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## THE LAWYER'S FORUM

### THE PITFALLS OF PRACTICE BEFORE THE REGIONAL OFFICES OF THE NATIONAL LABOR RELATIONS BOARD

BEN F. FOSTER, JR.\*

On July 5, 1935, the Congress of the United States enacted the Wagner Act to be known as the "original" National Labor Relations Act.<sup>1</sup> This statute declared it to be "the policy of the United States" to encourage the practice of collective bargaining and full freedom of worker-self organizations, as means of facilitating the free flow of interstate commerce. This original Act prescribed as "unfair labor practices" five kinds of employer conduct vis à vis Unionism. The statute went on to create a three member National Labor Relations Board that was given authority to settle representation questions and to prosecute violations of the unfair labor practice provisions of the statute. This agency combined the functions of prosecutor and judge although its orders had no binding force until "enforced" by a circuit court of appeals upon appropriate petition. The constitutionality of the statute was upheld in 1937 by the United States Supreme Court in a now infamous decision.<sup>2</sup> Since the original statute was passed, several amendments have been made, such as the Taft-Hartley Act<sup>3</sup> and Landrum-Griffin Act.<sup>4</sup>

In administering the statute, the National Labor Relations Board, hereinafter referred to as the Board, founded and established certain regional offices to act in its behalf in the investigation and processing of representation and unfair labor practice cases filed by the droves of charging parties. The United States has been divided, geographically, into thirty-one regional and sub-regional offices of the Board. These offices and their duties have continually expanded. Their role in interpreting and overseeing the effects of the various labor statutes subjected to their control and administration has created a nightmare to the

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<sup>1</sup> 49 Stat. 499, 29 U.S.C.A. § 151 (1935).

<sup>2</sup> NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

<sup>3</sup> 29 U.S.C.A. § 168 et seq. (1947).

<sup>4</sup> 29 U.S.C.A. § 309 et seq. (1959).

practicing attorney attempting to represent a respondent<sup>5</sup> before these "Arms" of the Board.

It is the purpose and intent of this article to make the practicing attorney aware of some of the pitfalls that he faces on a daily basis when representing a respondent who has been charged with the commission of an unfair labor practice or who has the misfortune of being petitioned by a labor organization for a representation election. The three areas of practice with which this article deals can be classified as unfair labor practice proceedings, settlement agreements, and representation proceedings.

#### INVESTIGATION AND PROCESSING OF UNFAIR LABOR PRACTICE CHARGES

Sections 102.9 and 102.10 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, states that a charge may be filed by "any person" against any individual who is engaged in any unfair labor practice affecting commerce. Such charge shall be filed with the regional director for the region in which the alleged unfair labor practice has occurred or is occurring. Accordingly, a person, no matter what his motive,<sup>6</sup> may file a charge against any other person. There need not be any showing of any authority on the part of the charging party to make the charge, nor is the filing of a charge limited to a labor organization, an employer or an employee, but merely to "any person."<sup>7</sup>

Section 10(b) of the National Labor Relations Act, as amended, hereinafter referred to as "Act," contains the statute of limitations applicable to the filing of unfair labor practice charges with the regional offices of the Board. This section of the statute provides that no complaint shall issue based upon unfair labor practices occurring more than six months prior to the filing of the charge with the Board and the service of a copy of the charge upon the person against whom the charge is made.<sup>8</sup> If one were to strictly interpret this particular section of the statute, it would seem clear that commissions, omissions or other events occurring prior to the "10(b)" period would not, or should not, be considered by the Board in determining whether a particular charge has merit and alleges an unfair labor practice. However, there have

<sup>5</sup> § 102.12(c), NLRB Rules and Regulations and Statements of Procedure, Series 8 defines the term "respondent."

<sup>6</sup> NLRB v. General Shoe Corp., 192 F.2d 504 (6th Cir. 1951).

<sup>7</sup> NLRB v. Indiana & Michigan Electric Co., 318 U.S. 9, 63 S. Ct. 394, 87 L. Ed. 579 (1943).

<sup>8</sup> 29 U.S.C.A. § 160(b) (1935).

been numerous cases holding to the contrary and in fact permitting pre-"10(b)" events and statements to be admitted into evidence to show the existence of an unfair labor practice. Evidence, however, pertaining to these events occurring outside the "10(b)" period may not be used as the "sole" basis for finding that subsequent acts occurring during the "10(b)" period constitute unfair labor practices.<sup>9</sup>

The Act's provision establishing the statute of limitations creates just that, and not a jurisdictional limitation on the power of the Board. A party who fails to invoke the defense of statutory limitation will waive that defense and cannot, on court review, attack the Board's jurisdiction even though he has previously and expressly reserved the right to contest jurisdiction at all times.<sup>10</sup>

Through unreleased rulings of the General Council of the National Labor Relations Board, Board agents can, and have been directed, to dismiss charges where the charging party refuses to cooperate with and/or to assist the Board agents by supplying them with information establishing a prima facie case. By these unofficial releases the Board has stated that the charging party must, within approximately a seventy-two hour period, produce at the Board's regional office witnesses whose testimony will be relied upon to establish the prima facie case. The one exception to this rule is where the charging party and/or the witnesses upon which he intends to rely are located a great distance from the regional office. In this event the regional director will assign the case to a field examiner, who will travel to the place of residence of the charging party and appropriate witnesses for the purpose of obtaining affidavits and proceeding with the investigation.

#### RESPONDENT'S RIGHT TO LEGAL COUNSEL

Section 102.14 of the Rule and Regulations and Statements of Procedure states that the charging party shall be responsible for the timely and proper service of a copy of the charge upon the respondent. Although not a fatal error, the rules and regulations of the Board require that this service must be made on the respondent by registered mail.<sup>11</sup>

The Board agent will, as a matter of course, initially set out to establish and confirm the prima facie case as is alleged in the charge. After this Board agent, called a field examiner, has examined all of the wit-

<sup>9</sup> NLRB v. Patterson Menhaden Corp., d/b/a Gallant Man, 57 CCH Lab. Cas. ¶ 12,465, 389 F.2d 701 (5th Cir. 1968).

<sup>10</sup> NLRB v. Nettleton Co., 241 F.2d 130 (2d Cir. 1957).

<sup>11</sup> Olin Industries, Winchester Repeating Arms Co. Division v. NLRB, 192 F.2d 799 (5th Cir. 1951).

nesses and all of the documentary evidence made available by the charging party and by reason of his own investigatory efforts, he will proceed to question the respondent and/or his agents as to their formal position with regard to the allegations in the charge. All practicing attorneys are well aware of the United States Supreme Court decisions involving the *Escobedo*<sup>12</sup> and *Miranda*<sup>13</sup> line of cases protecting and guaranteeing the individual's right to due process and assistance of counsel during the conduction of a pending investigation. If the field examiner representing the charging party is not aware (either in actuality or conveniently) of a respondent being represented by counsel he will approach the respondent in an attempt to obtain a formal statement of position with regard to the unfair labor practice allegations. He will go further and obtain written, signed affidavits from the respondent even though the same may contain serious "statements against interest" or other damaging remarks. This is done without warning the respondent of the effect this may have on his liability under the pending charge.

