

GUIDE TO BOARD PROCEDURES



**NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY**

APRIL 2017

Foreword

A *Guide to Board Procedures* has been prepared by the Office of the Executive Secretary to assist parties in complying with the Board's Rules and Regulations and administrative practices. The *Guide* is intended to assist the practitioner who is generally familiar with the Board's procedural requirements, but it is especially designed to help those with little or no familiarity with those rules. The *Guide* covers filing requirements, and answers questions concerning many other procedures and practices. It includes, among other helpful provisions, a quick reference guide for unfair labor practice case filings, a checklist for preparing exceptions, cross-exceptions, and briefs, and a number of helpful hints on how to avoid common filing mistakes. The *Guide* also includes a table of contents that facilitates finding the rules that pertain to particular areas of concern quickly and easily.

This *Guide* does not have the force of law or regulation, it is not intended to provide legal advice, and it does not limit or extend the Board's authority.

The Office of the Executive Secretary would like to thank the Board legal staff who contributed to the preparation of the prior version of the *Guide*, especially former Associate Executive Secretary Richard D. Hardick, who led the original drafting project. I would also like to express my great appreciation to Associate Executive Secretaries Farah Qureshi and Leigh Reardon, and Deputy Executive Secretary Roxanne Rothschild for their work in updating this *Guide* to reflect current rules, regulations and practices.

Gary Shinnars
Executive Secretary
April 6, 2017

NATIONAL LABOR RELATIONS BOARD
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1. Introduction

1.1 Purpose

This Guide describes procedures, requirements, and recommendations for practice before the National Labor Relations Board. It is provided for the information and convenience of the general public and for parties and their representatives who appear before the Board.

This Guide DOES NOT provide guidance for practice before the Board's regional offices, the General Counsel, or the Division of Judges.

1.2 Disclaimer

This guide does not carry the weight of law or regulation. It is neither intended, nor should it be construed in any way, as legal advice. It also does not extend or limit the jurisdiction of the Board as established by law and regulation. Parties with business before the Board are strongly encouraged to consult the Board's Rules and Regulations prior to taking any action on a case.

1.3 Revisions

The Office of the Executive Secretary reserves the right to amend or revoke the text of this guide at its discretion.

2. The Board

2.1 Function, Jurisdiction, and Authority

The National Labor Relations Board is an independent federal agency created by Congress in 1935 to administer the [National Labor Relations Act](#), the primary law governing labor-management relations in the private sector. The statute guarantees employees the rights to organize, form or join unions, and bargain collectively with their employers; to engage in other protected concerted activity concerning workplace issues, with or without a union; and to refrain from all such activity.

The Board's mission is to enforce those rights. To that end, the Board's General Counsel, through the Board's regional offices, conducts elections for employees to decide whether they will have union representation, and investigates and prosecutes alleged unlawful acts, called unfair labor practices, by employers, unions, or both. The 5-member Board itself serves as an appellate body, reviewing decisions of Regional Directors and Hearing Officers in representation cases, and of Administrative Law Judges in unfair labor practice cases.

This Practitioner's Guide is for parties who are practicing before the Board itself. Parties with business before the Board's regional offices, the General Counsel, or the Division of Judges should consult the Board's website (www.nlr.gov) for guidance concerning filing documents with those offices.

2.2 Location and Hours of Operation

The Board's main administrative offices are located at 1015 Half Street, S.E., Washington, D.C., 20570. Hours of operation are 8:30 a.m. until 5 p.m. Eastern Time, Monday through Friday. The office is closed on Saturdays and Sundays and on the following federal holidays:

- New Year's Day
- Martin Luther King, Jr. Day
- Presidents Day
- Memorial Day
- Independence Day
- Labor Day
- Columbus Day
- Veteran's Day
- Thanksgiving Day
- Christmas Day

3. Common to All Cases

3.1 Filing with the Board

(a) Do I need an attorney or a legal representative?

No. There is no requirement that you be represented by an attorney or have other representation for any matter before the Board. The Board, however, expects that you will follow all applicable rules and regulations in all filings. Thus, parties may find it beneficial to have a legal representative who is familiar with the Board's procedures and rules.

(b) How do I designate a representative or notify the Board of a change of counsel or representative?

Ideally, such a notification should be filed by a party. A party that retains or changes its counsel or representative when the case is pending before the Board must either file a Form NLRB 4701, obtainable from the NLRB's public website (<https://www.nlr.gov/resources/forms>), or submit a letter to the Board's Executive Secretary that includes the party's name, title and address; the case name and number; and the name, address (street and e-mail), and facsimile and telephone numbers of the new attorney or representative. Sign and date the form or letter and serve it on all parties and, if applicable, on the attorney or representative that is being replaced. (Addresses of the parties can be obtained by telephoning the Executive Secretary's Office at (202) 273-1940). Enclose a certificate of service with the form or letter you file with the Board.

The form or letter may be filed by the new attorney if the above information is included. The certificate of service should reflect that a copy was sent to the client and, if applicable, the attorney or representative being replaced.

Either the party or the attorney or representative should notify the Board if it has severed its relationship with its representative or client as the case may be. Indicate the date the representative's services ceased if it is different from the date of the letter. Serve all parties, including the client or attorney, as the case may be.

3.2 Methods of Filing

(a) How do I file documents with the Board?

Documents generally must be E-Filed using the Board's website (<http://www.nlr.gov>). Some items can be filed by facsimile (unfair labor practice charges, petitions in representation cases, objections to elections, and requests for extension of time and to exceed page limitations), but others may not. Otherwise, documents may be filed by personal hand delivery, private delivery service, or regular mail only if the filer does not have access to the means for filing electronically or filing electronically would impose an undue burden. Documents cannot be filed by e-mail.

All filings, whether submitted by e-filing, facsimile, personal hand delivery, private delivery service, or regular mail must be accompanied by a statement of service on the other parties. See Section 5 for information regarding service on other parties, statements of service, and proof of service.

(b) What do I need to know about each method of filing?

(1) E-filing using the Board's website: Required Method for Most Filings

In order to file documents electronically, access the Agency's website at <http://www.nlr.gov>, then click on the "E-File Case Documents" link under the "CASE RELATED LINKS" heading on the main page. Please read the E-File Terms and Conditions prior to e-filing the case documents.

Any document may be filed electronically provided that it is no more than 20 megabytes in size.

E-FILINGS MUST BE TIMELY. E-filings must be received by the Board by 11:59 p.m. Eastern Time on the due date in order to be considered timely. Be aware that a failure to timely E-File a document will not be excused on the basis of a claim that transmission could not be accomplished because of technical or other problems on the user's end.

If a party is unable to file electronically, the party must accompany the filing with a statement explaining why the party does not have access to the means for filing electronically or why filing electronically would impose an undue burden.

Authority: Rule 102.5(c).

(2) Facsimile

Requests for extensions of time and to exceed page limitations may be filed with the Board by facsimile transmission without advance permission of the Executive Secretary, or may be E-Filed.

A failure to timely file or serve a document will not be excused on the basis of a claim that facsimile transmission could not be accomplished because the receiving machine was off-line or unavailable for any other reason.

Authority: Rule 102.5(e).

(3) Personal hand delivery, private delivery service, and regular mail.

If a document is permitted to be filed by personal hand delivery, private delivery service, or regular mail, the document should be filed with the Board's Office of the Executive Secretary at the address set forth below, during the Board's normal operating hours.

Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

Caution: Misaddressing documents intended for the Board is a frequent problem. Practitioners often inadvertently send Board filings to the General Counsel's Office of Appeals, the Division of Judges (or the Administrative Law Judge assigned to the case), the Regional Director, or the Board, itself, rather than to the Executive Secretary of the Board. Because prior filings had been sent to the Judge or Regional Director, the practitioner may consider "the Board" in the generic sense and mail a filing to the Judge or Regional Director that is intended for the Board. Although the Office of Appeals, Division of Judges, and regional offices usually recognize when a document they receive is intended to be filed with the Board and refer it to the Office of the Executive Secretary, you should not rely on them to correct this mistake.

Filings by personal hand delivery must arrive before 5:00 p.m. Eastern Time on the due date in order to be considered timely. The Board will also accept as timely most documents that are postmarked on the day before (or earlier than) the due date. "Postmarking" includes depositing the document in the regular mail (United

States Postal Service) or with a private delivery service that will provide a record showing that the document was deposited with that service in sufficient time for delivery by the due date (but in no event later than the day before the due date).

Authority: Rule 102. 2(b).

(c) How do I determine if the Board received my filing?

If you file electronically using the website, the Board's e-filing system generates a confirmation number. Please print and keep this confirmation number for your records. If you file by facsimile, be sure your own facsimile machine is capable of printing a report of the date and time and whether the transmission was successful. If you use a messenger for personal hand delivery, be sure the messenger asks the individual to whom he/she gives the document for a receipt. If you use the United States Postal Service or a private delivery service, choose the type of service that provides a return receipt or record of delivery.

Regardless of the method you choose, you may telephone the Executive Secretary's Office to confirm receipt within a reasonable time after the documents are sent. Allow sufficient time, however, to make other delivery arrangements in case the document has not been received.

3.3 Due Dates and Extensions

(a) What is the Board's definition of a due date or deadline for a filing?

The due date is the date on which the filing must arrive at the Board. E-Filings must be received by the Board before 11:59 p.m. Eastern Time on the due date in order to be considered timely. The Board accepts as timely any document that is hand delivered to the Executive Secretary's Office on or before 5:00 p.m. Eastern Time on the due date. Filings allowed by facsimile must be received before 5:00 p.m. Eastern Time on the due date in order to be considered timely.

The following documents must be received by the Board on or before 5:00 p.m. Eastern Time on the due date: requests for extensions of time to file any document, requests to exceed page limits, and applications for awards and fees and expenses under EAJA.

Authority: Rule 102.2(b) and 102.5(c).

(b) How are due dates determined?

Some documents, e.g., orders to show cause, transfer orders, and grants of extensions, contain the specific date a document is due. For others, e.g., answering and reply briefs and certain oppositions, you must compute deadlines in accordance with the Board's Rules.

With respect to deadlines that you must compute, first determine the due date of the document to which you will be responding (the “initiating document”), and, from that date, check the number of days the Rules provide for responding to that initiating document. When calculating the due date from that time period, do not start counting from the due date of the initiating document but rather the following day. Do not count the day of the act from which the time runs. The first day following issuance or service of the initiating document is day one, even if it falls on a weekend or holiday. The last day of the time limit is included, unless it falls on a weekend or holiday. For example, if you desire to file an answering brief to another party’s exceptions brief, the due date begins to run from the last due date for filing of the exceptions. The next day following that due date is day one. Since answering briefs are due under the Rules within 14 days from the last day exceptions can be filed, the 14th day thereafter is the due date.

Be aware that the date you received the initiating document is irrelevant for counting purposes. All due dates run from the due date of the document to which you will respond, not the date you received it. If you will be responding to a document filed early, your response time still starts to run from that document’s due date, not the earlier date on which it was filed.

Most due dates are in multiples of 7 except for the due date for a petition to revoke a subpoena. See Section 102.2(a) of the Board’s Rules. Most due dates do not fall on weekends, but may fall on a holiday, in which case the document is due the next business day. Be aware that the Board does not add additional days when the initiating document was served on you by mail. If your receipt of a document is substantially delayed, consider filing a request for an extension of time to respond.

If you are responding to a Judge’s decision or Board notice to show cause, the clock starts on the date those documents were placed in the mail or the date an e-mail with a link to the decision was sent to you. That usually coincides with the date on the document.

The computation of some due dates requires you to count backwards from a certain date or event, in the same manner as described above. Thus, if you wish to file a motion to dismiss, pursuant to Section 102.24 of the Board’s Rules, it is due no later than 28 days prior to the scheduled hearing (in most situations). You can determine the due date for the motion by counting 28 days backwards from the scheduled hearing date. Do not count the hearing date. The day before the hearing date is day one. The 28th day prior is the last date before the hearing that you may file the motion.

With respect to unfair labor practice cases, if the due date for the filing of exceptions in the transfer order was inadvertently computed as less than the 28 days allowed, bring it to the Office of the Executive Secretary’s attention to issue a correction. If the incorrect date is longer than 28 days, however, the Board adheres to the longer date and does not issue a correction.

Authority: Rule 102.24(b-c).

(c) *What kind of due dates can be extended?*

All Board filing deadlines can be extended for a reasonable period except the deadline for filing an EAJA application, which is established by statute, and for filing a reply brief. (The deadlines for filing unfair labor practice charges pursuant to Section 10(b) of the Act and petitions to revoke subpoenas also are statutory, but those are ordinarily filed with the Regional Director or the Administrative Law Judge rather than the Board, and are therefore outside the scope of this Guide.) Repeat requests for extensions will generally not be granted, especially if the prior extension was granted with the condition that no further extensions will be granted. Also, be aware that an extension of time to file a request for review of a decision and direction of election or an opposition to the request may be limited to only a few days.

