upon the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the disposition of the challenges or objections, or both if it be a consolidated report. The agent conducting the hearing shall forward to the Board in Washington, D. C., the notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, all of which, together with the objection to the conduct of the election or conduct affecting the results of the election, the report on such objections, the report on challenged ballots, and exceptions to the report on objections or to the report on challenged ballots, and the record previously made, together with his report, if any, shall constitute the record in the case. In any case in which the Board has directed that a report be prepared and served, any party may within 10 days from the date of issuance of the report on challenged ballots or objections, or both, file with the Board in Washington, D. C., 7 copies of exceptions to such report: *Provided, however,* That in any proceeding wherein a representation case has been consolidated with an unfair labor practice case for purposes of hearing the provisions of § 102.46 shall govern with respect to the filing of exceptions to the intermediate report and recommended order. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the regional director. Proof of service shall be made to the Board. If no exceptions are filed to such report, the

Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The Board shall thereupon proceed pursuant to § 102.68.

(e) In any such case in which the Board, upon a ruling on challenged ballots, has directed the regional director to open and count such ballots and to issue a revised tally of ballots, and no objection to such revised tally is filed by any party within 3 days after the revised tally of ballots has been furnished, the regional director shall forthwith issue to the parties certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed.

§ 102.70 *Runoff election.* (a) The regional director shall conduct a runoff election, without further order of the Board, when an election in which the ballot provided for not less than 3 choices (i. e., at least 2 representatives and "neither") results in no choice receiving a majority of the valid ballots cast and no objections are filed as provided in § 102.69. Only one runoff shall be held pursuant to this section.

(b) Employees who were eligible to vote in the election and who are employed in an eligible category on the date of the runoff election shall be eligible to vote in the runoff election.

(c) The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

(d) In the event the number of votes cast in an inconclusive election in which the ballot provided for a choice among two or more representatives and "neither" or "none" is equally divided among the several choices; or in the event the number of ballots cast for one choice in such election is equal to the number cast for another of the choices but less than the number cast for the third choice, the regional director shall declare the first election a nullity and shall conduct another election, providing for a selection from among the three choices afforded in the original ballot; and he shall thereafter proceed in accordance with paragraphs (a), (b), and (c) of this section. In the event two or more choices receive the same number of ballots and another choice receives no ballots and there are no challenged ballots that would affect the results of the election, and if all eligible voters have cast valid ballots, there shall be no runoff election and the petition shall be dismissed. Only one such further election pursuant to this paragraph may be held.

(e) Upon the conclusion of the runoff election, the provisions of § 102.69 shall govern, insofar as applicable.

§ 102.71 *Refusal to issue notice of hearing; appeals to Board from action of the regional director.* If, after a petition has been filed, it shall appear to the regional director that no notice of hearing should issue as provided in § 102.63, the regional director may dismiss the petition and shall so advise the petitioner in writing, accompanied by a simple statement of the procedural or other grounds. The petitioner may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., and filing a copy of such request with the regional director and each of the other parties within 10 days of service of such notice of dismissal. The request shall be submitted in seven copies and shall contain a complete statement setting forth the facts and reasons upon which the request is based. Requests for an extension of time within which to file the request for review shall be filed with the Board in Washington, D. C., and proof of service shall accompany such request.

§ 102.72 *Filing petition with general counsel; investigation upon motion of general counsel; transfer of petition and proceeding from region to general counsel or to another region; consolidation of proceedings in same region; severance; procedure before general counsel in cases over which he has assumed jurisdiction.* Whenever the general counsel deems it necessary in order to effectuate the purposes of the act, or to avoid unnecessary costs or delay, he may permit a petition to be filed with him in Washington, D. C., or may, at any time after a petition has been filed with a regional director pursuant to § 102.60, order that such petition and any proceeding that may have been instituted with respect thereto:

(a) Be transferred to and continued before him, for the purpose of investigation or consolidation with any other proceeding which may have been instituted in a regional office or with him; or

(b) Be consolidated with any other proceeding which may have been instituted in the same region; or

(c) Be transferred to and continued in any other region, for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such region; or

(d) Be severed from any other proceeding with which it may have been consolidated pursuant to this section.