The result of the abuse of this constitutionally protected right of a respondent, by young attorney advocates in the General Council's Office, has in many instances drawn sharp criticism from both the American Bar Association and from several individuals within the structure of the Board itself. Trial examiner David F. Doyle found that a certain respondent had not engaged in unfair labor practices because of the failure of the field examiner to inform the respondent of his constitutional right to the assistance of counsel and by taking affidavits directly from the respondent without counsel or proper warnings of due process during the investigation.<sup>14</sup> The General Council appealed the decision of the trial examiner. The Board held that neither *Escobedo* nor *Miranda* was applicable in the administrative investigation of an unfair labor practice charge and, therefore, a respondent was not entitled to the assistance of counsel during such an investigation. In doing so the Board reaffirmed their earlier decisions that unfair labor practice proceedings are not criminal proceedings in which a constitutional right should be considered.<sup>15</sup>

The American Bar Association's Committee on Practice and Procedure under the National Labor Relations Act, in light of these cases,

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<sup>12</sup> *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964).

<sup>13</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

<sup>14</sup> *Wilbur J. Allingham, d/b/a Mary Anne Bakeries*, 164 N.L.R.B. 107 (1967).

<sup>15</sup> *Crown Imports Co., Inc.*, 163 N.L.R.B. 24 (1967).

continued to exert pressure on the Board and its representatives as to the role of the attorney representing a respondent before the regional office of the Board. As a result, instructions were given to the regional directors in two separate memoranda.<sup>10</sup> These memos stated that where a respondent is represented by counsel or other representatives all communications with the party, whether written or oral, will be through the counsel or representative of record. Under no circumstances should such parties or their main representatives be interviewed without the consent of counsel or representative of record. This has, in fact, been the policy of the Board for a number of years, but whether a respondent is known to be represented by counsel or other individual, the investigation by the field examiner is "at his convenience," unless evidence to the contrary is contained in the file. Further, the memorandum from the General Council states that these requirements are only necessary where the investigator or attorney for the Board is interviewing top management echelon and not low-level supervisors or representative of a respondent. These individuals, whose statements can bind a respondent in proceedings before the Board, may be seen and interviewed without the consent of counsel in circumstances where: (1) the respondent or his counsel or representative are not cooperating in the field examiner's investigation; (2) counsel-representative does not make the individual who is to be interviewed available with reasonable promptness, so as to delay the investigation; and, (3) where during the interview counsel-representative interferes with, hampers, or impedes the Board's agent's investigation.

After examining the cases and various memoranda set out above it would seem that the task of counsel representing a respondent during the investigation stages of an unfair labor practice charge is a dubious one. The counsel for the respondent has available to him several techniques that he may use to his client's advantage. As soon as the client has notified counsel that he has received a copy of the charge, counsel should make arrangements to interview all of the upper-management officials of the respondent as well as all supervisory personnel whose statements could be legally binding on his client. It should be noted at this juncture that supervisors, as defined in section 2(11) of the Act, are generally not entitled to the protection guaranteed "employees" in section 7 of the Act and can be questioned and interviewed by counsel

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<sup>10</sup> Memorandum 67-32 from Arnold Ordman, General Council, National Labor Relations Board and Memorandum 68-15 from Arnold Ordman and H. Stephen Gordon, General Council and Associate General Council of the National Labor Relations Board.

at will without facing the possible consequences of an unfair labor practice charge being filed in the supervisor's behalf. Therefore, it is evident that counsel can interview and prepare his client as to the events in the upcoming investigation.

At the outset, counsel should notify, in writing, the regional office that he is acting as counsel representing the respondent in the present proceeding. In this same correspondence counsel should request that all communications, either written or oral, should be made through him when the regional office is dealing with the respondent or its agents.

#### CONSEQUENCES OF A RESPONDENT GIVING STATEMENTS

After notifying the regional director of the representative status of counsel he should then seek to meet with the respondent and its supervisors to discuss, in detail, the allegations set forth in the original charge. At this meeting, counsel should determine whether any of the supervisory personnel or managerial personnel have any first-hand knowledge as to the events surrounding the allegations in the charge. He should then discuss these events in detail with the individual concerned. Counsel should make all of the supervisors aware that there is nothing in the Act that compels them to communicate, aid, and/or assist the Board's agent in his investigation. Further, he should instruct these individuals that they are not required, regardless of what the Board agent says, to give a statement of any form whatsoever, written or oral.

At this point there is a practical problem to be faced by respondent's counsel. Should a respondent, or its agents, when asked by a representative of the Board, voluntarily, or otherwise, give a written or oral statement representing its position on the matters contained in the unfair labor practice charge? In dealing with the Board, both as a representative of General Council and as a representative of respondent employers, the author has found that, unless there is some demonstrative evidence that would serve as an absolute defense to the allegations in the charge, it is neither reliable nor helpful to your client to give a written or oral statement to the Board agent. In the first place, matters contained in the statement of a respondent can be used by the Board attorney to limit the defense of the respondent at the trial of the unfair labor practice. Secondly, if a question of fact exists, *i.e.* the charging party alleges that certain oral statements were made to him containing threats and/or coercive remarks, and a statement from the respondent denies ever making any remarks even remotely related to the situation,

the regional director will not resolve these questions of credibility. In cases involving credibility questions, the regional director will authorize the issuance of a complaint so the issue can be resolved by a trial examiner at the hearing on the unfair labor practice. Accordingly, your client will be involved in an unfair labor practice hearing if the Board agent establishes a prima facie case regardless of whether the client rebuts the Board's case by sworn affidavit.

During the investigation of unfair labor practice charges or during the "campaign," which usually precedes a representation election, counsel should forewarn his client that phone conversations with various parties to the proceedings may return to "haunt" the client at a later date. In a very recent case, the trial examiner admitted evidence that had been secured by the use of a "wiretap" of a telephone conversation, a practice admittedly in violation of the Federal Communications Act. In this case the wife of a charging party recorded a telephone conversation that she had listened to between her husband and a union business agent. The union business agent whose union had been charged with discriminating against this particular charging party was unaware that the phone conversation was being "monitored" or of the fact that anyone else was listening to the conversation. When the case was tried before a trial examiner, the charging party, through the Board's attorney, attempted to introduce and did introduce and play back the recording of the telephone conversation. This was done over respondent's objections that the evidence was obtained in violation of the Federal Communications Act and inadmissible in any United States Court. The trial examiner, however, ruled that the recording of a telephone conversation with the consent of one party to it does not constitute "interception" in violation of the provision of the Federal Communications Act prohibiting interception of communications and the testimony was received into evidence.<sup>17</sup>

In light of this holding, the author deems it feasible to advise counsel to instruct his clients and their agents to refuse to communicate with any party to the proceedings, and to refer the communication directly to counsel. This precaution should apply to any "stranger" asking questions over the telephone of various supervisors regarding an alleged incident, phone calls from union representatives of *any* union (not necessarily just the one involved in the present proceedings) or any phone calls with agents of the Board.

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<sup>17</sup> Howard Sober, Inc., 168 N.L.R.B. No. 77 (1967).



If counsel finds himself in the position of representing a charging party and if he has cooperated and assisted the field examiner as is required, and the Board agent has finished compiling all the evidence available under the circumstances of the charge, there are further steps available to counsel in representing his client. In this first instance, if the charge involves a serious question of law (this usually occurs where a charge has alleged a violation of section 8(b)4 and/or 8(b)7 of the Act alleging some sort of illegal threats or picketing on the part of a labor organization), counsel may well find it advantageous to his client to submit a memorandum brief to the regional director to assist him in making a determination whether a complaint should issue. This memorandum brief should consist of a brief statement of the facts and should be accompanied by applicable case citations that he desires the regional director to consider in making his determinations.