(d) *How do I obtain an extension of time?*

Those seeking an extension of time should always provide a specific reason for the request and must serve the request on all other parties. Parties are encouraged to seek agreement from the other parties for the extension, and to indicate the other parties' position in the extension request. The Executive Secretary's Office may wait only a few days (or less) before ruling on such requests to afford other parties an opportunity to file an opposition, so any opposition should be filed promptly. The Board may grant the entire amount sought, grant part of the time sought, or deny the request. If filed prior to 3 days before the due date, requests for reasonable extensions will be granted because of the nature of the issues involved and the amount of other work the practitioner is handling, conflicting court dates, and other prescheduled matters occurring within the briefing period. If an unusually long extension is sought, it may be granted under the condition that no further extensions will be granted or denied. Parties should be mindful, however, that the Board considers its cases to be important and they should take priority over many other matters. Whether an injunction has been granted and/or whether there is an ongoing strike or picketing are important considerations in limiting or denying an extension.

Authority: Rule 102.2(c).

(e) *When should I file my extension of time request?*

File the request as soon as you know that you need additional time. The Rules allow for the filing of extension requests up to and including the due date for the filing of the document for which you seek additional time, but waiting to file a request may become problematic. Requests filed within 3 days of the due date must be grounded on circumstances not reasonably foreseeable in advance. For instance, requests within 3 days of the due date based on the press of other work,

vacation, trial appearances, or other reasons that do not appear to be unforeseen, will be denied.

There are two exceptions to this 3-day rule: (1) where all parties agree on the extension – (this is the only Rule that the Board allows the other parties to waive); and 2) where the delayed filing is based on excusable neglect.

Authority: Rule 102.2(c) and (d).

(f) *Do I share the extension of time granted to another party?*

It depends. An extension granted to one party affords the same extension to all parties who are eligible to file the same type of document. For instance, if you are filing an answering brief and another party is granted an extension for filing an answering brief, that extension also applies to you. But an extension to file one document does not extend the time to file a different document, even for the same party. For example, the grant of an extension for filing an answering brief does *not* extend the time for filing cross-exceptions by any party. An exception exists when a party is granted an extension for filing cross-exceptions: that party automatically receives the same extension for filing an answering brief, and therefore so do all other parties who are eligible to file cross-exceptions and/or answering briefs. See *P&M Cedar Products*, 282 NLRB 772 (1987).

Extensions also affect the due dates for responsive documents. An extension to file exceptions, for example, will affect the due date for answering briefs, which are due 14 days after the due date for the filing of exceptions, and the filing of replies, which are due 14 days after the due date for the filing of answering briefs.

3.4 Late Filings

(a) *Are there any allowances for late filings?*

A late document will be allowed if the other party's initiating document that began the time period for filing was served on the other parties in a slower manner than that utilized to file with the Board. Unlike some courts, however, the Board does not automatically allow an additional 3 days if the initiating document was filed by mail or was E-Filed.

The Board may also allow a late document under its excusable neglect rule.

Authority: Rule 102.2(b).

(b) How do I obtain permission to file a late document under the Board's excusable neglect rule?

File the late document along with a motion that states the grounds relied on for requesting permission to file untimely.

The specific facts relied on to support the motion must be set forth in an affidavit and sworn to by individuals with personal knowledge of the facts. *International Union of Elevator Constructors, Local No. 2 (Unitec Elevator Services Company)*, 337 NLRB 426 (2002). It would be prudent if the affidavit was submitted by someone with direct knowledge of the facts.

In determining whether neglect is excusable, the Board takes into account all relevant circumstances, including: any prejudice to the non-moving party; the length of the delay and its potential impact on judicial proceedings; the reason for the delay, including whether it was within the reasonable control of the movant; and whether the movant acted in good faith. The Board currently places the greatest weight on the reasons for the delay. In this regard, "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Id.* at 427. Thus, inattentiveness or carelessness, absent other circumstances or further explanation, will not excuse a late filing.

Authority: Rule 102.2(d).

3.5 Service on Other Parties, Statement of Service, and Proof of Service

(a) Am I required to serve my filings on other parties?

Yes. Documents must be served on all other parties in the same manner that they were filed with the Board, or faster, with the following exceptions.

- When filing with the Board is accomplished by e-filing, the other parties must be served by electronic mail (email), if possible. If a party to be served does not have the ability to receive electronic service, that party must be notified by telephone of the substance of the transmitted document and a copy of the document must be served by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission.
- When filing with the Board is accomplished by hand delivery, the other parties must be promptly notified by telephone and served in a manner designed to insure receipt by the close of the next business day (e.g., personal service, overnight delivery service or, with the permission of the party receiving the document, facsimile transmission).
- When filing with the Board is accomplished by facsimile transmission, the same method must be used to serve other parties whenever possible. The

consent of the party receiving the document must be obtained prior to service by facsimile transmission. When a party cannot be served by facsimile, or chooses not to accept service by facsimile, the party must be notified personally or by telephone of the filing and a copy of the document must be served by personal service or overnight delivery service.

- In addition, all filings in representation cases must be served on the Regional Director.
- Individual Charging Parties in unfair labor practice cases must always be served.

Authority: Rule 102.5 (f).

(b) Am I required to provide a statement of service and/or proof of service?

Yes. All filings must be accompanied by a statement of service on other parties. The statement of service must specify the name or title of all parties served, the date of service, and the means of service (i.e., hand delivery, private delivery service, regular mail, e-filing, or facsimile). In representation cases, service on the Regional Director should be reflected on the certificate of service.

It is also helpful if you include in your certificate of service the addresses of the parties you served and the date and manner that the document was transmitted to or filed with the Board.

Proof of service (e.g., return post office receipt or private delivery service receipt) will be required only if, subsequent to the receipt of the statement of service, a question is raised with respect to proper service.

Authority: Rule 102.5(f), (g), and (h).

3.6 Format and Length

(a) Does the Board require a specific format for filings?

Yes. Documents must be typed on 8 ½" by 11" plain white paper. Margins must be no less than 1" on all sides. Type should be no smaller than 12 point, in both text and footnotes. Documents should be double-spaced, except that quotations and footnotes may be single spaced. Briefs that exceed 20 pages must contain a subject index (or table of contents) with page references and an alphabetical table of cases and other authorities cited. There is no requirement for special binding.

The Executive Secretary's Office always assures that the document is within the page limit before accepting it. The Board has the discretion to reject any document that is not properly formatted. Its current policy, however, is to provide the non-complying party an opportunity to resubmit a correctly formatted document.

Authority: Rule 102.5(a).

(b) Are there limitations on the length of my filing?

Yes. Unless a request for additional pages is granted, all documents, except for reply briefs and *Reliant* (i.e., supplemental authority) submissions, discussed below, are limited to 50 pages. Parties are advised to start planning or outlining their briefs early because any request for additional pages must be received no later than 10 days (5 days, including weekends and holidays in representation cases) before the document is due. The Executive Secretary's Office always assures that the document is within the page limit before accepting it.

Reply briefs are limited to 10 pages and no additional pages will be allowed for them under any circumstances. *Reliant* submissions and responses to them are limited to 350 words, about 1 ½ pages.

Authority: Rules 102.5(b); 102.46(e) and (h); 102.67(h)(i)(1); *Reliant Energy*, 339 NLRB 66 (2003).

(c) How do I obtain permission to exceed the 50-page limit?

A motion requesting permission to exceed the page limitation must be filed with the Board not less than 10 days before the brief's due date (5 days, including Saturdays, Sundays, and holidays, for all documents filed in representation cases), and must set forth the reasons supporting the request.

The Board is reluctant to grant additional pages unless you demonstrate that you are briefing an extraordinary case based on the complexity, novelty, or national impact of the issues involved. That the case involves numerous issues may not be sufficient, but is considered. Likewise, the length of the Judge's, Regional Director's or Hearing Officer's decision and the number of days of hearing will be considered, but are not dispositive. The length of the briefs to the Judge, Regional Director, or Hearing Officer is usually given little weight because as the case progresses to the Board and the issues become more refined, it is assumed the briefs should become shorter, not longer.

Authority: Rule 102.5(b).

(d) Does the permission for additional pages obtained by one party automatically extend to another party?

No, you must file your own request, unless the original request was submitted on your, as well as the submitter's, behalf. It is assumed that not all parties have the same need for additional pages.

3.7 Case Information

(a) *How do I obtain information about the status of a case?*

You may call the Executive Secretary's Office when you desire to know the status of a case pending before the Board. The telephone number is (202) 273- 1940. Such a request is not a prohibited *ex parte* communication. Generally, however, the case status information provided by the Executive Secretary's Office is limited to the stage the case is in.

Given the volume and the varying complexity of the cases before the Board, the Executive Secretary's Office cannot predict processing times. If you have registered for E-Service (which is highly recommended), you will be notified by e-mail on the same day that the Board issues its decision. To sign up for E-Service, please see Section 3.8(e) below.

The Executive Secretary's Office will not reveal the panel assigned to a pending case or the votes of the Board members.

You may also obtain case status information, including whether any rulings or decisions have been issued and whether any motions or pleadings have been filed, on the Board's Internet website (<http://www.nlr.gov>).

3.8 The Board's Decision

(a) *Will the full Board decide my case?*

Not usually. To expedite case handling, the Board, pursuant to Section 3(b) of the Act, ordinarily decides cases through the use of five three-member panels with each Board Member acting as head of one panel. Each panel considers and decides the cases assigned to the member who is head of the panel. In some cases, the panel may direct that the case be discussed and decided by a full complement of the Board. A Board member, however, may participate in any case regardless of the panel assignment. Every Board member reviews every decision before it issues unless the Board member is recused in the case.

(b) *Will I have an opportunity for oral argument before the Board?*

Not usually. The Board rarely allows oral argument. Any request for oral argument should be filed when you file exceptions (or cross-exceptions).

The Board, however, has the discretion to hold oral argument at any time on any case or motion, and will provide an official Notice of Oral Argument when it so decides.

Authority: Rules 102.46(g) and 102.67(h).

(c) May the Board itself decide my case in the first instance rather having it ruled on by a Hearing Officer, Regional Director, or Administrative Law Judge?

In order to effectuate the purposes of the Act and to avoid unnecessary costs or delay, the Board on its own motion may transfer a case to itself, or any of its members, following issuance of a complaint, to hear and decide a case in place of an Administrative Law Judge. The Board has not exercised this prerogative in many years.

Under Rule 10.235(a)(9), parties may agree to waive a hearing and decision by the Administrative Law Judge and submit directly to the Office of the Executive Secretary a stipulation of facts, which if approved, provides the record based on which the Board will issue its decision. A statement of the issues presented may be set forth in the stipulation of facts, and each party may also submit a short statement (no more than three pages) of its position on the issues. If the Board approves the stipulation, the Board will set a time for the filing of briefs. In proceedings before the Board, answering briefs may be filed within 14 days, or such further period as the Board may allow, from the last date on which an initial brief may be filed. No further briefs may be filed except by special leave of the Board. Motions to waive a hearing and to issue a decision based on a stipulation of facts may also be filed with the Administrative Law Judge. This may in certain circumstances provide for a speedier resolution of the case than filing the motion with the Board.

Authority: Rule 102.35(a)(9).

(d) Can a party move the Board to expedite its decision?

The Rules do not prohibit such motions. The Board recognizes, however, that most parties feel their cases are special and warrant prompt attention. The Board is also well aware that labor disputes are disruptive to the work place, frequently divide the work force, and affect productivity and future planning. Pursuant to Section 10(m) of the Act, the Board must give priority to cases involving secondary boycotts, recognitional strikes, injunctions, and those alleging violations of Section 8(a)(3) and 8(b)(2) of the Act. In this regard, any of the parties may bring to the Office of the Executive Secretary information of this nature that might affect the Board's prioritization of the case.

(e) How will I be notified of the Board's decision?

The Board serves its "published" decisions on the parties in one of two ways. On the day the Board decision issues, an e-mail notification containing a link to the decision will be sent to those who have signed up for E-Service.

Enrollment in E-Service is voluntary, but strongly encouraged by the Board. To enroll, visit www.nlr.gov and click on “Sign up for E-Service” under the heading “Case Related Links” on the right-hand side of the web page. If you opt for E-Service, you agree that service of the decision is the date the Board sends you the e-mail notification that the decision has issued.

If you are not signed up for E-Service, you will receive a copy of the decision by mail. Representatives and attorneys are sent a copy of the decision by certified mail and regular mail. A party that has a representative or attorney will receive a copy by regular mail. A party that is unrepresented will receive a copy by both certified and regular mail.