The provisions of §§ 102.60 to 102.71, inclusive, shall, insofar as applicable, apply to proceedings before the general counsel pursuant to this section, and the powers granted to regional directors in such provisions shall, for the purpose of this section, be reserved to and exercised by the general counsel. After the transfer of any petition and any proceeding which may have been instituted in respect thereto from one region to another pursuant to this section, the provisions of this subpart shall, insofar as applicable, govern such petition and such proceeding as if the petition had originally been filed in the region to which the transfer is made.

SUBPART D—PROCEDURE FOR REFERENDUM UNDER SECTION 9 (e) OF THE ACT

§ 102.73 *Petition for referendum under section 9 (e) (1) of the act; who may file; where to file; withdrawal.* A petition to rescind the authority of a labor organization to make an agreement requiring as a condition of employment membership in such labor organization may be filed by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by such an agreement. The petition shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief.[4] Four copies of the petition shall be filed with the regional director wherein the bargaining unit exits or, if the unit exists in two or more regions, with the regional director for any of such regions. The petition may be withdrawn only with the approval of the regional director with whom such petition was filed, except that if the proceeding has been transferred to the Board, pursuant to § 102.67, the petition may be withdrawn only with the consent of the Board. Upon approval of the withdrawal of any petition the case shall be closed.

§ 102.74 *Contents of petition to rescind authority.* (a) The name of the employer.

(b) The address of the establishments involved.

(c) The general nature of the employer's business.

(d) A description of the bargaining unit involved.

(e) The name and address of the labor organization whose authority it is desired to rescind.

(f) The number of employees in the unit.

(g) The date of execution and of expiration of any contract in effect covering the unit involved.

(h) The name and address of the person designated to accept service of documents for petitioners.

(i) Any other relevant facts.

§ 102.75 *Investigation of petition by regional director; consent referendum; directed referendum.* Where a petition has been filed pursuant to § 102.73 and it appears to the regional director that the petitioner has made an appropriate showing, in such form as the regional director may determine, that 30 percent or more of the employees within a unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization desire to rescind the authority of such labor organization to make such an agreement, he shall proceed to conduct a secret ballot of the employees involved on the question whether they desire to rescind the authority of the labor organization to make such an agreement with their employer: *Provided, however,* That in any case in which it appears to the regional director that the proceeding raises questions which should be decided by the Board before election, he may issue and cause to be served on the parties a notice of hearing before a hearing officer at a

[4] Forms for filing such petitions will be supplied by the regional office upon request.

time and place fixed therein. The regional director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements of the balloting, but the parties may enter into an agreement, subject to the approval of the regional director, fixing such arrangements. In any such consent agreements, provision may be made for final determination of all questions arising with respect to the balloting by the regional director or by the Board.

§ 102.76 *Hearing; posthearing procedure.* The method of conducting the hearing and the procedure following the hearing, including transfer of the case to the Board, shall be governed, insofar as applicable, by §§ 102.63 to 102.68, inclusive.

§ 102.77 *Method of conducting balloting; postballoting procedure.* The method of conducting the balloting and the postballoting procedure shall be governed by the provisions of § 102.69, insofar as applicable.

§ 102.78 *Refusal to conduct referendum; appeal to Board.* If, after a petition has been filed, it shall appear to the regional director that no referendum should be conducted, he shall dismiss the petition. Such dismissal shall be in writing and accompanied by a simple statement of the procedural or other grounds. The petitioner may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., and filing a copy of such request with the regional director and each of the other parties within 10 days from the service of notice of such dismissal. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based.

SUBPART E—PROCEDURE TO HEAR AND DETERMINE DISPUTES UNDER SECTION 10 (k) OF THE ACT

§ 102.79 *Initiation of proceedings.* Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the regional director shall investigate such charge, giving it priority over all other cases in the office except cases under paragraph (4) (A), (4) (B), and (4) (C) of section 8 (b) and other cases under paragraph (4) (D) of section 8 (b).