If counsel requests, he sometimes may be made aware of the fact that the regional director will hold an "agenda" before making a determination as to whether the charge is meritorious.<sup>18</sup> Counsel may request, either orally or in writing, that he be permitted to present an oral argument in his behalf at this agenda. The regional director will welcome this assistance from counsel, but if he permits counsel to make such an argument before the agenda, he will certainly notify the respondent and/or his attorney in order to give him the opportunity to make a similar argument as to why no complaint should issue.

#### DISMISSALS

At this juncture in the life of a typical charge, a decision will be made as to whether a complaint will issue. If the regional director determines that reasonable cause exists that would establish a prima facie case, or if a question of fact exists as to the possibility of a violation, a complaint will normally be issued. However, if the regional director does not feel that the issuance of the complaint is necessary in order to effectuate the purposes and policies of the Act, he will request the charging party to affirmatively withdraw the charge, without prejudice.<sup>19</sup> In the absence of a withdrawal, the regional director may formally dismiss the charge.<sup>20</sup>

<sup>18</sup> An agenda proceeding is most normally held where there is a serious question of law that has arisen during the investigation of the charge and is usually headed by the regional director himself, assisted by the regional attorney, assistant regional director, field examiner who has investigated the charge, an attorney from the regional office who is or may be prosecuting the case if a complaint is issued, and any supervisory personnel who has been aware of the processing of the charge.

<sup>19</sup> § 101.5, NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

<sup>20</sup> § 101.6, NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

The dismissal by the regional director takes one of two forms: informal or formal. It must be cautioned at this time that the dismissal, whether it be formal or informal, will be sent to the respondent as well as to the charging party. This must be contemplated in determining whether one wishes to request the regional director to supply him with the formal, as opposed to the informal, dismissal letter. The difference between the two is somewhat self-evident by the terms used. An informal dismissal letter summarily states that the regional director feels that there is "insufficient evidence" to support the allegations contained in the charge, and therefore refuses to issue a complaint based on the same. The formal dismissal letter states in detail the particular reasons for the dismissal of the charge. In most instances this letter will include case authority supporting the regional director's dismissal of the charge.

If the charging party desires to appeal the dismissal of the charge by the regional director, he must do so within ten days after service of the dismissal.<sup>21</sup> This appeal is taken to the General Council in Washington, D.C. Accordingly, if a charging party knows in advance that he will appeal the dismissal of the charge, he should, for review purposes, request a formal dismissal as opposed to an informal dismissal. When and if the appeal is taken, the entire file in the case is sent to the General Council in Washington, D.C. where it is fully reviewed by the General Council. A charging party may request oral argument before the General Council in Washington. This request must be in writing and filed simultaneously with a statement of exceptions to the regional director's determination along with a statement of service upon the other parties.<sup>22</sup> When such oral request is granted, the other parties to the proceeding are notified and are afforded a like opportunity. Oral argument is normally limited to thirty minutes for each party entitled to participate. Following the review of the file, the appropriate memorandum brief, if any, and after listening to oral arguments, the General Council may sustain the regional director's dismissal. In doing so, he must state the grounds for his affirmance or he may direct the regional director to take further action of some nature.

#### SETTLEMENT AGREEMENTS

Where the regional director has determined that it will serve the purposes and policies of the Act to issue a complaint on the basis of

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<sup>21</sup> § 101.6, NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

<sup>22</sup> § 102.46(i) NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

the terms and conditions of the original charge, plus any other information obtained subsequent to the filing of the charge in the investigation, he will, where time permits, afford the parties an opportunity to settle or adjust their disputes.<sup>23</sup> If counsel for a respondent feels that there is a strong possibility that the charging party and the General Council for the Board will prevail in an unfair labor practice hearing, and he further feels that it would be advantageous to his client to *toll* his liability at the earliest possible date, counsel should seriously examine and consider this offer of a settlement agreement. It is at this point that counsel can "bargain" with the regional director as to the exact terms and conditions of the settlement agreement because at this stage the regional director has the authority to accept a "unilateral" settlement agreement. If the respondent and the regional director agree on the terms and conditions of a settlement agreement, this settlement agreement will in most cases be approved even though the charging party is not in full agreement with its provisos. The charging party has, however, the right to appeal the decision of the regional director accepting a settlement agreement that is not in accordance with his feelings. An appeal at this time is, in most instances, futile because of the regional director's wide discretionary powers.

If counsel represents a respondent who has never been subjected to previous unfair labor practice charges, there is a possibility, a rare one, that the regional director may agree to an "out-of-Board" settlement agreement. In this instance, however, the charging party must also be in agreement with the terms of the settlement, because in this type of settlement it is a usual practice that the charging party withdraws the charge, with the approval of the regional director, since there are no formal written documents constituting the settlement agreement as such.

At this time the author feels it should be emphasized that a "settlement agreement" normally consists of two separate documents, the settlement agreement itself and the "notice" portion of the settlement agreement. The settlement agreement itself contains the actual terms, conditions and posting requirements of the accompanying notice and may also contain, if requested, a "nonadmission clause." This "nonadmission" clause will not generally be offered to the respondent, and therefore, he must affirmatively request its inclusion in the terms of

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<sup>23</sup> § 102.51 and § 101.7, NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

the settlement. The "nonadmission" clause is generally a simple statement indicating that, by the signing and the execution of the agreement, the respondent does not admit that it has violated any of the terms of the Act. However, a respondent may be able to insist upon a more detailed "nonadmission" clause including provisos that neither the instruments making up the settlement agreement nor any of the terms and conditions contained in those instruments can be admitted into evidence in any subsequent civil court proceedings. Along with this statement, in a case where a charge has been filed in behalf of certain named individuals, the settlement agreement will contain a list of names and amount of back pay due, if any, to the alleged discriminatees.

The second portion of the settlement agreement is commonly known as the "notice" portion. This document is generally a standard printed form supplied by the regional director and contains specific language covering all of the allegations as contained in the charge. Here again, the counsel can benefit his client by requesting a "one paragraph" notice as opposed to a multi-paragraphed notice containing individual statements that would be more readily communicated to its employees. He can also "bargain" over the terminology used in the settlement notice. Developments within the Board practice as to the contents of the "notice" portion of settlement agreements have established that the terminology used in the notice itself should not be of such a restricted legal nature as to be incomprehensible by the parties to which it is directed. As a result of these developments, a large outgrowth of decisions have indicated that the terminology used is no longer "standard" and that it must relate to the circumstances involved in the particular situation. Through these decisions, the Board has now found that it is more appropriate, in many instances, for the notice not to repeat the verbiage contained in the applicable sections of the Act, but to use common everyday language that will be understood by the individuals to which the notice is directed. Along this line, recent cases have shown that in some instances "bilingual" notices are required where there is a substantial percentage of the individuals who would more easily understand the notice in some foreign language.<sup>24</sup> Further, the Board has found it appropriate for the purpose of effectuating the purposes and policies of the Act to require a respondent to mail these notices to in-

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<sup>24</sup> *Lozano Enterprises and Javier Martinez*, 150 N.L.R.B. 1285 (1965).

dividual employees involved and to read the notice out loud at a mass gathering of employees. In one recent case,<sup>25</sup> the Board required a top member of management to read the notice and all of its provisions to a mass assembly of employees. This case was appealed to the appropriate circuit court which held that, although the reading of the notice was a proper objective and effectuated the purposes and policies of the Act, the Board could not require the respondent himself to read the notice, but instead should make a Board agent available to carry out the proposed remedy.