In situations where a party has been represented by different counsels or representatives at various stages of the case, please be aware that the Board will serve its documents and decisions (E-Service or certified or regular mail) on the current representative of record. It is the responsibility of the party and any new counsel to notify the Office of the Executive Secretary of any change in counsel. Service will be made only to the party and the last attorney of record.

You will receive Board unpublished decisions by facsimile, electronic mail, or mail. Board decisions that, in the absence of exceptions, adopt the Judge’s decision are served on the parties and their representatives by E-Service, or regular and certified mail as noted above.

Authority: Rule 102.4 and Section 11(4) National Labor Relations Act.

(f) *What decisions does the Board publish in its bound volumes?*

The Board includes in its bound volumes decisions and orders on exceptions to Administrative Law Judges’ decisions. The Board does not usually include in its bound volumes decisions and orders in representation cases, orders remanding to an Administrative Law Judge, or orders ruling on requests for review, motions, interlocutory appeals or petitions to revoke subpoenas. Decisions and orders on motions for summary judgment are included in the Board’s slip opinions but not usually in the bound volumes. The Board has the discretion, however, to publish any of its decisions or orders.

Parties should be aware that a vacatur of a Board decision will be published. Vacaturs of Judges’ decisions are unpublished. Further, the Board is not responsible for the handling of vacaturs by commercial services like Westlaw. Thus, although a decision may be vacated, it may still be available for viewing by subscribers of commercial services.

Finally, vacated decisions that are based on a settlement retain their precedential value regarding the legal holding of the decision. They may continue to be cited by practitioners in this regard. See, e.g., *Caterpillar, Inc.*, 332 NLRB 1116 (2000).

(g) Can I move the Board to publish the decision in my case?

Motions to publish otherwise unpublished Board decisions or orders are permitted. Whether or not a Board decision, order, or ruling is included in the bound volumes is within the Board's sole discretion.

4. Representation Cases

4.1 Delegation

Most representation matters have been delegated to Regional Directors. Parties may raise issues with the Board by filing motions, requests for special permission to appeal, requests for review, or exceptions as provided by Section 102.60 through 102.71 of the Rules.

4.2 Motions and Requests

(a) When can I file a motion with the Board?

Motions, including motions to intervene, may be filed with the Board only when the case is pending before the Board or after it has been transferred to the Board. Earlier in the case, motions should be filed with either the Regional Director or the Hearing Officer. The failure to grant a motion may be appealed to the Board when the aggrieved party files a request for review disputing the Regional Director's determination of the appropriate unit, existence of a question concerning representation, direction of election, or dismissal of the petition.

Authority: Rule 102.65.

(b) Can I file a Motion to Intervene with the Board?

Motions to Intervene should be filed with the Regional Director prior to the pre-election hearing or with the Hearing Officer after the hearing has opened. If intervention has been granted over the other parties' objections, the other parties may appeal the decision as part of a request for review as noted in (a) above. Although there is no provision to appeal a denial of intervention directly to the Board, as the proposed intervenor has no status to file a request for review, it may appeal the denial to the Board in a request for special permission to appeal.

Authority: Rule 102.65(a - b).

4.3 Requests for Special Permission to Appeal

(a) When can I file a request for special permission to appeal a Hearing Officer's ruling?

Generally, rulings by the Hearing Officer should not be appealed directly to the Board, but instead should be challenged when the aggrieved party files a request for review disputing the Regional Director's determination of the appropriate unit, existence of a question concerning representation, direction of election, or dismissal of the petition. If the Board grants permission to appeal, it may proceed to rule on the merits of the appeal.

Authority: Rule 102.65(c); 102.78; 102.80(c).

(b) When should my request for special permission to appeal be filed?

The Rules say requests for special permission to appeal should be filed "promptly," but do not specify a definite time period.

Authority: Rules 102.65(c); 102.78; 102.80(c).

(c) Will my request for special permission to appeal stay the hearing or election?

No. The Board's Rules state that a request for special permission to appeal does not stay a hearing or an election.

Authority: Rule 102.65(c).

(d) What must I include in my request for special permission to appeal?

The request must include the reasons permission should be granted and the grounds relied on. The request must also include a certificate that the other parties and the Regional Director were served with the request.

Authority: Rules 102.65(c); 102.78; 102.80(c).

(e) Can other parties file a response to the request for special permission to appeal?

Yes. The response should be filed promptly and include a certificate reflecting service on the other parties and the Regional Director.

Authority: Rule 102.65(c).

4.4 Subpoenas

(a) *Can I appeal an adverse ruling by the Regional Director or the Hearing Officer on a subpoena?*

There is no provision in the Rules for such a filing directly to the Board. The aggrieved party may appeal the adverse ruling in its request for review disputing the Regional Director's determination of the appropriate unit, existence of a question concerning representation, direction of election, or dismissal of the petition.

Authority: Rule 102.66(f); *Marion Manor for the Aged and Infirm, Inc.*, 333 NLRB 1084 (2001); *Millsboro Nursing & Rehabilitation Center, Inc.*, 327 NLRB 879 (1999).

4.5 Pre-Hearing Dismissals Unrelated to Pending Unfair Labor Practices

(a) *How do I appeal the Regional Director's pre-hearing administrative dismissal of the petition?*

If the dismissal is unrelated to any pending unfair labor practice, file a request for review within 14 days of service of the notice of dismissal.

Authority: Rule 102.71.

(b) *What do I have to show for the Board to reverse the Regional Director?*

A request for review from the Regional Director's action may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
- (2) There are compelling reasons for reconsideration of an important Board rule or policy.
- (3) The request for review is accompanied by documentary evidence previously submitted to the Regional Director raising serious doubts as to the Regional Director's factual findings, thus indicating that there are factual issues which can best be resolved upon the basis of the record developed at a hearing.
- (4) The Regional Director's action is, on its face, arbitrary or capricious.
- (5) The petition raises issues which can best be resolved upon the basis of a record developed at a hearing.

Authority: Rule 102.71(a)(1)-(5).

4.6 Pre-Hearing Dismissals Based on Pending Unfair Labor Practice Charges

(a) What do I file if the pre-hearing dismissal is based on a merit finding in a related unfair labor practice case?

File a request for review within 14 days of service of the notice of dismissal.

Authority: Rule 102.71(b).

(b) What do I have to show for the Board to reverse the Regional Director?

You must include a complete statement of the facts and reasons upon which the request is based including at least one of the following:

- (1) The absence of, or departure from, officially reported Board precedent raises a substantial question of law or policy.
- (2) Existence of compelling reasons for reconsideration of an important Board rule or policy.
- (3) A demonstration that the Director's action is arbitrary or capricious on its face.

Authority: Rule 102.71(b).

4.7 Decisions to Hold the Processing of the Petition in Abeyance

(a) How do I appeal the Regional Director's decision to hold the processing of the petition in abeyance because of pending concurrent unresolved charges of unfair labor practices?

File a request for review within 14 days from service of the notification of the decision to hold processing of the petition in abeyance, and satisfy at least one of items 1, 2, or 4 of Section 4.5(b) above.

Authority: Rule 102.71(b).

4.8 Decisions to Continue Processing Petition Despite Pending Concurrent Unresolved Charges of Unfair Labor Practices

(a) How do I appeal the Regional Director's decision to continue to process the petition despite the existence of pending concurrent unresolved charges of unfair labor practices?

File a request for special permission to appeal as noted in 4.3 above.

4.9 Rehearing, Reopening of the Record, or Reconsideration of Regional Director's or Board Decision

(a) When must I file my motion for rehearing, reopening the record, or reconsideration?

Section 102.65(e)(2) of the Rules provides that a party shall file for reconsideration or rehearing within 14 days after service of a Regional Director's decision or report or after a Board decision or order. A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

(b) Can I receive an extension of time for the filing of my motion?

Yes. You can move the Board to grant an extension of time to file a motion for rehearing or reconsideration.

Authority: Rule 102.2(c).

(c) What must I demonstrate in my motion for rehearing, reopening the record or reconsideration?

All such motions must demonstrate that extraordinary circumstances require granting the motion. In addition, a motion for rehearing or to reopen the record must specify the error alleged to require a rehearing or hearing de novo; the prejudice to the movant resulting from the error; the additional evidence sought to be adduced; why it was not produced previously; and what result it would require if adduced and credited. Such a motion will be granted only if the evidence is either newly discovered, became available only after the close of the hearing, or in the Board's opinion should have been taken at the hearing. Newly discovered evidence is evidence in existence at the time of the hearing which could not be discovered at that time by the exercise of reasonable diligence. *Point Park University*, 344 NLRB 275, 276 (2005). A motion for reconsideration, in addition to extraordinary circumstances, shall state with particularity the material error claimed, and shall specify the page of the record relied on with respect to any finding of material fact.

Authority: Rule 102.65(e)(1).

(d) Can I move for reconsideration, rehearing, or reopening the record because I forgot to raise an issue, place a document in evidence, or call an important witness?

No. These do not constitute extraordinary circumstances. Further, Section 102.65(e)(1) of the Rules specifies that if the motion raises a matter that could have been but was not raised previously, it will not be entertained.

(e) Will the filing of any of these motions alone automatically stay further proceedings?

No. Filing of any of these motions will not stay the time for filing a request for review of a decision or exceptions to a report. Nor will they stay the effectiveness of any action taken or directed to be taken. However, if a motion states with particularity that the granting of the motion will affect the eligibility to vote of specific employees, their votes in any election will be challenged and impounded while the motion is pending. Further, the Regional Director has discretion, upon notice to the Board, to treat a request for review of a decision or exceptions to a report as a motion for reconsideration. The Regional Director in those circumstances may decide to stay certain further proceedings previously ordered.

Authority: Rule 102.65(e)(3).

4.10 The Regional Director's Pre-Election Decision or Order Following a Hearing.

(a) When may I appeal the Regional Director's Decision and Direction of Election or Order based on a record developed at a hearing?

A request for review may be filed at any time up to 14 days after a final disposition of the proceeding by a Regional Director. A final disposition occurs when the Regional Director dismisses the petition or issues a certification of representative or certification of election results.

Authority: Rule 102.67(c).

(b) Will the filing of a request for review stay the election?

No. The Regional Director will schedule and conclude the election even if a request for review has been filed and granted, unless ordered otherwise by the Board.

Authority: Rule 102.67(c).

(c) How will the filing of my request for review affect the eligibility of employees who are the subject of the request for review?

If the request for review is not ruled on, or if it is granted (but a decision on review remains pending), the ballots of those whose validity may be affected by the Board's decision will be segregated and all ballots will be impounded and remain unopened pending the decision. Therefore, when the prospective voters in dispute appear at the polls, they will be provided ballots and may vote, but their ballots will be challenged and placed in challenge envelopes.

Authority: Rule 102.67(a).

(d) What do I have to show to persuade the Board to grant my request for review?

You must demonstrate that there exists a compelling reason to grant review based on one or more of the following grounds:

- (1) The absence of, or departure from, officially reported Board precedent raises a substantial question of law or policy.
- (2) The decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) The conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) There are compelling reasons for reconsideration of an important Board rule or policy.

With respect to ground 2, and other grounds when appropriate, you must include a summary of all evidence or rulings bearing on the issue. You must also include a summary of the argument.

Authority: Rule 102.67(e).

(e) Can I presume that the Board will read the transcript of the hearing before ruling on my request for review?

No. The Rules require that any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. Parties filing a request for review should include with the filing a summary of the arguments, excerpts from the record, and page citations to the relevant portions of the record.

Authority: Rule 102.67(e).

(f) Can I raise an issue with the Board that I did not raise with the Regional Director?

No. You may not raise any issue or allege any facts not timely presented to the Regional Director.

Authority: Rule 102.67(e).

(g) Can another party file an opposition to a request for review? If so, when?

Yes. It must be filed within 7 days after the last day a request for review may be filed.

Note: If a party files a request for review prior to the final disposition of the case, the opposing party is not required to file an opposition until 21 days after final disposition (14 days to file request for review plus 7 days to file the opposition).

Authority: Rule 102.67(f).

(h) Will the Board wait for an opposition before deciding the request for review?

The Board may grant or deny the request for review at any time without awaiting a statement in opposition. If you intend to file an opposition to a request for review, it is a good practice to immediately notify the Office of the Executive Secretary so that it can let the Board know that an opposition will be coming.

Authority: Rule 102.67(f).

(i) What effect will my failure to file a request for review have on related unfair labor practice cases? What effect does a denial have?

The failure to file a request for review precludes the party from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was or could have been raised in the representation proceeding.

A denial of a request for review is an affirmation of the Regional Director's action which also precludes relitigation of any such issue in an unfair labor practice case.

Authority: Rule 102.67(g).

(j) Can I waive my right to a request for review?