§ 102.80 *Notice of hearing; hearing; proceedings before the Board; briefs; determination of dispute.* If it appears to the regional director that the charge has merit and the parties to the dispute have not submitted satisfactory evidence to the regional director that they have adjusted, or have agreed upon methods for the voluntary adjustment of, the dispute out of which such unfair labor practice shall have arisen, he shall cause to be served on all parties to such dispute a notice of the filing of said charge together with a notice of hearing under section 10 (k) of the act before a hearing officer at a time and place fixed therein which shall be not less than 10 days after service of the notice of hearing. The notice of hearing shall contain a simple statement of the issues involved in such dispute. Hearings shall be conducted by a hearing officer, and the procedure shall conform, insofar as applicable, to the procedure set forth in §§ 102.64 to 102.67, inclusive. Upon the close of the hearing, the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or make other disposition of the matter. Should any party desire to file a brief with the Board, 7 copies thereof shall be filed with the Board at Washington, D. C., within 7 days after the close of the hearing. Immediately upon such filing, a copy shall be served on the other parties. Such brief shall be legibly printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Requests for extension of time in which to file a brief under authority of this section shall be in writing and received by the Board in Washington, D. C., 3 days prior to the due date with copies thereof served on each of the other parties. No reply brief may be filed except upon special leave of the Board.

§ 102.81 *Compliance with determination; further proceedings.* If, after issuance of the determination by the Board, the parties submit to the regional director satisfactory evidence that they have complied with the determination, the regional director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the regional director shall proceed with the charge under paragraph (4) (D) of section 8 (b) and section 10 of the act and the procedure prescribed in §§ 102.9 to 102.51, inclusive, shall, insofar as applicable, govern.

§ 102.82 *Review of determination.* The record of the proceeding under section 10 (k) and the determination of the Board thereon shall become a part of the record in such unfair labor practice proceeding and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under section 10 (e) and (f) of the act.

§ 102.83 *Alternative procedure.* If, either before or after service of the notice of hearing, the parties submit to the regional director satisfactory evidence that they have adjusted the dispute, the regional director shall dismiss the charge and shall withdraw the notice of hearing if notice has issued. If, either before or after issuance of notice of hearing, the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if notice has issued. If it appears to the regional director that the dispute has not been adjusted in accordance with such agreed-upon methods and that an unfair labor practice within the meaning of section 8 (b) (4) (D) of the act is occurring or has occurred, he may issue a complaint under § 102.15, and the procedure prescribed in §§ 102.9 to 102.51, inclusive, shall, insofar as applicable, govern; and §§ 102.80 to 102.82, inclusive, are inapplicable.

SUBPART F—PROCEDURE IN CASES UNDER SECTION 10 (j) AND (l) OF THE ACT

§ 102.84 *Expeditious processing of section 10 (j) cases.* (a) Whenever temporary relief or a restraining order pursuant to section 10 (j) of the act has been procured by the Board, the complaint which has been the basis for such temporary relief or restraining order shall be heard expeditiously and the case shall be given priority by the Board in its successive steps following the issuance of the complaint (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all other cases except cases of like character and cases under section 10 (l) of the act.

(b) In the event the trial examiner hearing a complaint, concerning which the Board has procured temporary relief or a restraining order pursuant to section 10 (j), recommends a dismissal in whole or in part of such complaint, the chief law officer shall forthwith suggest to the district court which issued such temporary relief or restraining order the possible change in circumstances arising out of the findings and recommendations of the trial examiner.

§ 102.85 *Priority of cases pursuant to section 10 (l) of the act.* Whenever a charge is filed alleging the commission of an unfair labor practice within the meaning of paragraph 4 (A), (B), or (C) of section 8 (b) of the act, the regional office in which such charge is filed or to which it is referred shall give it priority over all other cases in the office except cases of like character.

§ 102.86 *Issuance of complaint promptly.* Whenever the regional attorney or other Board officer to whom the matter may be referred seeks injunctive relief of a district court pursuant to section 10 (l) of the act, a complaint against the labor organization sought to be enjoined, covering the same subject matter as such application for injunctive relief, shall be issued promptly, normally within 5 days of the date upon which such injunctive relief is first sought.

§ 102.87 *Expeditious processing of section 10 (l) cases in successive stages.* Any complaint issued pursuant to § 102.85 shall be heard expeditiously and the case shall be given priority in its successive steps following its issuance (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all cases except cases of like character.

SUBPART G—SERVICE AND FILING OF PAPERS

§ 102.88 *Service of process and papers; proof of service.* (a) Charges, complaints and accompanying notices of hearing, final orders, intermediate reports, and subpenas of the Board, its member, agent, or agency, may be served personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the

same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same.