In still other instances where violations are widespread and flagrant in nature, the Board has required the respondent to publish certain "notices" in local newspapers so that the notices would have the requested far-reaching effect and would in turn effectuate the purposes and policies of the Act.<sup>26</sup>

At this time one further point should be considered. The remedies of the Board have been subjected to considerable interpretation and thought in the recent past as a result of volumes of cases and requests by various parties. The attorney can best represent a charging party by being dynamic in his thinking and requesting certain terms and conditions in the settlement agreement and in all of its ramifications, as well as being unique and original where the circumstances demand such action in order to "effectuate the purposes and policies of the Act." An attorney should not leave the entire settlement process to the Board agent alone, but should take an active part in formulating the terms, conditions and procedures to be followed in conforming to the settlement agreement itself.

Other than the out-of-Board settlement previously discussed, the two other broad classifications of settlement agreements are formal and informal. The formal is divided further in that there are formal settlement agreements providing for the entry of a Board Decree,<sup>27</sup> and formal settlement agreements providing for the entry of a court decree. These are used primarily where a complaint has already been issued and/or where the particular respondent involved is one that has found himself continually involved in defending charges of unfair labor practices. A brief note should be made of the fact that an employer's pre-

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<sup>25</sup> *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292 (2d Cir. 1967), *cert. denied*, 389 U.S. 1005, 88 S. Ct. 564, 19 L. Ed. 2d 600 (1967).

<sup>26</sup> *International Hod Carriers, Local 916*, 145 N.L.R.B. 565 (1963); *Plumbers Local 420*, 111 N.L.R.B. 1126 (1955); *Carpenters Local 1400*, 115 N.L.R.B. 126 (1956).

<sup>27</sup> § 101.8(b)(1), NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

vious unfair labor practices can be considered relevant in subsequent proceedings as to his union animosity. Thus, the formal settlement is applicable prior to the issuance of a complaint if the employer or respondent is one who had numerous prior unfair labor practice charges brought against him.<sup>28</sup>

The informal settlement agreement is the one primarily used by the Board in the majority of cases and consists of the two documents previously discussed, the settlement agreement itself and the "notice." The formal settlement agreement is, again, a document consisting of two separate parts, the "Settlement Stipulation" and the "notice," which is attached to the settlement stipulation as an appendix. This formal settlement stipulation generally parallels the terminology and chronological order of the elements set forth in the complaint that has been issued. It also contains an affirmative "cease and desist" order reviewing the practices that are admonished by the regional director as having been unfair labor practices. It should be noted that the formal settlement agreement, like the informal settlement agreement, can at the insistence of the respondent's counsel contain a "nonadmission" clause as discussed previously.

Both types of formal settlement agreements provide for approval by the National Labor Relations Board in Washington, D.C., and the settlement stipulation does not have any force or effect until such approval has been made. In the instance of a formal settlement providing for the entry of a court decree, the settlement stipulation must be recommended and approved by the office of the General Council, and contain a positive statement so that the Board may apply to an appropriate United States Court of Appeals to enter a decree enforcing the order of the Board pursuant to the "cease and desist" provisos contained in the stipulation.

With the one exception of the out-of-Board settlement agreement, all other types of settlement agreements provide for a "posting period" otherwise known as the "hiatus" period. This "hiatus" period is defined as the length of time within which the respondent is required to post the "notice" portion of the settlement agreement at his place of business or pursuant to the terms of the settlement agreement itself. In most instances a sixty day period of time is called for, but in unusual circumstances, a longer or shorter period of time may be authorized by the regional director. This "hiatus" period does not begin to run until

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<sup>28</sup> R.J. Reynolds Foods Co., 168 N.L.R.B. 47 (1967).

the settlement has been approved by the regional director, General Council, or the appropriate circuit court, whichever the case may be. One will notice that the Act or settlement agreement only requires that the respondent post the "notice" portion of the settlement agreement. The respondent would therefore seem to have no way to communicate to the persons confronted with the terms of the settlement agreement that he was not admitting liability of unfair labor practices by the posting of this notice. On January 20, 1964, a certain respondent posted, in addition to the required "notice," a notice of his own, signed by him, containing a nonadmission clause and a statement of position as to the allegations contained in the original charge. The regional director indicated that this was noncompliance on the respondent's part as to the terms and conditions of the settlement agreement and attempted to have the settlement agreement set aside. The United States Court of Appeals for the Sixth Circuit refused enforcement of the Board's order holding the respondent in "contempt," permitting the respondent to post his own notice as well as that of the Board's in the settlement of an unfair labor practice charge.<sup>29</sup>

A respondent should be careful, however, as to the language contained in his own "notice" so that it does not contain any implied threats or any other terms and conditions that may interfere with employee Section 7 rights. Although *Bangor Plastic* is apparently still the law, there are many decisions on the other side of the docket. These decisions hold that employer notices breach the terms and conditions of the settlement agreement thus warranting regional director action in setting aside the settlement agreement, in continuing with the issuance of a complaint and in the holding of an unfair labor practice hearing.<sup>30</sup>

As indicated earlier, there is a great distinction between "pre-complaint" and "post-complaint" settlement agreements. This difference has been the result of a fairly recent decision,<sup>31</sup> which held that the action of a regional director who entered into an informal settlement agreement resulting in the dismissal of a complaint against a union was arbitrary and capricious. This was done over the objections of the charging employer and afforded him no opportunity for a hearing on his objection. The Board accordingly amended its Rules and Regula-

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<sup>29</sup> NLRB v. Bangor Plastics, Inc., 57 CCH Lab. Cas. ¶ 12,607, 392 F.2d 772 (6th Cir. 1968).

<sup>30</sup> Southern Athletic Co., 157 N.L.R.B. 1051 (1966); The Pay Master Corporation, 162 N.L.R.B. 123 (1966).

<sup>31</sup> Leed's and Northrup Co. v. NLRB, 53 CCH Lab. Cas. ¶ 11,060, 61 L.R.R.M. 2283, 357 F.2d 527 (3d Cir. 1966).

tions and Statements of Procedure in several respects—sections 102.19 and 101.9. In these amendments it is clear that a regional director may withdraw and refuse to re-issue a complaint prior to the opening of an unfair labor practice hearing, or in the alternative, he may accept an informal unilateral settlement agreement. Such action, however, is reviewable by the General Council upon appeal under section 102.19 of the Rules and Regulations. By way of further caution the General Council issued a memorandum stating that a regional director should seek advice from the General Council for the purpose of clearing a post-complaint unilateral settlement agreement.<sup>32</sup> The memorandum further stated that the NLRB was still in favor of issuing formal settlement agreements after the issuance of a complaint. Regional directors may still recommend the approval of unilateral informal post-complaint settlement agreements, if in their opinion, good reason exists therefor and even if the objection of the charging party is not of a “frivolous” nature.