Yes. If you plan to waive your right to file a request for review, then you should notify the Regional Director pursuant to Statement of Procedure 101.21(d).

(k) Can I withdraw my request for review?

Yes. Seek permission to withdraw from the Board any time prior to the issuance of the Board's decision. Serve the other parties and the Regional Director with your request.

Authority: Rule 102.67(h).

(l) What types of decisions will the Board issue?

The Board may deny review, issue an order granting review and rule on the merits of the issue(s) presented in the same document, or grant review without ruling on the issue(s).

(m) If the Board grants review without ruling on the merits of the issue(s) presented, can I file another brief?

Yes. All parties can file a brief on review within 14 days after issuance of the order granting review. These briefs may be a reproduction of the earlier brief requesting review and/or response to the request for review. You may not file responses to the briefs submitted following a grant of review.

Authority: Rule 102.67(h).

(n) Must a brief on review be a self-contained document?

No. After review is granted, the Board will consider the entire record in light of the grounds relied on in the request for review.

Authority: Rule 102.67(h).

(o) What is the record the Board relies on following a grant of review?

The record consists of the petition, notice of hearing with affidavit of service, statements of position, responses to statements of position, offers of proof made at the pre-election hearing, motions, rulings, orders, the stenographic record of the hearing, oral argument (if any) before the Regional Director, stipulations, exhibits, briefs or other legal memoranda submitted to the Regional Director or the Board, and the Regional Director's decision.

Authority: Rule 102.68.

(p) Can the Regional Director treat a brief on review as a request for reconsideration?

No. The Regional Director cannot reconsider the Director's decision following a grant of review. Pursuant to Rule 102.65(e)(1), however, the Regional Director may treat a request for review as a motion for reconsideration of the Director's decision prior to action by the Board.

(q) Can the party requesting review withdraw that request following the Board's grant of review?

Yes, with permission of the Board.

Authority: Rule 102.67(h).

4.11 Post Election Decisions and Filings

(a) What can I file when the Regional Director decides challenges and/or objections following an administrative investigation?

The type of document you can file and where you file is determined by the authority on which the election was conducted (Consent Election Agreement, Full Consent Election Agreement, Stipulated Election Agreement, or Decision & Direction of Election) and the manner by which post-election issues were resolved (administrative investigation or hearing). Use the following chart to determine the type of document to file and where it is to be filed.

| Resolution by Regional Director Without a Hearing | | |
|--|---|---|
| If Election Conducted Pursuant to... | Regional Director Issues... | Appeal by Filing with the Board |
| Consent or Full Consent Agreement <i>Rule 102.62(a) and (c)</i> | Decision <i>Rule 102.69(c)(1)(i)</i> | Not Appealable. Regional Director's Decision is final. <i>Rule 102.69(c)(2)</i> |
| Stipulated Agreement <i>Rule 102.62(b)</i> | Decision <i>Rule 102.69(c)(1)(i)</i> | Request for review due within 14 days from final disposition of proceeding by Regional Director. <i>Rules 102.67(c) and 102.69(c)(2)</i> |
| Decision and Direction of Election <i>Rule 102.67(b)</i> | Decision <i>Rule 102.69(c)(1)(i)</i> | Request for review due within 14 days from final disposition of proceeding by Regional Director. <i>Rules 102.67(c) and 102.69(c)(2)</i> |

(b) What can I file to appeal the Regional Director's decision to issue a Notice of Hearing on challenges and/or objections?

If the election was conducted pursuant to a consent election agreement, final consent election agreement, or decision and direction of election, the decision to issue a Notice of Hearing is final and not appealable. If the election was conducted

pursuant to a stipulated election agreement, you can challenge the decision to proceed to a hearing by filing a request for special permission to appeal promptly.

Authority: Rule 102.69.

(c) What must be shown to warrant a hearing?

If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, and the Regional Director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election and raise substantial and material factual issues, the Regional Director must issue a Notice of Hearing.

Authority: Rule 102.69(c)(1)(ii).

(d) What can I file to appeal a decision on challenges and/or objections that issues following a hearing?

The type of document you can file and where you file it is determined by the authority on which the election was conducted (Consent Election Agreement, Full Consent Election Agreement, Stipulated Election Agreement, or Decision & Direction of Election) and the instructions to the Hearing Officer in the notice of hearing. Use the following chart to determine the type of document to file and where to file it.

| Resolution by Hearing | | |
|--|--|--|
| If Election Conducted Pursuant to... | Hearing Officer will Issue... | Appeal by Filing |
| Consent or Full Consent Agreement <i>Rule 102.62(a) and (c)</i> | Report with Recommendations to the Regional Director. <i>Rule 102.69(c)(1)(iii)</i> | Exceptions to Hearing Officer's Report filed with the Regional Director within 14 days of issuance of Report. Rule 102.69(c)(1)(iii). Regional Director's Decision is final. <i>Rule 102.69(c)(2)</i> |

Chart continued on next page

Resolution by Hearing, cont.

| If Election Conducted Pursuant to... | Hearing Officer will Issue... | Appeal by Filing |
|---|--|---|
| <p>Stipulated Agreement <i>Rule 102.62(b)</i></p> | <p>Report with Recommendations to the Regional Director. <i>Rule 102.69(c)(1)(iii)</i></p> | <p>Exceptions to Hearing Officer's Report filed with the Regional Director within 14 days of issuance of Report. <i>Rule 102.69(c)(1)(iii)</i></p> <p>Regional Director will decide exceptions in supplemental decision. <i>Rule 102.69(c)(1)(iii)</i></p> <p>Party may file request for review with the Board within 14 days from final disposition of proceeding by Regional Director. <i>Rule 102.69(c)(2) and 102.67(c)</i></p> |
| <p>Decision and Direction of Election <i>Rule 102.67(b)</i></p> | <p>Report with Recommendations to the Regional Director. <i>Rule 102.69(c)(1)(iii)</i></p> | <p>Exceptions to Hearing Officer's Report filed with Regional Director within 14 days of issuance of Report. <i>Rule 102.69(c)(1)(iii)</i></p> <p>Regional Director will decide exceptions in supplemental decision. <i>Rule 102.69(c)(1)(iii)</i></p> <p>Party may file request for review with the Board within 14 days from final disposition of proceeding by Regional Director. <i>Rules 102.69(c)(2) and 102.67(c)</i></p> |

5. Unfair Labor Practice Cases

5.1 Pretrial Motions

After an unfair labor practice complaint has issued, parties may seek to avoid the necessity of a hearing by filing with the Board motions for default judgment, motions for summary judgment, or motions to dismiss the complaint.

(a) *What is a motion for default judgment?*

Following issuance of a complaint, but before a hearing has opened, the General Counsel may file with the Board a motion requesting that the Board dispense with a hearing and enter a default judgment on the grounds that the respondent has failed to file an answer to the complaint.

Upon receipt of the motion, the Board will issue a notice to show cause why the motion should not be granted, which will postpone any scheduled hearing indefinitely.

After a notice to show cause has issued, the respondent may file a response. The time for filing the response will be stated in the notice to show cause.

Absent good cause being shown for the failure to file a timely answer, the Board will generally find that the allegations of the complaint are true and grant the motion for default judgment.

Authority: Rule 102.24.

(b) *What are a motion for summary judgment and a motion to dismiss?*

Following the issuance of a complaint, but before a hearing has opened, any party may file with the Board a motion requesting that the Board dispense with a hearing and enter summary judgment on all or some of the allegations in the complaint. A respondent may also file with the Board a motion to dismiss or partially dismiss the complaint.

The General Counsel may move for summary judgment or partial summary judgment on the grounds that the answer admits or fails to adequately deny all or some of the material allegations in the complaint. The General Counsel may also file a motion for summary judgment on the grounds that the respondent is attempting to relitigate in an unfair labor practice proceeding issues that were or could have been litigated in a prior representation proceeding (known as a test-of-certification proceeding).

A respondent may move for dismissal or partial dismissal of the complaint on the ground that the facts in the complaint, even if true, do not constitute a violation of the Act.

Motions for summary judgment and motions for dismissal ordinarily must be filed no later than 28 days before the scheduled hearing date. However, if no hearing is scheduled or if the hearing is scheduled less than 28 days after the answer to the complaint is due, the motion must be filed “promptly.”

The Board may either deny the motion or issue a notice to show cause why the motion should not be granted. Generally, the motion will be denied if the Board determines that there are genuine issues of material fact warranting a hearing. If the Board issues a notice to show cause, it will normally postpone the hearing indefinitely. If the non-moving party wishes to argue that there are issues of fact and the hearing should not be postponed, it may file an opposition to the motion. The opposition must be filed no later than 21 days prior to the hearing.

Please note that the Board will routinely issue a notice to show cause in test-of-certification proceedings. However, the Board only issues notices to show cause in approximately 10 percent of other cases involving pre-trial motions.

After a notice to show cause has issued, any party may file a response. The time for filing the response will be stated in the notice to show cause.

In addition, the party moving for summary judgment or dismissal may file a reply to an opposition brief or a response filed by another party. Sur-reply briefs are generally not permitted, “except by special leave of the Board.” *Baker Electric*, 330 NLRB 521 fn. 4 (2000).

It is not necessary to attach affidavits or other documentary evidence to a motion for summary judgment or dismissal, or to an opposition, response, or reply.

After issuance of a notice to show cause, the Board will grant a motion for summary judgment or a motion to dismiss only where there are no genuine issues of material fact requiring a hearing and the moving party is clearly entitled to judgment as a matter of law.

Authority: Rule 102.24.

(c) How do I file a motion for summary judgment or a motion to dismiss?

If you wish the Board to consider a motion for summary judgment or a motion to dismiss, you must file it electronically, with a statement of service, with the Office of the Executive Secretary.

To expedite consideration of your motion, you should attach all documents that bear upon the motion, i.e., complaints, answers to complaints in unfair labor practice cases, and decisions on requests for review and decisions and certifications in representation cases.

Authority: Rule 102.24(a).

(d) What is the due date for the filing a motion for summary judgment or a motion to dismiss?

Generally, 28 days before the scheduled hearing. If a notice of hearing has not issued or if one has issued without a hearing date, you should file “promptly.” Be aware, however, that if you wait to file and a notice of hearing subsequently issues with a hearing date less than 28 days from service, you may be precluded from filing. You may also be able to file when less than 28 days remains before the hearing if the hearing date is less than 28 days from the date an answer to the complaint is due.

Authority: Rule 102.24 (b).

(e) Can I file a reply to an opposition to my motion or to a response to a notice to show cause even if the Rules do not provide for it?

A party that has filed a motion may file a reply to an opposition to its motion within 7 days of receipt of the opposition, but in the interest of administrative finality, further responses are not permitted except where there are special circumstances warranting leave to file such a response.

In *Baker Electric*, 330 NLRB 521 fn. 4 (2000), the Board decided to allow a reply to a response to a notice to show cause in a summary judgment case. The Board said it would follow the briefs allowed in Section 102.46 of the Rules, in which each party gets one response to a movant's document. Since then, the Board has accepted replies to oppositions and responses in all motion cases, petitions to quash subpoena cases, motions for reconsiderations, and special appeals cases.

Authority: Rule 102.24(c).

(f) Will the Board decide my motion for summary judgment or my motion to dismiss before the hearing opens?

The Board will make every effort to decide the motion prior to the opening of a hearing. For the purpose of trial preparation, however, you should always assume that the trial will open as scheduled.

5.2 Requests for Special Permission to Appeal

(a) How do I file a special appeal?

The Rules provide that adverse rulings of a Regional Director or an Administrative Law Judge shall not be appealed to the Board directly, except by special permission. Following the adverse ruling, the request for special permission, together with the appeal, should be filed “promptly.” The request should contain a brief statement of the reasons special permission to appeal should be granted and the grounds relied on for the appeal.

Statements in opposition to the request should be filed within 7 days of receipt of the appeal, and must be served simultaneously on the other parties and the ALJ. Filing of the request does not automatically stay continuation of the hearing or implementation of the ruling.

Authority: Rule 102.26.

(b) Can I request special permission to appeal the General Counsel's refusal to issue complaint?

No. Section 3(d) of the Act provides that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints" Further, the Supreme Court has declared that the General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

(c) If the Administrative Law Judge grants a motion to dismiss my entire case before the judge files a decision, should I file a request for special permission to appeal with the Board?

No. Instead, you should file a request for review with the Board within 28 days of the judge's order of dismissal.

File a request for special permission to appeal only if the judge dismisses part of the case over your objections.

Authority: Rule 102.27.

(d) How long will it take for the Board to rule on my request for special permission to appeal?

The Board will rule as soon as possible, but it may not rule before the hearing has been completed.

5.3 Subpoenas

(a) Can I obtain subpoenas to compel testimony or production of documentary evidence during the investigation of an unfair labor practice charge and prior to issuance of a complaint?