(b) Process and papers of the Board, other than those specifically named in paragraph (a) of this section, may be forwarded by certified mail. The return post office receipt therefor shall be proof of service of the same.

§ 102.89 *Same; by parties; proof of service.* Service of papers by a party on other parties shall be made by registered mail, or by certified mail, or in any manner provided for the service of papers in a civil action by the law of the State in which the hearing is pending. When service is made by registered mail, or by certified mail, the return post office receipt shall be proof of service. When service is made in any manner provided by such law, proof of service shall be made in accordance with such law.

§ 102.90 *Date of service; filing of proof of service.* (a) The date of service shall be the day when the matter served is deposited in the United States mail or is delivered in person, as the case may be. In computing the time from such date, the provisions of § 102.91 apply.

(b) The person or party serving the papers or process on other parties in conformance with §§ 102.88 and 102.89 shall submit a written statement of service thereof to the Board stating the names of the parties served and the date and manner of service. Proof of service as defined in § 102.89 shall be required by the Board only if subsequent to the receipt of the statement of service a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of the service.

§ 102.91 *Time; additional time after service by mail.* (a) In computing any period of time prescribed or allowed by the rules in this part, the day of the act, event, or default after which the designated period of time begins to run, is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day, which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. For the purpose of this section a Saturday on which the Board's offices are not open for business shall be considered as a holiday, but a half holiday shall be considered as other days and not as a holiday. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period: *Provided, however,* That 3 days shall not be added if any extension of such time may have been granted.

(b) When the act or any of the rules in this part require the filing of a motion, brief, exception, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter before the close of business of the last day of the time limit, if any, for such filing or extension of time that may have been granted.

SUBPART H—CERTIFICATION AND SIGNATURE OF DOCUMENTS

§ 102.92 *Certification of papers and documents.* The executive secretary of the Board or, in the event of his absence or disability, whosoever may be designated by the Board in his place and stead shall certify copies of all papers and documents which are a part of any of the files or records of the Board as may be necessary or desirable from time to time.

§ 102.93 *Signature of orders.* The executive secretary or the associate executive secretary or, in the event of their absence or disability, whosoever may be designated by the Board in their place and stead is hereby authorized to sign all orders of the Board.

SUBPART I—RECORDS AND INFORMATION

§ 102.94 *Files, records, etc., in exclusive custody of Board and not subject to inspection; formal documents and final opinions and orders subject to inspection.* (a) The formal documents described as the record in the case or proceeding and defined in §§ 102.45, 102.67, and 102.69 are matters of official record and are available for inspection and examination by persons properly and directly concerned, during usual business hours, at the appropriate regional office of the Board or in Washington, D. C., as the case may be. True and correct copies thereof will be certified upon submission of such copies a reasonable time in advance of need and payment of lawfully prescribed costs: *Provided, however,* That if the Board, the general counsel, or the regional director with whom the documents are filed shall find in a particular instance good cause why a matter of official record should be kept confidential, such matter shall not be available for public inspection or examination. Application for such inspection, if desired to be made at the Board's office in Washington, D. C., shall be made to the executive secretary or the general counsel, as the case may be, and, if desired to be made at any regional office, shall be made to the regional director. The executive secretary, the general counsel, or the regional director may, in his discretion, require that the application be made in writing and under oath and set forth the facts upon which the applicant relies to show that he is properly and directly concerned with such inspection and examination. Should the executive secretary, the general counsel, or the regional director, as the case may be, deny any such application, he shall give prompt notice thereof, accompanied by a simple statement of procedural or other grounds.

(b) All final opinions or orders of the Board in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and its rules and regulations are available to public inspection during regular business hours at the Board's offices in Washington, D. C. Copies may be obtained upon request made to any regional office of the Board at its address as published in the FEDERAL REGISTER, or to the director of information in Washington, D. C. Subject to the provisions of §§ 102.31 and 102.66, all files, documents, reports, memoranda, and records pertaining to the internal management of the Board or to the investigation or disposition of charges or petitions during the nonpublic investigative stages of proceedings and before the institution of formal proceedings, and all matters of evidence obtained by the Board or any of its agents in the course of investigation, which have not been offered in evidence at a hearing before a trial examiner or hearing officer or have not been made part of an official record by stipulation, whether in the regional offices of the Board or in its principal office in the District of Columbia, are for good cause found by the Board held confidential and are not matters of official record or available to public inspection, unless permitted by the Board, its chairman, the general counsel, or any regional director.