It has developed from the above as a matter of practice that the regional directors will not approve a unilateral settlement agreement requiring the regional director to affirmatively withdraw a previously issued complaint. The only instance in which this may be done today is where the charging party's objection to the terms and conditions of the settlement agreement are of a “frivolous” nature. The benefits of contemplating a pre-complaint as opposed to a post-complaint settlement agreement in behalf of his client should now be apparent to the attorney.

One last word on settlement agreements should be mentioned. There is a great area of dispute as to whether a United States Court of Appeals may review the action of the Board in approving settlement agreements of all types, with one exception, the out-of-Board settlement agreement. We have already noted and discussed the *Leed's and Northrup Co.* decision in which the Third Circuit Court of Appeals stated that the informal settlement agreement was a final order subject to judicial review. However, two other circuits in recent cases<sup>33</sup> have refused jurisdiction over the review of settlement agreements, stating that the same were not “final orders” subject to review by a court of appeals. The author believes that the Third Circuit's *Leed's and Northrup* decision is by far the most “considerable,” and should be looked upon with

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<sup>32</sup> Memorandum Number 68-9 (February 21, 1968).

<sup>33</sup> *Teamsters Local v. NLRB*, 339 F.2d 695 (2d Cir. 1964); *Anthony v. NLRB*, 204 F.2d 832 (6th Cir. 1953).



more favor, especially since it is the more recent of the three cases. Thus if you represent a disgruntled client refusing to join in a settlement agreement and have appealed the terms and conditions of the agreement to the Board and still suffer from "inadequate" relief, it may be worthwhile to examine the possibilities of appeal to an appropriate federal circuit court.

#### INVESTIGATION AND PROCESSING OF ELECTION CASES

Section 3(b) of the Act, added by the 1959 amendments, permits the Board to delegate to the regional directors all of its powers with respect to the conduct of elections as contained in section 9 of the Act. The regional director has therefore assumed the decision making powers and duties in processing representation cases. The most important factor to consider here is that the regional director is now empowered to determine whether a "question concerning representation" (QCR) exists and whether an appropriate collective bargaining unit has been requested. Then he can ultimately direct an election to establish representative status and certify the results of that election.

There are basically six types of "petitions" found in section 9 of the Act. They are: (1) "RC"-certification of representatives: a substantial number of employees wish to be represented for purposes of collective bargaining by petition, and petitioner desires to be certified as representative of the employees; (2) "RM"-representation (employer petition): one or more individuals or labor organizations have presented a claim to petitioner (employer) to be recognized as the representative of employees of petitioner (employer); (3) "RD"-decertification: a substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative; (4) "UD"-withdrawal of union shop authority: thirty per cent or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded; (5) "UC"-unit clarification: a labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees in either a unit not previously certified or in a unit previously certified in Case Number —; and (6) "AC"-amendment of certification: petitioner seeks amendment of certification issued in Case Number —.

Only four of the aforementioned "types" of petitions actually present a "QCR". The two not technically indicating a QCR are the "UC"

and "AC" petitions. Until a recent decision, petitions of the two latter categories merely called for some sort of adjustment as to terms or conditions in previous certifications or contracts, etc. There was never an "election" directed by the Board under either of these petitions until this recent and astounding case.<sup>34</sup> The *Libby-Owen-Ford Glass Company* case was the first occasion that the Board directed an election in a "UC" petition situation. Until this decision, it was always felt that an amended certification "AC" or unit clarification "UC" petition did not raise a question concerning representation, and therefore no elections were ordered or required.

The "UD" petition involves the filing of a petition to secure a deauthorization election by employees. At least thirty per cent of the employees presently covered by a collective bargaining agreement within a bargaining unit previously determined must sign this petition. The most normal cases for the filing of the "UD" petition are where the employees are working under a contract that has a "union shop" or a "maintenance of membership" clause. The employees within the bargaining unit desiring the abolishment of one or the other of these clauses in their contract file a petition ("UD") for an election with the regional director asking him to rescind the authority of their representative (the union) to enter into a union security agreement in their behalf. When these employees do this, and if they prevail in the election, the union security clause that has previously covered them becomes immediately void even though the contract itself, which contains the clause, may continue on for an extended period of time.<sup>35</sup>

Another type of petition is the "RD." It is filed when an employee, a group of employees or a labor organization acting in behalf of an employee or group of employees files a petition for a decertification of an individual or labor organization that is currently certified or recognized as the bargaining representative of a particular unit of employees of an employer. An employer is not permitted to petition for a decertification election. If the employer instigates or assists in the filing of the "RD" petition by a particular employee or group of employees he may be guilty of an unfair labor practice.<sup>36</sup> Here, as is the case in the "RC" and "RM" petitions, a QCR must be present. Accordingly, if the employer involved has not recognized a labor organization or if a particular labor organization has not been certified as the bargaining represen-

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<sup>34</sup> *Libby-Owen-Ford Glass Company*, 169 N.L.R.B. 2 (1968).

<sup>35</sup> *Great Atlantic and Pacific Tea Co.*, 100 N.L.R.B. 1494 (1952).

<sup>36</sup> *Sperry Rand Corp. (Sperry Gyroscope Co. Division)*, 136 N.L.R.B. 294 (1962).

tative of the petitioning employees, no QCR exists and the petition will be dismissed. Similarly, where the labor organization involved affirmatively disclaims a desire to represent the "petitioning employees," no QCR exists thus negating the necessity of the holding of an election.

As is the case in the "RC" and "UD" petitions, the "RD" petition must be accompanied within forty-eight hours after the filing of the petition by a designation of at least thirty per cent of the employees involved who desire the holding of the requested election.<sup>37</sup>

The "showing of interest" requirements in the "RD," "UD," and "RC" petitions are an administrative matter not subject to litigation.<sup>38</sup> The validity of the petitioner's "showing of interest" is determined by investigative administrative procedure subject to an appropriate challenge by a party as to the validity of the "showing" of grounds that may warrant an investigation by the regional director. The most common grounds are forgery or fraud, and if the investigation reveals instances of either of these, the regional director will dismiss the petition if his findings result in a "showing" of less than the "thirty per cent" required by the Statements of Procedure.<sup>39</sup>

This "showing of interest" must relate to a unit appropriate for the purposes of collective bargaining,<sup>40</sup> and it must be current to support the filing of the petition.<sup>41</sup> Where a "valid" petition has been filed, a third party may wish to intervene in the process, and in doing so he must also make a "showing of interest" adequate to support his intervention. Different rules of practice, however, apply to these intervening parties. For example, intervening parties are able to participate when they can show a contractual relationship existing between them and the employer<sup>42</sup> at the time of the filing of the petition.

If the intervenor is, however, seeking a unit different from that sought by the original petitioner he must make the same "showing of interest" as is required of the original petitioner, *i.e.* thirty per cent in the unit it seeks.<sup>43</sup>

When a petition is filed in an industry that is seasonal in nature and the number of employees in that industry fluctuates from time to time, the Board requires the thirty per cent "showing of interest" only among the employees in the unit at the time of the filing of the petition.<sup>44</sup>

<sup>37</sup> § 101.17, NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

<sup>38</sup> O.D. Jennings and Company, 68 N.L.R.B. 516 (1946).

<sup>39</sup> Columbia Records, 125 N.L.R.B. 1161 (1959).