No. The Board will deny a charging party's and/or a respondent's subpoena request submitted prior to the issuance of a complaint. Only the General Counsel can utilize an investigative subpoena.

(b) How do I obtain subpoenas to compel testimony or production of documentary evidence after issuance of a complaint?

You may obtain such subpoenas by written application, which are returnable at a hearing. The parties may agree on an earlier return date for subpoenas duces tecum.

Specify the number and type requested, i.e., ad testificandum or duces tecum. Although you can apply for subpoenas to the Board through the Executive Secretary in Washington, D.C., you will find it more expeditious to apply to the Regional Director prior to a hearing or to the Administrative Law Judge after the hearing opens. You do not have to serve the other parties with the application. The application will be granted, as providing such subpoenas is considered a ministerial act involving no exercise of discretion.

Authority: Rule 102.31(a).

(c) How can I obtain enforcement of the subpoena if the person on whom I served it refuses to comply?

Section 102.31(d) provides that the General Counsel on behalf of the Board and “on relation of such private party,” will institute enforcement proceedings in the appropriate district court for enforcement. It is your responsibility, however, to prosecute enforcement thereafter. Before the General Counsel will institute enforcement proceedings, you may be required to demonstrate an undue hardship in obtaining substantially equivalent materials by other means.

Authority: *Marian Manor for the Aged and Infirm, Inc.*, 333 NLRB 1084 (2001).

(d) If I or my client has been served with a Board subpoena and do not intend to comply, should I file a request for special permission to appeal with the Board?

No. If you do not intend to comply, you should file a petition to revoke with either the Regional Director (if filed prior to the hearing) or with the Administrative Law Judge (if filed during the hearing). *Do not file the petition with the Board.* You must file the petition within 5 business days from the date you receive the subpoena. The Regional Director may either grant your petition, modify the subpoena in light of the issues raised in the petition, or oppose the petition.

If the Regional Director opposes the petition, the Director will forward your petition along with the Director’s opposition to the Board (if it involves a pre-complaint investigative subpoena) or to the Administrative Law Judge (if it involves a trial subpoena). If the Regional Director refers your petition to the Board, you may file a response with the Board to the Regional Director’s opposition. If the Regional Director refers your petition to an Administrative Law Judge and the Judge denies

your petition in whole or in part, you can challenge the Judge's decision by filing a request for special permission to appeal with the Board, pursuant to Rule 102.26.

Authority: Rule 102.31(b); Section 11(1) National Labor Relations Act.

(e) *What do I have to show to revoke the subpoena?*

You must show that the evidence subpoenaed does not relate to any matter under investigation; that the subpoena does not describe with sufficient particularity the evidence whose production is required; or "any other reason sufficient in law."

Authority: Rule 102.31; *Brink's Incorporated*, 281 NLRB 468 (1986); Federal Rules of Civil Procedure 26(b)(1) and (c) and 45(b).

(f) *Should I withdraw my petition to revoke the subpoena if the matter has been resolved?*

The Board encourages the parties to seek an amicable resolution of subpoena issues. If, after a petition to revoke has been referred to the Board the parties reach a resolution, the General Counsel or the subpoenaing party should notify the Board that the matter no longer needs to be decided. The parties should also rescind the subpoena or withdraw the petition to revoke.

5.4 Review of Administrative Law Judge's Decisions and Orders

(a) *How do I obtain review of an Administrative Law Judge's decision and order?*

After the close of the hearing and the submission of post-hearing briefs, the Administrative Law Judge issues a decision containing findings of fact, conclusions of law, and the reasons or basis therefore, together with a recommended order. The Administrative Law Judge files the decision with the Board and copies are served upon each of the parties along with an order transferring the matter to the Board. All motions, exceptions, or other documents submitted after the transfer must be filed with the Board in Washington, D.C.

- Filing Exceptions to the Decision of the Administrative Law Judge

Within 28 days from the date of service of the order transferring the case to the Board, any party may file exceptions to all or any part of the Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions.

Exceptions must identify:

- The questions of procedure, fact, law, or policy to which exception is taken.
- The part of the judge's decision to which exception is taken, citing page and line.
- The precise page citations to the parts of the official record (transcripts and exhibits) that are being relied upon.
- The grounds for each exception.

The Board may disregard any exception that does not meet these four criteria. Rule 102.46(a)(1).

- Briefs in Support of Exceptions

If a supporting brief is filed, the exceptions must not include any argument or the citation of authorities relied upon. If a supporting brief is not filed, however, the exceptions must include the supporting arguments and citation of authority. Rule 102.46(b)(2).

Please note: There is no page limit to the exceptions document unless you combine it with a brief in which case the combined document is limited to 50 pages, absent the grant of a request for additional pages. If you combine the exceptions and brief, the document should also include the citation of authorities. When the brief is a separate document, its limit is also 50 pages, absent the grant of additional pages. Rule 102.46(h).

If you file a separate brief, it should not contain any matter that is not within the scope of the exceptions, and it must contain the following, in order:

- A clear and concise statement of the case containing all that is material to consideration of the questions presented.
- The questions involved and to be argued "together with a reference to the specific exceptions to which they relate."
- Argument that clearly presents the points of fact and law relied on in support of the position taken with specific reference to the record.

The Board finds it helpful if you relate your numbered exceptions to the argument as well as the questions involved.

Exceptions that are not specifically urged are considered waived. Accordingly, you should be careful to take specific exception to any of the judge's rulings, findings of fact, conclusions of law, and recommended remedial provisions that you wish the Board to review. Rule 102.48(a).

(b) How can I participate in the ADR Program?

The Board created the ADR program to assist the parties in settling unfair labor practice cases pending before the Board on exceptions to decisions issued by an Administrative Law Judge. Participation in the program is voluntary, and a party who enters into settlement discussions under the program may withdraw its participation at any time. No party will be charged fees or expenses for using the program. The Board will provide the parties with an experienced neutral, to facilitate confidential settlement discussions to explore resolution options that serve the parties' interests. Where feasible, the settlement conferences will be held in person at the parties' location, but some conferences may be held telephonically or by video conference.

The parties may request participation in the ADR program by contacting the program director, the Executive Secretary. Deadlines for filing pleadings with the Board will be stayed effective the date that the case enters the ADR program. A request to participate in the program does not by itself stay the deadline. If the case is removed from the ADR program, the time period for filing will begin to run and will consist of the time period that remained when the case entered the ADR program. Notice will be provided to the parties of the date the case enters the ADR program and the date it is removed from the ADR program.

A case may remain in the ADR Program for 28 days from the first settlement meeting or until the parties reach a settlement, whichever occurs first. A request for extension of the stay beyond the 28 days will be granted only with the approval and in the discretion of both the neutral and the program director upon a showing that such an extension is supported by good cause.

Authority: Rule 102.45(c).

(c) What happens if no party files exceptions to the Administrative Law Judge's decision?

If no party files proper exceptions within the time period allowed by the Board, the findings, conclusions, and recommendations contained in the Judge's decision automatically become the decision and order of the Board and become its findings, conclusions, and order pursuant to Section 10(c) of the Act.

Authority: Rule 102.48(a).

(d) *In addition to exceptions and a brief in support of exceptions, what other documents can be filed after a judge's decision issues?*

In addition to exceptions and a brief in support of exceptions, you can file:

(1) Cross-exceptions and a brief in support of cross-exceptions.

Any party, who has not previously filed exceptions, may file cross-exceptions and a brief in support of cross-exceptions.

Cross-exceptions are due within 14 days from the last date on which exceptions and any supporting brief may be filed.

Cross-exceptions and supporting briefs are subject to the same requirements as exceptions and supporting briefs with regard to content, format, and length.

Authority: Rule 102.46(c).

(2) One answering brief to each party's exceptions or cross-exceptions.

(If two parties file exceptions, you should file two answering briefs.)

Answering briefs to exceptions are due within 14 days from the last date on which exceptions and any supporting brief may be filed.

Answering briefs to cross-exceptions are due within 14 days from the last date on which cross-exceptions and any supporting briefs may be filed.

Answering briefs must be limited to the issues raised in the other party's exceptions or cross-exceptions and supporting briefs, and must, with respect to each issue, clearly present the facts and points of law relied upon to support the position taken.

Authority: Rule 102.46(b) and (d).

(3) A reply brief to each party's answering brief

A reply brief, limited to 10 pages and only addressing issues raised in an answering brief to which it is replying, may be filed within 14 days of the date on which the answering brief is due. The due date for a reply brief may NOT be extended.

| |
|--|
| A responsive brief to a reply brief cannot be filed except by special leave of the Board. |
|--|

Authority: Rule 102.46(e).

(e) *Can I file my brief to the Judge, in whole or in part, with the Board?*

You may file with the Board the same brief you filed with the Judge. Generally, when a party refiles with the Board its brief to the Judge, the brief is filed as a brief in support of exceptions. The brief to the Judge when refiled with the Board, however, counts toward the page limit for briefs. Thus, if you do not obtain permission to file a brief in excess of the standard 50 pages and your brief to the Judge that you are submitting to the Board exceeds 50 pages, it will be rejected. If you file a brief in which you incorporate by reference your brief to the Judge, the pages for both will be counted toward the page limit.

Although you may file an exact copy of the brief you submitted to Judge with a cover letter indicating you are submitting it to the Board, such copies will often contain extraneous material, e.g., argument on issues with which the Judge subsequently agreed. Therefore, the better practice is to change the title and make other appropriate changes (e.g., delete portions in which you prevailed before the Judge) and reprint it for submission to the Board. Such changes are critical if the brief is submitted as an answering brief or reply brief, both of which are limited to issues raised in the brief to which you are responding.

| |
|---|
| <p>The Board will not review a brief submitted to the judge unless the party refiles the brief with the Board.</p> |
|---|

(f) *Can I adopt another party's brief?*

Yes. However, if the adoption is accompanied by your own argument or brief, the pages of both briefs will be counted toward the page limit. For example, if you file a 10 page brief with respect to one or two issues and you adopt another party's 50-page brief with regard to other issues and you have not obtained permission for additional pages, it will be rejected because you have exceeded the page limit.

(g) *Can I file attachments to my briefs?*

It depends. Generally, if the document you attach is not part of the record, the Board will disregard it and, upon the filing of a motion to strike, it will be rejected. Affidavits and documentary evidence, for example, which are not part of the record will be rejected. Charts that the filer constructs may be allowed, but, if they contain argument or are intimately connected to arguments in the brief, they may be counted toward the page limit for argument. If the total exceeds the page limit, the entire brief with attachments will be rejected. There is no prohibition to attaching exhibits already in evidence, but it is unnecessary.

(h) *Must my cross-exceptions be related to exceptions filed by the other parties?*

No. In fact, the purpose of the provision for filing cross-exceptions contemplates that they be unrelated.

(i) *Can I combine the briefs I want to file?*

Generally, no. Section 102.46(h) of the Rules states that any brief filed as part of the briefing schedule precipitated by an Administrative Law Judge's decision must not be combined with any other brief. Therefore, do not combine answering briefs and reply briefs, answering briefs that respond to exceptions filed by two other parties, or reply briefs that respond to answering briefs filed by two other parties. The prohibition against combining briefs assures that parties do not devote more than the allowable pages to one brief. Further, the prohibition assures that the Board can determine which briefs and legal arguments are being addressed.

Notwithstanding the prohibition in Section 102.46(h) of the Rules, the Executive Secretary's Office has allowed combining of briefs where subject headings in the brief make clear which briefs and arguments of the opposing parties are being addressed and the brief does not exceed the number of pages allowed to address each brief.

(j) *What do I file to correct errors in the transcript?*

The best procedure is to file such requests with the Administrative Law Judge before the Judge issues the decision. If you do not notice the errors until after the case has been transferred to the Board, file a motion with the Board identifying the mistakes and indicating the pages and lines of the transcript where they are found, and how they should be corrected. As with all filings, be sure to serve this motion on the other parties. Upon receipt of your motion, the Executive Secretary's Office will invite the parties to provide a position on the alleged errors with a due date for a response. If no opposition is filed by the due date, the record is corrected as requested.

(k) *How do I file an amicus brief?*

At this time, there are no Board Rules on the filing of amicus briefs. The Board, however, generally allows them in most circumstances. Indeed, sometimes the Board solicits amicus briefs. Unless amicus briefs are solicited, those seeking amicus status should file a motion. The Board will consider the motion unless it was filed after the Board made its decision and the case is in the issuance process. Accordingly, waiting to file the motion may result in rejection on timeliness grounds. The best practice is to file the amicus brief with the motion early after the case has been transferred to the Board.