§ 102.95 *Same; Board employees prohibited from producing files, records, etc., pursuant to subpena ad testificandum or subpena duces tecum, prohibited from testifying in regard thereto.* No regional director, field examiner, trial examiner, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, Territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether in answer to a subpena, *subpena duces tecum*, or otherwise, without the written consent of the Board or the chairman of the Board if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel. Whenever any *subpena ad testificandum* or *subpena duces tecum*, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served upon any such persons or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpena invalidated on the ground that the evidence sought is privileged against disclosure by this rule.

SUBPART J—PRACTICE BEFORE THE BOARD OF FORMER EMPLOYEES

§ 102.96 *Prohibition of practice before Board of its former regional employees in cases pending in region during employ-*

ment. No person who has been an employee of the Board and attached to any of its regional offices shall engage in practice before the Board or its agents in any respect or in any capacity in connection with any case or proceeding which was pending in any regional office to which he was attached during the time of his employment with the Board.

§ 102.97 *Same; application to former employees of Washington staff.* No person who has been an employee of the Board and attached to the Washington staff shall engage in practice before the Board or its agents in any respect or in any capacity in connection with any case or proceeding pending before the Board or any regional offices during the time of his employment with the Board.

SUBPART K—CONSTRUCTION OF RULES

§ 102.98 *Rules to be liberally construed.* The rules and regulations in this part shall be liberally construed to effectuate the purposes and provisions of the act.

SUBPART L—ENFORCEMENT OF RIGHTS, PRIVILEGES, AND IMMUNITIES GRANTED OR GUARANTEED UNDER SECTION 222 (f), COMMUNICATIONS ACT OF 1934, AS AMENDED, TO EMPLOYEES OF MERGED TELEGRAPH CARRIERS

§ 102.99 *Enforcement.* All matters relating to the enforcement of rights, privileges, or immunities granted or guaranteed under section 222 (f) of the Communications Act of 1934, as amended, shall be governed by the provisions of Subparts A, B, G, H, I, and K of this part, insofar as applicable, except that reference in Subpart B to "unfair labor practices" or "unfair labor practices affecting commerce" shall for the purposes of this article mean the denial of any rights, privileges, or immunities granted or guaranteed under section 222 (f) of the Communications Act of 1934, as amended.

SUBPART M—AMENDMENTS

§ 102.100 *Amendment or rescission of rules.* Any rule or regulation may be amended or rescinded by the Board at any time.

§ 102.101 *Petitions for issuance, amendment, or repeal of rules.* Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation. An original and five copies of such petition shall be filed with the Board in Washington, D. C., and shall state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.

§ 102.102 *Action on petition.* Upon the filing of such petition, the Board shall consider the same and may thereupon either grant or deny the petition in whole or in part, conduct an appropriate hearing thereon, or make other disposition of the petition. Should the petition be denied in whole or in part, prompt notice shall be given of the denial, accompanied by a simple statement of the grounds unless the denial is self-explanatory.

[F. R. Doc. 58-3649; Filed, May 13, 1958; 8:54 a. m.]

TITLE 21—FOOD AND DRUGS

Chapter I—Food and Drug Administration, Department of Health, Education, and Welfare

Subchapter B—Food and Food Products

PART 120—TOLERANCES AND EXEMPTIONS FROM TOLERANCES FOR PESTICIDE CHEMICALS IN OR ON RAW AGRICULTURAL COMMODITIES

TOLERANCES FOR RESIDUES OF *S*-(*p*-CHLOROPHENYLTHIO) METHYL *O,O*-DIETHYL PHOSPHORODITHIOATE

A petition was filed with the Food and Drug Administration by Stauffer Chemical Company, Richmond, California, requesting the establishment of tolerances for residues of *S*-(*p*-chlorophenylthio) methyl *O-O*-diethyl phosphorodithioate in or on various raw agricultural commodities. Subsequently, the petitioner withdrew his request with respect to certain commodities.

The Secretary of Agriculture has certified that his pesticide chemical is useful for the purposes for which tolerances are being established.