<sup>40</sup> ESSO Standard Oil Company, 124 N.L.R.B. 1383 (1959).

<sup>41</sup> A. Werman and Sons, Inc., 114 N.L.R.B. 629 (1955).

<sup>42</sup> Slater System Maryland, Inc., 134 N.L.R.B. 865 (1961).

<sup>43</sup> Southern Radio and Television Equipment Company, 107 N.L.R.B. 216 (1953).

<sup>44</sup> Sebastopol Cooperative Cannery, 111 N.L.R.B. 530 (1955).

Naturally, where the Board directs an election in a larger unit and the petitioner still maintains the thirty per cent showing of interest in that larger unit, the election will be directed.<sup>45</sup> If the unit is, however, different from the one petitioned for, the petitioner, even though continuing to maintain an adequate showing of interest, normally will be given the opportunity to withdraw his petition without prejudice within ten days from the date of the direction of the election if he so desires.<sup>46</sup> Needless to say, the employer does not enjoy this luxury. In those situations where the showing of interest falls below the thirty per cent minimum because the election has been directed in a larger unit than that petitioned for, the petition will be dismissed.<sup>47</sup> In some situations the regional director will allow the petitioner time to submit additional evidence establishing the thirty per cent "showing."

The "RM" petition is filed by an employer under section 9(c)(1)(B) of the Act and alleges that one or more individuals or a labor organization has presented a claim to the employer that it wishes to be recognized as the bargaining representative of the employer's employees within a designated unit. The employer must definitely decline recognition. If he does not, no "QCR" exists necessitating the holding of an election. The employer is generally required to show that he has been presented with a bona fide representation claim. Thus, it is not necessary for the union involved to make a showing of its representative interest in the proceeding filed by the employer.<sup>48</sup>

In the "RM" petition the filing employer must supply, within forty-eight hours after filing, proof of demand for recognition by the labor organization named in the petition, and when the labor organization so named is the incumbent representative of the unit involved in the petition, the employer must provide the Board with "a statement of the objective considerations demonstrating reasonable grounds for believing that the labor organization has lost its majority status."<sup>49</sup>

Prior to the amendment of section 101.17 of the Statement of Procedures of the Board, "RM" petitions would automatically be received and be entitled to the direction of an election in the unit, upon a showing that the union maintained a claim for continued recognition. However, in the case of *U.S. Gypsum*, the Board added the further requirement that in addition to the continued majority claim by the incumbent

<sup>45</sup> *N. Summergrade and Sons*, 121 N.L.R.B. 667 (1958).

<sup>46</sup> *Cities Service Oil Co., Lake Charles, Louisiana Operation*, 145 N.L.R.B. 467 (1963).

<sup>47</sup> *T. Ballantine & Sons*, 120 N.L.R.B. 86 (1958).

<sup>48</sup> *Siemons Mailing Service*, 124 N.L.R.B. 594 (1959).

<sup>49</sup> § 101.17, NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965); *U.S. Gypsum Company*, 157 N.L.R.B. 652 (1966).

union, the petitioner (employer) must also demonstrate by objective considerations that it had some reasonable grounds for believing that the incumbent lost its majority status since the certification.<sup>50</sup>

#### TYPES OF ELECTIONS

There are basically three types of election cases. If the parties agree as to the time, date, place of the election, the appropriate bargaining unit and the eligible voters, there is no need for a formal hearing. The agreements allowed by Board procedure take one of two forms: an "Agreement for Consent Election" or a "Stipulation for Certification upon Consent Election." These two forms are similar, but differ dramatically in one respect. The difference is that parties who sign and agree to the terms and conditions of the holding of the election using NLRB Form No. 651 ("Agreement for Consent Election") formally waive a hearing, admit jurisdiction and provide that all rulings and methods of handling differences by the regional director shall be final and binding upon all parties. Thus, by signing such an agreement, the parties waive their right to an appeal of any action or inaction on the part of the regional director or his staff. There are three exceptions to the waiver of appellate rights. These are: (a) when the regional director has acted in excess of his power and violated a clear mandatory requirement of statute;<sup>51</sup> (b) when he has not considered substantial evidence indicating that the constitutional rights of the complaining party have been violated;<sup>52</sup> or (c) when he has overlooked questions of considerable national interest and international overtones.<sup>53</sup> As opposed to the "Agreement for Consent Election" form, the other "agreed upon" type of election is called a "Stipulation for Certification upon Consent Election." This is NLRB Form No. 652 and it is basically similar to the "Consent Election" form, except that each and every party to the agreement maintains his right of appeal and other rights assured him through prior case law, interpretations of the statutes administered (as in the Administrative Procedure Act), or the Board's Rules and Regulations and Statements of Procedures, Series Eight (1965). Needless to say, where counsel represents a party to a petition and all the parties thereto have agreed to the terms and conditions of the election, the eligible voters, the time, the place, and

<sup>50</sup> U.S. Gypsum Company, 157 N.L.R.B. 652 (1966).

<sup>51</sup> Leedom v. Kyne, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958).

<sup>52</sup> Fay v. Douds, 172 F.2d 720 (2d Cir. 1949).

<sup>53</sup> Boire v. Greyhound Corp., 376 U.S. 473, 84 S. Ct. 894, 11 L. Ed. 2d 849 (1964).

the date of the election, the author would certainly, and strongly, urge counsel to sign *only* the "Stipulation for Certification upon Consent Election" agreement.

The third type of an election arises where the parties are in disagreement over some particular issue after a petition has been filed, such as jurisdiction, appropriate bargaining unit, time, date, place of election, or the existence of a QCR. Under these circumstances an agent of the regional director will contact the parties by telephone, will discover exactly what disputes do exist between the parties and will set a hearing date, the purpose of this hearing is to receive evidence so that a determination can be made by the regional director and the dispute resolved.<sup>54</sup> The regional director will then issue a "notice of hearing," which will state the style of the case and the time and place of the hearing.

The hearing will be conducted before a "hearing officer," usually a field examiner from the regional director's office (Note that in some regions only "field attorneys" are used for the purposes of holding the representation hearings and not field examiners). It is the hearing officer's duty to obtain a full and complete record upon which the Board or the regional director can determine an appropriate bargaining unit, jurisdiction of the parties to the petition, the existence of a QCR and/or any other disputes that exist between the parties. This is not an adversary proceeding, and consequently, the hearing officer will be more favorably inclined to admit evidence as opposed to restricting the admission of evidence because of some "technicality." The hearing officer has discretion to open, to close and to continue the hearing and to receive all motions filed by a party to the proceeding.<sup>55</sup> If a motion of any kind is filed in writing, there must be an original and two copies and other copies must be made available and served upon the other parties to the proceedings. Carbon copies of typewritten matter will not be accepted. All motions, rulings and orders thereon shall become a part of the record with one exception; a ruling on a motion to revoke subpoenas shall only become a part of the record when requested by the aggrieved party.<sup>56</sup> The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.<sup>57</sup>

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<sup>54</sup> § 102.63, NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

<sup>55</sup> § 102.65, NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

<sup>56</sup> § 102.66, NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

<sup>57</sup> § 102.65(d), NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

Brief mention should be made at this time that in these "Representation Hearings" evidence of unfair labor practices is generally excluded,<sup>58</sup> even where this evidence may pertain to some of the propaganda used by either of the parties during the "election campaign" that has occurred since the filing of the original petition.<sup>59</sup>

Once the hearing is closed by the hearing officer, it, as a general rule, will not be reopened unless the rehearing will be based on newly discovered evidence not available to the parties at the time of the original hearing.<sup>60</sup> Further, even though the record in a representation proceeding remains open until the investigation is concluded, a motion to reopen the record will be refused where the subject matter, even though newly discovered and unavailable at the time of the original hearing, could be made the basis of objections to the conduct of the election.<sup>61</sup> Such objections are generally investigated subsequent to the election.