A motion seeking to file an amicus brief must state the bases of the movant's interest in the case and why the brief will be of benefit to the Board in deciding the matters at issue. The motion should be accompanied by the proposed amicus brief, and must comply with the service and form requirements set forth in §102.5. The brief may be no more than 25 pages in length.

The parties are often allowed to file replies which may be noted in the Order granting amicus status.

The Board may direct the Executive Secretary to solicit amicus briefs. The Executive Secretary's invitation to file amicus briefs will specify the due date and page length for the briefs, and a deadline for the parties to file answering briefs.

(l) *If I am not a charging party, respondent, or amicus, can I intervene in a Board proceeding?*

Except for intervention in cases seeking an advisory opinion or declaratory order, the Rules do not contemplate filing a request for intervention directly with the Board. Rules 102.29 and 102.65(b) discuss seeking intervention with the Regional Director and the Administrative Law Judge, and such matters should be resolved when the case is before them, rather than in the later stages when the case is before the Board. On occasion when special circumstances arise, the Board has granted intervention requests to permit the filing of exceptions by an interested party. The Board has discretion to grant intervention in special cases to such an extent and upon such terms as it deems proper.

(m) *In addition to the exceptions and briefs, what does the Board review and consider in making its decision?*

Rule 102.48(b) specifies that the Board decides unfair labor practice matters based on the record. Rule 102.45(b) states that the record comprises the charge and amended charge, complaint and amended complaint, notice of hearing, answers and amended answers to the complaint, motions, rulings and orders of the judge or the Board, the transcript of the hearing, stipulations, exhibits, documentary evidence, depositions, the judge's decision and the parties' exceptions, cross-exceptions, answering briefs, and reply briefs.

Briefs to the Judge are not part of the record. Also, rulings on petitions to revoke subpoenas become part of the record only upon request of the party aggrieved by the ruling.

The Board does not contact or discuss the case with the General Counsel, counsel for the General Counsel, or any Administrative Law Judge.

(n) *How do I bring the Board's attention to a matter after the briefing schedule has closed?*

Under Rule 102.6, a party can call the Board's attention to "pertinent and significant authorities" that "come to a party's attention after the party's brief has been filed." (This is more commonly referred to as a *Reliant* submission). This is accomplished usually through a letter setting forth the case citations, pages and lines in the brief where the citations belong, and the bases of their relevance. The body of the letter must not exceed 350 words (approximately 1½ pages). The case allows the other

parties to file an equally short reply within 14 days of service of the letter in unfair labor practice cases and 7 days in representation cases. No extension of time is permitted to file a response.

Authority: Rule 102.6.

5.5 Motions for Reconsideration, Rehearing, or Reopening the Record

(a) *How do I request a rehearing, reopening of the record, or reconsideration of a Board decision?*

Rule 102.48(c) provides that, in extraordinary circumstances, a party may move for reconsideration, rehearing, or reopening of the record after a Board decision or order.

A motion to reopen the record must briefly state the evidence sought to be adduced, why it was not produced previously, and explain why the evidence would lead to a different result if adduced and credited. Such a motion will be granted only if the evidence is either newly discovered, or became available only after the close of the hearing. Newly discovered evidence is evidence in existence at the time of the hearing which could not be discovered at that time by the exercise of reasonable diligence. *Point Park University*, 344 NLRB 275, 276 (2005).

Motions allowed under this rule must be filed within 28 days after service of the Board's decision or order, unless the Board allows additional time. A motion for leave to adduce additional evidence will be timely, even if filed after the end of the 28-day period, if it is filed promptly after the evidence is discovered.

Authority: Rule 102.48(c).

(b) *How do I request that the Board clarify its decision?*

Motions for clarification are most appropriate if you suspect that an omission or error in an uncontested fact or conclusion was inadvertent. The Board can modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it provided that "reasonable notice" is provided and the record has not been filed in a court of appeals.

Authority: Section 10(d), National Labor Relations Act; Rule 102.49.

(c) *If I lost my case before a Board panel, can I request consideration by the full Board?*

There is no rule prohibiting such requests, but they are rarely granted. These types of motions often are filed by a losing party in a case in which the panel split 2-1. The movant presumes that the other two members, if given the opportunity to

participate, will take the minority view changing it into a majority. You should be aware, however, that before any published case issues the non-participating members review the decision. During that review, they have the opportunity to join the panel. Accordingly, any assumption that the non-participants were not aware of the decision or were precluded from participating is erroneous.

5.6 Court Review of Board Decisions

(a) *Can I obtain court review of the Board's decision?*

Any person aggrieved by a final order issued by the Board may petition a United States court of appeals for review of the order. No time limitations have been set within which review or enforcement must be sought. A petition for review may be filed in the United States court of appeals for the circuit in which the unfair labor practices allegedly occurred, or in which the parties reside or conduct business, or in the District of Columbia Circuit. Review petitions may be filed by a respondent, a charging party, or any other person who is aggrieved, including, for example, an alleged discriminatee.

Authority: Section 10(f), National Labor Relations Act.

(b) *Can I obtain a stay of the Board's decision until I file a request for reconsideration with the Board or a request for review with a United States court of appeals?*

No. Rule 102.48(c)(3) clearly states that a request for reconsideration "shall not operate to stay the effectiveness of the action of the Board unless so ordered."

With respect to a stay sought pending a request for review, Board orders are not self-enforcing. A respondent cannot be compelled to take affirmative action required by a Board order until the order is enforced by a court of appeals. If the stay is sought to avoid accruing additional liability pending review, either for engaging in additional conduct in violation of the Board's order or for failing to provide benefits or backpay currently accruing under the order, an application for review affords no basis for granting a stay. A respondent that fails to comply with a Board order pending court review acts at its peril and assumes the risk that liability will continue to accrue. A contrary result would prejudice innocent employees while benefiting the violator of the Act. See *Maywood Do-nut Co., Inc.*, 256 NLRB 507 (1981).

(c) *What happens if a court of appeals remands a case to the Board?*

After the court of appeals issues a formal notice of decision remanding the case to the Board, the General Counsel will recommend to the Board whether it should accept the remand or seek certiorari before the Supreme Court. Most often, the Board decides to accept the remand. The Board panel to which the case was

originally assigned will then decide whether to accept the decision of the court as the law of that case, issue another decision based solely on the issues the court remanded without the benefit of additional briefs by the parties, or solicit additional briefs on the remanded issues. Occasionally, the Board may remand the matter to an Administrative Law Judge for further hearing and/or supplemental decision. The Executive Secretary issues a letter to the parties advising them of the Board's decision on the remand and whether briefs will be entertained and their due date. Usually, if the Board asks for briefs on the remanded issue, it does not allow answering briefs.

6. Settlements

(a) *Can I settle my case after the Administrative Law Judge has issued a decision and the case has been transferred to the Board?*

Yes. You should contact the Regional Compliance Officer if you desire to settle. You may also want to consider participating in the Board's ADR program.

(b) *What must I file if a case pending before the Board has settled?*

Except for formal settlements that provide for a Board Order and court judgment, the Board does not approve settlements or approve withdrawals. It prefers to remand the case to the Regional Director for approval of settlements and withdrawals. Thus, the best procedure is to file a motion for remand.

Although the Board generally will not approve the settlement, this is not to say that the settlement and its terms are irrelevant. Indeed, the movant must disclose the terms of the settlement to the Board. Merely stating that the case has settled is insufficient. If the settlement is written, a copy should be submitted with the motion.

In reviewing the parties' motion to remand based on a settlement, the Board balances public policy concerns with the wishes of the parties. To do so, the Board will analyze all the surrounding circumstances, including, but not limited to: 1) whether the charging party, the respondent, and individual discriminatees have agreed to be bound, and whether the General Counsel agrees with the settlement; 2) whether the settlement is reasonable in light of the nature of the alleged violations, the risks of continued litigation, and the stage of litigation; 3) whether the settlement was obtained through fraud, coercion, or duress by any of the parties; and 4) whether the respondent has a history of violating the Act or breaching previous settlements. See *Independent Stave*, 287 NLRB 740, 744 (1987).

The Board does not require that pending exceptions be withdrawn, but the parties may want to do so as an indication of their good faith (subject to reinstatement if

the motion for remand is denied). Even if the settlement satisfies the *Independent Stave* criteria, the Board may refuse to remand the case because it deems that a public policy outweighs the wishes of the parties. See *Flyte Time*, 362 NLRB No. 46 (2015) (Board denied motion to remand finding that approval of the settlement would not effectuate policies of the Act).

(c) *Can I settle my case after the Board has issued a decision?*

Yes, with qualifications. Before issuing a complaint, the General Counsel can settle cases in a manner that the General Counsel determines will best effectuate the Act in the circumstances of the case. After a case is transferred to the Board, those determinations rest with the Board. The optimal time to settle is early in the process. Except in circumstances where circuit court precedent indicates significant risk in court enforcement of the Board's decision, a respondent's influence in obtaining a post-Board Order settlement is substantially diminished. After the Board Order issues, the Regional Director serves as an agent of the Board in effecting compliance with the Board Order. Generally, unless there are certain financial exigencies which indicate full compliance is not immediately possible, or changed circumstances, the Regional Director will expect a respondent to comply fully with the Board's Order. Although the Regional Director will assess all settlement overtures, the Director usually will not delay seeking enforcement of the Board Order, which if obtained further diminishes the position of a respondent in settlement discussions.

Even when the respondent has demonstrated special circumstances that may warrant some remedial modifications, the respondent, as a condition for a settlement, may be required to agree to a formal compliance stipulation, consent to court enforcement, and/or provide security collateral.

The Board will entertain post-Board Order requests from a prevailing charging party that desires to immediately settle for less than full compliance rather than await the resolution of compliance issues through litigation.

(d) *Will the Board vacate a judge's or Board decision as part of a settlement?*

The Board rarely agrees to vacate either a judge's decision or one of its own decisions as part of a settlement. Parties must demonstrate that extraordinary circumstances warrant vacating the decision. The few times the Board has done so involved settlements of numerous and complex unfair labor practice cases pending in various stages, and the "global" settlement saved the Board and the parties extensive time and costs involved in continued litigation.

Vacatur of a Board decision will be published. Vacaturs of judges' decisions are unpublished. Further, the Board is not responsible for the handling of vacaturs by services like Westlaw. Although a decision may be vacated, it may still be available for viewing by subscribers of the service.

Finally, decisions that are vacated pursuant to a settlement retain their precedential value regarding the legal holding of the decision. They may continue to be cited by practitioners in this regard. See, e.g., *Caterpillar, Inc.*, 332 NLRB 1116 (2000).

7. Compliance Proceedings

(a) How do I obtain review of a Regional Director's compliance determination?

As noted above, after the Board Order issues, the Regional Director serves as an agent of the Board in effecting compliance with the Order. During the compliance investigation, the Regional Compliance Officer will have numerous discussions with the charging party(ies) and the respondent regarding satisfaction of the affirmative provisions of the Board's Order. The Compliance Officer will share the Officer's conclusions regarding the backpay period interim earnings, and backpay and benefit amounts that will satisfy the Board's Order.

When a charging party disputes the Region's determination of what constitutes compliance with the Board's Order, the charging party has a right to request a written determination by the Regional Director of compliance requirements. Within 14 days of the issuance of the written compliance determination, the charging party may file an appeal with the General Counsel in Washington D.C. Should the General Counsel deny the appeal of a compliance determination, the charging party may file a request for review with the Board within 14 days. Only the charging party can file the appeal with the General Counsel and the request for review with the Board.

Should the respondent contest the compliance requirements determined by the Region, the Regional Director will issue a compliance specification and notice of hearing before an Administrative Law Judge.

Authority: Rules 102.52 – 102.54.

(b) How do I obtain review of an Administrative Law Judge's decision on a compliance matter?

A party that is aggrieved by an Administrative Law Judge's decision on a compliance matter may file exceptions with the Board. Such exceptions are due within 28 days of the Judge's decision. Answering briefs and reply briefs are also allowed.

Authority: Rule 102.46.

8. Advisory Opinions and Declaratory Orders

(a) *Does the Board provide advisory opinions?*

Yes, but only in response to a petition from an agency or court of any State or Territory regarding whether the Board would assert jurisdiction over the parties in a labor dispute pending before the agency or court. In that circumstance, the agency or court may file a petition with the Board for an advisory opinion as to whether the Board would decline to assert jurisdiction based either on its commerce standards or because the employer is not within the jurisdiction of the Act. The Board will only accept such petitions if filed by the agency or the court itself. A private party may not file a petition for an advisory opinion.

Authority: Rules 102.98 – 102.104.

(b) *Does the Board provide declaratory orders?*

Yes. Where both an unfair labor practice charge and a representation petition relating to the same employer are pending in a regional office, and the General Counsel is in doubt over whether the Board would assert jurisdiction over the employer involved, the General Counsel may petition the Board and obtain a declaratory order concerning whether, under its discretionary jurisdictional standards, the Board would assert jurisdiction over the employer's operations.