After consideration of the data submitted in the modified petition and other relevant material which show that the tolerances established in this order will protect the public health, and by virtue of the authority vested in the Secretary of Health, Education, and Welfare by the Federal Food, Drug, and Cosmetic Act (sec. 408 (d) (2), 68 Stat. 512; 21 U. S. C. 346a (d) (2)) and delegated to the Commissioner of Food and Drugs by the Secretary (21 CFR 120.7 (g)), the regulations for tolerances for pesticide chemicals in or on raw agricultural commodities (21 CFR 120.156 (22 F. R. 7502)) are amended by changing § 120.156 to read as follows:

§ 120.156 *Tolerances for residues of S-(p-chlorophenylthio) methyl O,O-diethyl phosphorodithioate.* Tolerances for residues of *S*-(*p*-chlorophenylthio) methyl *O,O*-diethyl phosphorodithioate in or on raw agricultural products are established as follows:

(a) 5 parts per million in or on sugar beets (roots), sugar beets (tops).

(b) 2 parts per million in or on almond hulls, grapefruit, lemons, limes, oranges, tangelos, tangerines.

(c) 0.8 part per million in or on apples, apricots, beans, snap (succulent form); beans, lima (succulent form); beets, garden (roots); beets, garden (tops); cantaloups, cherries, crabapples, eggplants, grapes, nectarines, olives, peaches, pears, peas (succulent form), peppers, pimentos, plums (fresh prunes), quinces, soybeans (succulent form), spinach, strawberries, tomatoes, watermelons.

Any person who will be adversely affected by the foregoing order may, at any time prior to the thirtieth day from the effective date thereof, file with the Hearing Clerk, Department of Health, Education, and Welfare, Room 5440, 330 Independence Avenue SW., Washington 25, D. C., written objections thereto. Objections shall show wherein the person filing will be adversely affected by this order, specify with particularity the provisions of the order deemed objectionable and reasonable grounds for the objections, and request a public hearing upon the objections. Objections may be accompanied by a memorandum or brief in support thereof. All documents shall be filed in quintuplicate.

Effective date. This order shall be effective upon publication in the FEDERAL REGISTER.

(Sec. 408 (d) (2), 68 Stat. 512; 21 U. S. C. 346a (d) (2))

Dated: May 8, 1958.

[SEAL] GEO. P. LARRICK,
Commissioner of Food and Drugs.

[F. R. Doc. 58-3656; Filed, May 13, 1958; 8:54 a. m.]

TITLE 32A—NATIONAL DEFENSE, APPENDIX

Chapter VI—Business and Defense Services Administration, Department of Commerce

[BDSA Reg. 2 (Formerly NPA Reg. 2); Direction 7, Amendment 1, of May 9, 1958]

BDSA REG. 2—BASIC RULES OF THE PRIORITIES SYSTEM

REG. 2, DIR. 7, AMDT. 1—LIMITATION ON USE OF RATINGS TO OBTAIN NICKEL—ELIMINATION OF NOTIFICATION REQUIREMENT AND CERTAIN USE LIMITATIONS

This amendment is found necessary and appropriate to promote the national defense and is issued pursuant to the Defense Production Act of 1950, as amended. In the formulation of this amendment, there has been consultation with industry representatives, including trade association representatives, and consideration has been given to their recommendations.

This amendment affects direction 7 to BDSA Reg. 2 by amending paragraph (b) of section 3 of said direction. The notification requirement and use limitations contained in said paragraph are eliminated.

Paragraph (b) of section 3 of direction 7 to BDSA Reg. 2 is amended to read as follows:

(b) If at any time any person who has generated scrap in the course of producing alloys containing nickel to fill mandatory acceptance orders has on hand such scrap containing a quantity of usable nickel which exceeds the quantity of such nickel needed by him to fill mandatory acceptance orders received by him, he may use it himself or dispose of it unless otherwise ordered or directed by BDSA.

(Sec. 704, 64 Stat. 816, as amended; 50 U. S. C. App. 2154)

This amendment shall take effect May 9, 1958.

BUSINESS AND DEFENSE SERVICES ADMINISTRATION,
H. B. MCCOY,
Administrator.

[F. R. Doc. 58-3614; Filed, May 13, 1958; 8:50 a. m.]