Section 102.66 of the Rules and Regulations states basically that *any* party may file an application for a subpoena *ad testificandum* or *duces tecum* and, upon filing of such application, the regional director or the hearing officer *shall forthwith* grant the subpoenas requested. If the application for the subpoena is filed prior to the opening of the hearing, it shall be filed with the regional director, or if it is filed after the opening of the hearing, it shall be filed with the hearing officer. The hearing officer and/or the regional director, whichever the case may be, may revoke the subpoena if in his opinion the evidence that these subpoenas request does not relate to any matter under investigation or in question in the proceeding, or if the subpoena does not describe with sufficiency the evidence in this production as required, or for any reason the subpoena is otherwise invalid. The party on which it is served shall have five days after the date of service of the subpoena to petition in writing to revoke the subpoena.

As indicated earlier, the person against whom the subpoena is issued may file a petition to revoke the subpoena within five days after service of the subpoena upon him. Petitions to revoke, after being filed with the proper authority, must be ruled upon by the regional director and/or the Board. If such ruling is adverse to the party filing the peti-

<sup>58</sup> Flint Mfg. Co., 62 N.L.R.B. 1003 (1945); Crowley's Milk Co., Inc., 79 N.L.R.B. 602 (1948).

<sup>59</sup> Bush Woolen Mills, Inc., 76 N.L.R.B. 618 (1948); P.R. Mallory & Co., Inc., 89 N.L.R.B. 962 (1950).

<sup>60</sup> Newbedford Loom Fixers Union v. Alpert, 23 CCH Lab. Cas. ¶ 67, 459, 110 F. Supp. 723 (1953); W. Top, Inc., 115 N.L.R.B. 758 (1956).

<sup>61</sup> Soldwedel Co., 113 N.L.R.B. 225 (1955).

tion, the Board may seek enforcement of the subpoena in the federal district court in the area where the Board hearing is held or where the witness is found or resides.<sup>62</sup> The Board has no enforcement powers; appropriate federal district courts only have jurisdiction to accept petitions for enforcement of subpoenas from the Board itself and not from private parties.<sup>63</sup> Like other documents used by the Board, the subpoena may be served personally, by registered mail, by telegraph, or by leaving a copy of the subpoena at the person's office or principal place of business. The verified return of the server or a returned post office or telegraph receipt is sufficient proof of service, and service by registered mail is good even though refused.<sup>64</sup>

It must be emphasized that the hearing officer presiding at the representation hearing is vested with some very poignant duties and powers under section 102.66(d) of the Rules and Regulations. In this section of the rules, the hearing officer is entitled to three "remedial" options for certain types of "misconduct of a witness of either party to the proceeding." These options are:

(1) the summary exclusion of witnesses guilty of misconduct from the hearing;

(2) if the misconduct is engaged in by an attorney or other representative of a party to the proceeding, after due notice and hearing, such misconduct may be grounds for suspension or disbarment by the Board from further practice before it; or

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

After the hearing officer has received all of the evidence available and the record is still open, he will generally ask the parties to the proceeding whether they wish to make an oral argument on their behalf for the record or file a written brief in support of their respective positions. As a general rule, the author discourages the making of an oral argument by counsel in lieu of the filing of a brief in support of his position. This is true even when counsel has done substantial research with regard to the legal questions involved prior to the opening of the hearing, which in all circumstances he should have done, and when he

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<sup>62</sup> NLRB, *ex rel.* Kohler Co. v. Gunaca, 29 CCH Lab. Cas. ¶ 69,598, 135 F. Supp. 790 (D.C. Wis. 1955).

<sup>63</sup> Evans Products Co. v. Reynolds, 53 CCH Lab. Cas. ¶ 11,116 (D.C. Tenn. 1966).

<sup>64</sup> Pasco Packing Co., 115 N.L.R.B. 437 (1956).



can support his oral argument by case citations. The reason for this is that many times during the hearing itself new questions or "twists" of old questions arise and further research is necessary prior to the presentation of arguments. Further, the written brief can refer to exact pages in the transcript to be considered by the regional director in making his decision, and if he fails to review the pertinent portions of the record as indicated in the brief, this conduct is possibly subject to review by the Board in Washington.

When a request to file a written brief in behalf of one's position is made to the hearing officer, he can readily give the requesting party seven days after the close of the hearing before the brief is due in the regional office. However, prior to the close of the hearing, the hearing officer, for good cause shown, has discretion to grant an additional fourteen days for the filing of the brief. When filing the brief, the original and one copy must be sent to the regional director with other copies simultaneously served on all other parties to the proceedings.<sup>65</sup> All briefs should contain a "certificate of service" section indicating that the party filing the brief has served all parties with copies. Requests for any extension of time for the filing of briefs shall be made to the regional director in writing and copies of such requests shall be extended to other parties to the proceeding. Such request shall be received not later than three days prior to the date such briefs are due in the regional director's office.<sup>66</sup>

After the regional director has received the briefs of the various parties, the transcript of the proceedings, a report from the hearing officer and all other documents and evidence in the proceeding, he shall then cause a decision to be issued setting forth his findings as to the various questions presented. The decision of the regional director shall be final, provided however, that within ten days after service thereof, any party may file eight copies of a request for review with the Board in Washington, D. C. with copies being simultaneously served on other parties to the proceeding. The filing of a request for review shall not, unless otherwise ordered by the Board, operate as a "stay" of any action taken or directed by the regional director in his decision.<sup>67</sup>

A request for review may be granted by the Board only upon one or more of the following grounds:

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<sup>65</sup> § 102.67, NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

<sup>66</sup> *Id.*

<sup>67</sup> § 102.67(b), NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

- (1) that a substantial question of law or policy was raised because of the absence of or a departure from officially reported Board precedent;
- (2) that the regional director's decision on a substantial factual issue was clearly erroneous on the record and such error prejudicially affects the rights of a party;
- (3) that the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or
- (4) that there are compelling reasons for reconsideration of an important Board rule of policy.<sup>68</sup>

The Board's rules and regulations further provide<sup>69</sup> that a party objecting to the requested review may himself submit a statement in opposition to the review within seven days after the "last day on which the request for review must be filed."