If the General Counsel files a petition for declaratory order regarding discretionary jurisdiction in a matter pending before the Agency, any persons may request intervention by filing with the Board a written motion stating their interest in the petition.

Authority: Rules 102.105 - 102.109.

9. Prohibited *Ex Parte* Communications

(a) *What is a prohibited ex parte communication?*

An "*ex parte* communication" is an oral or written communication relevant to the merits of an Agency proceeding that is not on the public record and with respect to which reasonable prior notice to all parties is not given. With certain limited exceptions, such private, off-the-record communications by interested persons in an Agency proceeding to any Agency official or employee who may reasonably be expected to participate in the decision in the proceeding is prohibited.

Specific examples of prohibited *ex parte* communications are set forth in Section 102.129 of the Board's Rules. These include, but are not limited to, communications by an interested party in an unfair labor practice case to an

administrative law judge assigned to hear the case or to the Board Members and/or their legal assistants relevant to the merits of the case. Examples of ex parte communications that are not prohibited are set forth at Section 102.130 of the Rules. These include, among other things, requests for information solely with respect to the status of a proceeding and communications proposing settlement or an agreement for disposition of any issues in the proceeding.

Authority: Rules 102.126 – 102.131.

(b) *How does the Board enforce prohibitions on ex parte communications?*

Any Agency official or employee who receives a prohibited communication is required to place the communication in the public record, if it was written, or to place a memorandum stating the substance of the communication in the public record, if it was oral. The Agency will then serve copies on all parties to the proceeding. Within 14 days after service, any party may file a statement admitting or denying any facts or contentions contained in the prohibited communication.

The Agency may also issue a notice to show cause why penalties should not be imposed on a party who knowingly makes a prohibited communication or knowingly causes a prohibited communication to be made. Penalties may include dismissal of the party's claim or interest in the proceeding, censure, or suspension or revocation of the privilege to practice before the Agency.

Authority: Rules 102.132; 102.133.

(c) *How do I report a prohibited ex parte communication?*

The Rules do not specify any means by which private parties should report prohibited communications. However, as discussed in greater detail in Section 10 of this Guide, allegations that an attorney or other representative appearing or practicing before the Agency has engaged in misconduct, including knowingly making or causing to be made a prohibited ex parte communication, may be brought to the attention of the Associate General Counsel in the Division of Operations-Management by any person.

10. Misconduct by an Attorney or Other Representative

(a) *How do I report misconduct of an attorney or representative in a Board proceeding and what action will the Board take after receiving my report?*

Any attorney or other representative appearing or practicing before the Agency is required to conform to the standards of ethical and professional conduct required of practitioners before the courts. Misconduct by an attorney or other representative at any stage of any Agency proceeding may be grounds for discipline.

Allegations that an attorney or other representative has engaged in misconduct may be brought to the attention of the Associate General Counsel in the Division of Operations-Management by any person.

For further information, see Rule 102.177.

Authority: Rule 102.177; *In re: Kirk Caraway*, 347 NLRB 884 (2006); *In re: James Simpson*, 347 NLRB 883 (2006); *In re: Stuart Bochner*, 322 NLRB 1096 (1997).

11. Equal Access to Justice Act (EAJA) Filings

(a) How do I know if I am eligible for an award of fees and expenses under EAJA?

You are eligible if you were a respondent in an adversary adjudication (unfair labor practice or backpay proceeding), you prevailed in a significant and discrete substantive portion of the proceeding, the General Counsel's position in the proceeding was not substantially justified, and your net worth or the number of employees you employ does not exceed certain thresholds:

- Individuals are eligible if their net worth does not exceed \$2 million.
- Other applicants are eligible if their net worth does not exceed \$7 million and they do not employ more than 500 employees.
- There is no net worth limit for charitable and other tax exempt organizations or cooperative associations, but they may not employ more than 500 employees.

Net worth and number of employees is determined as of the date of the complaint in an unfair labor practice proceeding or the date of the notice of hearing in a backpay proceeding. Net worth and the number of employees of the applicant and all its affiliates will be aggregated.

The application must be filed within 30 days "after entry of the Board's final order." Thus, the 30-day period begins to run on the date of the order, not the service or issuance date.

Authority: Rules 102.143; 102.144.

(b) How do I apply for an award of fees and expenses?

File with the Board an application that includes the following:

- (1) The identity of the applicant and the adversary adjudication.
- (2) A statement of the particulars in which you prevailed, and a description of the positions of the General Counsel that you allege were not substantially justified.

- (3) A statement of the number, category, and work location of your employees and those of each of your affiliates (unless applicant is an individual).
- (4) A brief description of the type and purpose of your business.
- (5) A statement that you did not exceed the standards for net worth and number of employees.
- (6) A statement of the amount of fees and expenses for which an award is sought.
- (7) Your signature or the signature of your attorney or agent, including a signed written verification under oath or under penalty of perjury that the information in the application is true.
- (8) A detailed exhibit showing your net worth and that of your affiliates that fully discloses all assets and liabilities.
- (9) An exhibit fully documenting the fees and expenses you are seeking, including separate itemized statements for each professional firm or individual whose services are covered by the application showing the dates of services, hours spent in connection with the proceeding by each, a description of specific services performed, the rates at which the fees were computed and the total amounts claimed and paid.
- (10) A certificate of service indicating that you served all parties with the application.

Authority: Rule 102.147.

(c) *How is my application processed?*

Upon the filing of the application, the Board refers it to the Administrative Law Judge who heard the adversary adjudication upon which the application is based. After the application is referred, file all documents and/or motions with the Judge, not the Board. Generally, the Judge will issue a decision based on the record. A hearing usually is not conducted. The Judge's decision on the application, including the Judge's decision to grant a motion to dismiss filed by the General Counsel, is appealable to the Board. Parties may also file requests for special permission to appeal with the Board concerning any interim ruling by the Judge.

Authority: Rule 102.148(b).

(d) *Is my net worth exhibit disclosable to the public?*

Yes. The net worth exhibit is part of the public record. If you object to the disclosure of the exhibit or any part of it, submit the exhibit or that portion in a sealed envelope labeled "Confidential Financial Information" accompanied by a motion to withhold the information from the public, which should include a description of the information sought to be withheld and a detailed explanation why

public disclosure will adversely affect the applicant and is not required in the public interest. Serve the motion on all parties.

Authority: Rule 102.147(g)(1).

(e) *If I file a motion to withhold disclosure of the net worth exhibit, must I serve the exhibit on all parties?*

No. You must serve the exhibit on the General Counsel, but you do not have to serve it on the other parties.

Authority: Rule 102.147(g)(1).

(f) *If the Judge grants my motion, can I assume the net worth exhibit will never be disclosed?*

No, it may be disclosed if required at a hearing on the application. Also, the Judge's decision granting the motion is not determinative regarding requests under the Freedom of Information Act when requested under the provisions of Section 102.117 of the Board's Rules. Finally, the General Counsel may disclose the information to others if required in the course of an investigation to verify the claim of eligibility.

Authority: Rule 102.147(g)(2).

(g) *Can I file a motion to withhold disclosure of my exhibit documenting the fees and expenses?*

No. The Rules do not provide for such a motion. The exhibit documenting fees and expenses is part of the public record.

(h) *Can I obtain an extension to file the application?*

No. The Board does not have authority to change EAJA's statutory deadlines.

Authority: Rule 102.111(b)(2).

(i) *Is there a limitation on the fees I may claim?*

Yes. An award for attorney or agent fees may not exceed \$75 per hour, but any person may file a petition with the Board for rulemaking to increase this rate. The petition should specify the rate the petitioner believes should be established and fully explain why the higher rate is warranted by the increase in the cost of living or a special factor.

Authority: Rules 102.145; 102.146.

(j) Will the Board decide my petition for fees before the judge issues a decision on my application?

No. The petition for fees is held by the Board's Office of the Executive Secretary until exceptions to the judge's decision are filed. If the judge dismisses the application and no exceptions are filed, or if the Board rules against the award of fees and expenses, the petition will be deemed moot.

(k) What can be filed with the Board following issuance of the judge's decision on my application?

Parties may file the briefs allowed following a judge's decision in an unfair labor practice case outlined in Section 102.46 of the Rules. These include exceptions and briefs in support, briefs in support of the judge's decision, cross-exceptions and briefs in support, answering briefs, and reply briefs.

APPENDIX A

CHECKLIST FOR PREPARATION OF EXCEPTIONS, CROSS-EXCEPTIONS, AND BRIEFS IN UNFAIR LABOR PRACTICE CASES

I. EXCEPTIONS, CROSS-EXCEPTIONS, AND SUPPORTING BRIEFS

A. TIME REQUIREMENTS

- 1. Exceptions and Supporting Briefs:** Due 28 days from the date of service of the order transferring the case to the Board. (The service date of the Transfer Order is the date it was placed in the mail or the date an e-mail was sent to you with a link to the Transfer Order.) The due date will appear in the “Note” at the bottom of the Transfer Order.

Authority: Rule 102.46(a).

- 2. Cross-Exceptions and Supporting Briefs:** Due 14 days from the last date on which exceptions and any supporting brief may be filed.

Authority: Rule 102.46(c).

B. REQUESTS FOR EXTENSIONS OF TIME

Due dates for exceptions and supporting briefs, cross-exceptions and supporting briefs, and answering briefs may be extended for a reasonable period with permission of the Board requested no later than the due date. Extension requests filed within 3 days of the due date must be grounded on circumstances not reasonably foreseeable in advance.

Authority: Rule 102.2(c).

C. CONTENTS

- 1. Exceptions and Cross-Exceptions:** Each exception and cross-exception must specifically set forth:
 - a. The questions of procedure, fact, law or policy to which exception is taken.
 - b. The part of the judge’s decision to which exception is taken, citing page and line.
 - c. The precise page citations to the parts of the official record (transcripts and exhibits) that are being relied upon.
 - d. The grounds for each exception.

Note: If no supporting brief is filed, each exception must also include the citation of authorities relied upon and the argument in support of the exception. If a supporting brief is filed, the exceptions cannot include any argument or the citation of authorities relied upon.

Authority: Rule 102.46(a)(1).

2. Briefs in Support of Exceptions and Cross-Exceptions: A brief filed in support of exceptions or cross-exceptions must not contain any matter that is not within the scope of the exceptions, and it must contain, in order, the following:

- a. A clear and concise statement of the case containing all that is material to consideration of the questions presented.
- b. The questions involved and to be argued “together with a reference to the specific exceptions to which they relate.”
- c. Argument that clearly presents the points of fact and law relied on in support of the position taken with specific reference to the record.

Any brief exceeding 20 pages must also include a subject index with page references and an alphabetical table of cases and other authorities cited.

Authority: Rule 102.46(a)(2).

D. LENGTH: Briefs are limited to 50 pages (not including the subject index and table of cases and other authorities), unless a request for additional pages is granted. Any request for additional pages must be received no later than 10 days before the due date. There is no page limit to the exceptions document unless it is combined with a brief, in which situation the combined document is limited to 50 pages.

Authority: Rule 102.46(a)(1).

E. FORMAT

- 1. Paper Size:** 8 ½” by 11”.
- 2. Margins:** No less than 1” on all sides.
- 3. Line Spacing:** Double, except that quotations and footnotes may be single spaced.
- 4. Type:** No smaller than 12 characters per inch (elite or the equivalent), including footnotes.
- 5. Binding:** No special requirements.

Authority: Rule 102.5(a); Rule 102.46(j) and 102.114(f).

F. HOW TO FILE: Unless otherwise stated, E-Filing via the Agency's website (www.nlr.gov). Documents that are more than 20 MB in size may not be E-Filed.

Authority: Rule 102.5(c).

G. WHERE TO FILE: Documents, except those that are E-Filed, should be filed with the Board's Executive Secretary at the address set forth below:

Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

II. SERVICE ON OTHER PARTIES

A. Methods of Service: Filings must be served on all other parties in the same manner that the document was filed with the Board, or in a more expeditious manner, with the following exceptions.

1. **E-Filing:** When filing with the Board is accomplished by e-filing, the other parties must be served by electronic mail (e-mail), if possible. If the other parties do not have the ability to receive electronic service, they must be notified by telephone of the substance of the document and a copy of the document must be served by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission.
2. **Facsimile:** When filing with the Board is accomplished by facsimile transmission, the same method must be used to serve other parties whenever possible. However, the consent of the party receiving the document must be obtained prior to service by facsimile transmission. When a party cannot be served by facsimile, or chooses not to accept service by facsimile, the party must be notified personally or by telephone of the filing and a copy of the document must be served by personal service or overnight delivery service.

Authority: Rule 102.5(f).

2. **Statement of Service and Proof of Service:** All filings must be accompanied by a statement of service on other parties. The statement of service must specify the names of the parties served and the date and manner of service. It is also helpful if you indicate the date and method of filing with the Board. Proof of service (e.g., return post office receipt or private delivery service receipt) is ordinarily not required. Proof of service will be required only if a question is raised with respect to proper service.

Authority: Rule 102.5(g) and (h).

III. ANSWERING BRIEFS

- A. TIME REQUIREMENTS:** Due 14 days from the last date on which exceptions or cross-exceptions and any supporting brief may be filed.

Authority: Rule 102.46(b).

- B. CONTENTS:** Answering briefs must be limited to the questions raised in the other party's exceptions or cross-exceptions and supporting briefs and must clearly present:

1. The facts and points of law relied upon to support the position taken.
2. The page citations to the parts of the official record (transcripts and exhibits) that are being relied upon to support the position taken.

Any answering brief exceeding 20 pages must also include a subject index with page references and an alphabetical table of cases and other authorities cited.

Authority: Rule 102.46(b).

Answering briefs are subject to the same requirements as exceptions and supporting briefs with regard to requests for extensions of time, length, format, filing, and service.

IV. REPLY BRIEFS

- A. TIME REQUIREMENTS:** Due 14 days from the date on which the answering brief is due. No requests for extensions of time will be granted.

Authority: Rule 102.46(h).

- B. CONTENTS:** Reply briefs must be limited to the matters raised in the answering brief to which it is replying.

Authority: Rule 102.46(h).

- C. LENGTH:** Limited to 10 pages. No requests for additional pages will be granted.

Authority: Rule 102.46(h).

Reply briefs are subject to the same requirements as exceptions and supporting briefs with regard to format, filing, and service.

APPENDIX B

**QUICK REFERENCE GUIDE FOR
UNFAIR LABOR PRACTICE FILINGS**

| Document | Rule | Due Date | Answer Date | Reply Due | Means |
|--|-------------|---|---------------------------------------|-----------------------|--------------|
| Motion for Summary Judgment (MSJ) or Dismissal | 102.24(b) | 28 days before hearing | Opposition due 21 days before hearing | Prior to Board action | E-File |
| Motion for Default Judgment | 102.24 | Prior to hearing | Opposition due prior to Board action | Prior to Board action | E-File |
| MSJ or Dismissal when no hearing is scheduled or when hearing is less than 28 days after due date for answer to complaint | 102.24(b) | Promptly | Opposition due prior to Board action | Prior to Board action | E-File |
| Response to Notice to Show Cause (NSC) | 102.24 | As noted in NSC | Prior to Board action | Prior to Board action | E-File |
| Requests for Special Permission to Appeal | 102.26 | Promptly | Opposition due promptly | Prior to Board action | E-File |
| Request for Review of Pre-Decision Administrative Law Judge's (ALJ) Dismissal | 102.27 | 28 days from date of the order | Prior to Board action | Prior to Board action | E-File. |
| Response to General Counsel's Opposition to Petition to Revoke Subpoena | 102.24(c) | Response due within 7 days of receipt of opposition | N/A | N/A | E-File |
| Request for Board Order compelling testimony from individual who is likely to refuse to testify on basis of privilege against self-incrimination | 102.31(c) | Anytime prior to hearing or after transfer to Board | N/A | N/A | E-File |

| Document | Rule | Due Date | Answer Date | Reply Due | Means |
|--|--------------|---|--|--|---|
| Special Appeal of ALJ's denial to compel testimony from witness who claims privilege against self-incrimination | 102.31(c) | Within 24 hours of ALJ's ruling | N/A | N/A | E-File |
| Briefs following Board acceptance of stipulation of facts | 102.35(a)(9) | As set forth in Order accepting stipulation | 14 days from last date for initial briefs | Not allowed except by special permission | E-File |
| Exceptions to Judge's Decision (JD) | 102.46(a) | 28 days from service of JD | 14 days from last due date for exceptions. | 14 days from last due date for answers. | E-File |
| Cross-Exceptions to Judge's Decision | 102.46(c) | 14 days from last due date for exceptions. | 14 days from last due date for cross-exceptions. | 14 days from last due date for answers. | E-File |
| Request for Extension of due date for exceptions to JD, cross-exceptions; and answering briefs <i>May not be requested for reply briefs</i> | 102.2(c) | Before the due date, but if within 3 business days of due date, must be based on unforeseen circumstances | Prior to Board action | Prior to Board action | E-File, hand delivery, mail; or fax to 202-273-4270 |
| Request to enlarge 50-page limit <i>May not be requested for reply briefs</i> | 102.5(b) | No later than 10 days before due date for filing document for which enlargement is requested | Prior to Board action | Prior to Board action. | E-File, hand delivery, mail; or fax to 202-273-4270 |
| Any Motion filed after the case is transferred to the Board | 102.47 | Prior to Board Decision | Prior to Board action | Prior to Board action | E-File |

| Document | Rule | Due Date | Answer Date | Reply Due | Means |
|---|-------------|---|--|-----------------------|---|
| Requests for reconsideration, rehearing or reopening record | 102.48(c) | No later than 28 days from service of Board Decision. For reopening, must be filed promptly after discovery of new evidence | Prior to Board action | Prior to Board action | E-File |
| Extension of due date for reconsideration, rehearing, or reopening record | 102.2(c) | Before due date, but if w/i 3 days of due date, must be based on unforeseen circumstances | Prior to Board action | Prior to Board action | E-File, hand delivery, mail; or fax to 202-273-4270 |
| Request for review of GC compliance determination | 102.53(c) | 14 days from service of GC decision; only the Charging Party (CP) can file | Prior to Board action | Prior to Board action | E-File |
| Brief after Section 10(k) hearing | 102.90 | 7 days after close of hearing; none in national defense industry unless by special permission based on good cause filed expeditiously | Not allowed except by special permission | N/A | E-File |

| Document | Rule | Due Date | Answer Date | Reply Due | Means |
|---|-------------|---|--|---------------------------------|--|
| EAJA Application | 102.148(a) | Within 30 days of the date of the Board Order | 35 days after service of application, unless stayed by motion to dismiss or filing of intent to negotiate. Then, answer due 35 days after issuance of Order denying motion to dismiss or 35 days after filing of intent to negotiate | 21 days after service of answer | E-File, hand delivery, or regular mail |
| Motion to Dismiss EAJA Application* | 102.150(a) | 35 days after service of application* | 21 days from service of Motion* | N/A | E-File, hand delivery, or regular mail |
| Request for Review of Order granting dismissal of EAJA Application | 102.150(a) | 28 days from date of Order dismissing | N/A | N/A | E-File, hand delivery, or regular mail |
| Filing of Comments on Application by party who is neither GC nor applicant* | 102.150(e) | 35 days from service of Application* | N/A | N/A | E-File, hand delivery, or regular mail |
| Filing of Comments on answer to Application by party who is neither GC nor applicant* | 102.150(e) | 21 days after service of answer* | N/A | N/A | E-File, hand delivery, or regular mail |
| Demand for award payment | 102.155 | No deadline, but applicant must affirm it will not seek court review. Payment to be made 60 days from receipt of demand | N/A | N/A | E-File, hand delivery, or regular mail |

* File this document with the Administrative Law Judge after the Board transfers the application to the Judge.

APPENDIX C

AVOIDING PROBLEMS

The following list contains helpful hints that will assist parties in avoiding common problems that may result in delay in Board consideration of the document or rejection of the document.

1. Acquaint yourself with the applicable Rules and Regulations. Many of the Board's Rules are unique to it. Never assume that the Board has the same rules as the Federal Courts or other Federal agencies. Failure to know the applicable Board Rules does not excuse a late filing. Most of the applicable Rules for filings in unfair labor practice cases are found in Sections 102.24 through 102.29, 102.31, and 102.46 through 102.51. Applicable Rules in representation cases are found in Sections 102.65 through 102.71. The unfair labor practice rules apply when unfair labor practice cases and representation cases are consolidated.
2. Send your documents, briefs, and motions that you want the Board to consider to the Executive Secretary's Office in Washington, D.C. Inadvertent filing with the General Counsel, Regional Director, or the Judge's Division is a common problem which will delay consideration and may cause rejection of documents meant to be filed with the Board.
3. If you E-File through the Board's website and do not receive a receipt from the Board, check that that your spam blocker will accept messages from nlr.gov and/or temporarily disable your pop-up blocker. Remember that the receipt for a successful e-filing will be sent to the e-mail address entered on the website form for e-filing.
4. If you encounter problems uploading and transmitting your document using e-filing, call the Executive Secretary's Office if the problem occurs before 5:00 p.m., Eastern Time. If the problem develops after 5:00 p.m. on the due date, check the website to determine if the Board's e-filing system is offline because of scheduled service, system maintenance, or upgrades. If there is no announcement on the website, assume the problem is on your end and try to E-File using another computer with internet access, such as another computer in the office, a home computer, a computer at a public library, or a computer at a commercial business service center. User-end problems will not excuse a late filing. These problems may be avoided if you file before the due date and/or before 5 p.m.
5. Serve all other parties with the document that you file with the Board. Inactivity by the charging party does not excuse your failure to serve the charging party. All filings with the Board in representation cases must be served on the Regional Director as well as the other parties.

6. Serve your document on the parties in the same, or faster, manner that you filed it with the Board. If you intend to accomplish service by facsimile, you must obtain permission from the party being served. If a party cannot be served by facsimile or indicates it will not accept facsimile service, telephone the party and inform them of the substance of your document and provide personal or overnight service so that it is received by the next business day. For documents that are E-Filed, serve the other parties by electronic mail (e-mail), if possible. If the other party does not have the ability to receive electronic service, telephone the party and inform them of the substance of your document and provide personal or overnight service so that it is received no later than the next day, or, with the permission of the party receiving the document, serve the document by facsimile transmission.
7. File timely. Be aware that some deadlines, especially in representation cases, require a quick filing or request for an extension.
8. Know how the Board uses these terms:
 - a. Due date. The date the Board must receive a filing. It is not the date you send it. A filing is untimely if it is mailed on the due date and arrives after the due date.
 - b. Service date. The date the document is served is when it is placed in the mail. It is not the date you receive it. The Board does not add additional days for your response even if you were served by mail.
 - c. Answering brief. A brief responding to exceptions, cross-exceptions, or a motion. Parties often erroneously call this a reply brief, which has a specific meaning at the Board. Use “answer” or “answering brief” rather than “response” or “responsive brief.”
 - d. Reply brief. A brief responding to an answering brief. Do not call it an answering brief. Use this term instead of “response” or “responsive brief.”
 - e. Sur-reply brief. A brief responding to a reply brief. Sur-replies are usually not allowed.
 - f. Opposition. A response to a request for review. Reply briefs are not permitted in representation cases.
9. Be aware that extension requests filed within 3 days of the due date must be grounded on unforeseen circumstances. That you have to be in court, will be away on vacation, or have other work are not usually considered unforeseen. An extension request filed within 3 days of the due date will be granted, however, if your request accurately reflects that the other parties, including individual charging parties, have stated that they consent or that they do not object.
10. Extension of a due date applies to all parties who can file the same document.

In unfair labor practice cases, the granting of an extension to file an answering brief does not serve to extend the time to file cross-exceptions, but the granting of

an extension of time to file cross-exceptions automatically extends the time for filing answering briefs.

11. Unless the Board grants you permission, do not exceed the page limit, which is 50 pages for most documents and 10 pages for reply briefs. Briefs that exceed these limits will be rejected, although the party will be given the opportunity to file a revised brief that complies with the limitations.
12. In unfair labor practice cases, a request for permission to exceed the page limit must be filed no later than 10 days before the due date for the document to be filed. In representation cases, the request must be filed no later than 5 days before the due date. The other parties do not share in the grant of additional pages.
13. Do not include argument in your exceptions if you file a separate brief in support of exceptions. All argument, including argument about facts or the facts relied on by the judge, belongs in the brief.
14. Documents attached to your brief that have not been received in evidence may be stricken on motion by the other parties.
15. Your brief to the administrative law judge is not part of the official record reviewed by the Board unless you incorporate it into your brief to the Board. However, in that circumstance, it will be counted toward the page limit.
16. Be aware that a request for review of a Regional Director's decision and direction of election or order must be a self-contained document enabling the Board to rule without the necessity of recourse to the record. You may wish to include excerpts from the record when filing a request for review.
17. The filing of a request for review does not stay an election. Note that a request for a stay of the election is rarely granted by the Board.
18. Be sure that you keep the Board advised regarding any changes that may delay contact with you or delivery of decisions to you, including firm name, street and e-mail addresses, and phone and facsimile numbers. If you have registered for E-Service, you may change this information yourself. Please also keep the Board advised of any similar changes regarding your client.