Contained within the regional director's decision, if he directs the holding of an election, there will be a proviso requiring the employer in the proceeding to submit to the regional director within seven days after the decision an "election eligibility list" containing the names and addresses of all of the eligible voters as determined in the decision.<sup>70</sup> Where the employer refuses to accede to the *Excelsior Underwear* requirement, the results of the election will be overturned if proper objections are filed by the aggrieved parties, and if the results of that election are in favor of the employer, *i.e.* the labor organization or labor organizations fail to receive a majority vote designating it or them as the bargaining representative. In some instances regional directors have found it appropriate, when an employer has refused to abide by the *Excelsior Underwear* requirement, to seek enforcement of a subpoena that the regional director has filed against the employer. The subpoena requests the names and addresses of the eligible voters pursuant to *Excelsior Underwear*. These subpoenas generally have been enforced by appropriate federal district courts.<sup>71</sup>

There have been some recent developments in the *Excelsior Underwear* field where, for instance, the employer inadvertently omits a name and/or an address from the eligibility list, and/or where the employer files the "election eligibility list", but does so four days after the prescribed filing time. In most of these cases, unless evidence is proved

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<sup>68</sup> § 102.67(c), NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

<sup>69</sup> § 102.67(d), NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

<sup>70</sup> *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).

<sup>71</sup> *N.L.R.B. v. Beach-Nut Life Savers, Inc.*, 274 F. Supp. 432 (S.D.N.Y. 1967).

damaging to the aggrieved party, the objections will be overruled. The rule in *Excelsior* is not to be "mechanically applied" but is to supplement the underlying rationale of the statute, which is to provide the labor organization with an opportunity to inform the employees of its position so that the employees will be able to vote "intelligently."<sup>72</sup>

One of the broad discretionary powers of the regional director is to determine voter eligibility. As a general rule, an employee will be able to vote in a representation election if "he is employed by the petitioned employer during the established payroll eligibility period *and* employed on the day of the election." Both conditions must be met.<sup>73</sup> This rule is applicable to most industries, however, there are specific "guidelines" and "rules of eligibility" within specific industries that have conditions of employment unique in-and-of-themselves. For an example, a new and unique rule of eligibility was recently founded by the Board in dealing with petitions filed in the oil and oil-service industries. The Board determined that since there was a high rate of turnover in the oil industry and "roughnecks" went from one job to another they would have to formulate a new "eligibility rule" applicable to the oil and related industries.<sup>74</sup> The voter eligibility requirements found to be applicable to roughnecks are: those employees who have been employed by the employer for a minimum of ten working days during the ninety calendar day period preceding the issuance of the decision and direction of election, those who have not been terminated for cause or quit voluntarily prior to completion of the last job for which they were employed, and all roughnecks whose names appear on the employer's payroll list immediately preceding the issuance of the usual director's notice of election in the proceeding.<sup>75</sup>

Still another problem arises as to the voter eligibility list when there is a strike at the employer's premises. In 1959, appropriate amendments were made in section 9(c)(3) of the Act to deal with striker eligibility. In order to comply with the 1959 amendment, the Board made the following changes to section 9(c)(3) of the Act:

(1) permanently replaced economic strikers will be able to vote in an election which is held less than 12 months after the start of a strike, unless they were discharged for cause during the strike and were not rehired or reinstated before the election,

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<sup>72</sup> Program Aids Company, Inc., 163 N.L.R.B. 410 (1967).

<sup>73</sup> Wayne Knitting Mills, Inc., 1 N.L.R.B. 53 (1935); Gulf State Asphalt Co., 106 N.L.R.B. 1212 (1953).

<sup>74</sup> Hondo Drilling Company N.F.L., 164 N.L.R.B. 416 (1967).

<sup>75</sup> See Carl B. King Drilling Co., 164 N.L.R.B. 419 (1967).

(2) both the economic strikers and their permanent replacements will vote by challenged ballot,

(3) permanently replaced economic strikers are ineligible to vote in an election which is held more than 12 months after the start of the strike.<sup>76</sup>

Of course, unfair labor practice strikers have remained eligible to vote and their replacements are, accordingly, ineligible to vote.<sup>77</sup>

The mechanics of holding the election are matters under the Board's realm of decision subject only to statutory prohibition. After the decision of the regional director in a "disputed" election case, or after the signing of a "Stipulation for Consent Election" or "Consent Election" agreement, but prior to the election, official notices are issued to the employer for posting. These notices contain the date, the hour and the place of the election, the payroll period upon which voter eligibility is based, a description of the voting unit and the general rules concerning the conduct of the election. The failure of an employer to post the notice as requested will be grounds, when objected to by the complaining party, to overturn the results of the election. Ordinarily, an election is directed to take place as early as possible but not later than thirty days from the date of the order. The elections are generally held on the employer's premises but not necessarily at that location. Where an employer refuses to have the election conducted at his premises, other areas may be used, including parked cars which serve as voting booths in an employer's parking lot.<sup>78</sup>

The parties to the election are generally afforded the courtesy of having an "observer" to assist the Board agent in identifying voters, acting as checkers and watchers and challenging voters and ballots on behalf of the party he represents. This is a strict courtesy and not a matter of right.<sup>79</sup> Where a "Consent for Stipulation" or "Consent" agreement positively indicates that both parties shall be entitled to the right to have an observer present and to the use of that observer, it is a contractual right and not merely a privilege. Depriving the employer of this right will result in the setting aside of the election.<sup>80</sup> As far as who is eligible to act as an observer in behalf of a respective party to the proceeding, it is generally stated that union officials may

<sup>76</sup> MacGregor Triangle Co., Inc., 1961 CCH NLRB Dec. ¶ 9856, Case No. 36-RC-1594 (April 3, 1961).

<sup>77</sup> Coast Radio Broadcasting Corp., d/b/a Radio Station KPOL, 166 N.L.R.B. No. 72, CCH NLRB Dec. ¶ 21,644 (1967).

<sup>78</sup> Cities Service Oil Co. of Pennsylvania, 87 N.L.R.B. 324 (1949).

<sup>79</sup> San Francisco Bakery Employees Association, 121 N.L.R.B. 1204 (1958).

<sup>80</sup> Breman Steel Co., 115 N.L.R.B. 247 (1956).

act as observers in behalf of the union, but supervisors of the employer or higher employer officials are generally not admitted as observers. Where a party acts as an observer in behalf of an employer and such party is directly "responsible" to the employer, the election can be set aside for that fact alone.<sup>81</sup>

The duty of the Board agent conducting the election is to make sure that the election is conducted under "laboratory conditions" to ensure all parties the right to freely express their desires in secret during the election. Accordingly, the Board agent must at all times observe the ballot box and the polling area. If he leaves the ballot box unattended and unsealed for even a short period of time (2 to 5 minutes), an election can be set aside on this basis alone.<sup>82</sup>

As a general rule, the decision rendered by the regional director in deciding the issues raised by the filing of a petition will also contain the time for the election to begin and the time for the election to be ended. In the decision or in the agreement for the election signed by the parties, unless express written waiver is received by all parties to the proceeding, the polls cannot be closed prior to the expiration of the full time allocated for the election. Thus, if there are only fifteen eligible voters and the agreement for the election or the regional director's decision allows 45 minutes for the eligible voters to vote, and in fact they all vote within the first 15 minutes after the polls have been opened, the polls will generally not be closed until after the expiration of the 45 minute time period.

After the time period called for in the decision directing the election or in the agreement signed by the parties agreeing to the terms of the election, the Board agent will then ask the observers to sign a statement entitled a "Certification on Conduct of Election." The signing of the certification does not in any way waive a party's right to object to certain conduct as a basis for overturning the results of the election. It is advisable if objections are anticipated to instruct ones' observer to sign the "certification" "in protest" and not in a "blank fashion."

After the above procedure has been followed, the Board agent will open the sealed ballot box and proceed with the "counting" of the ballots. The Board agent will, on an *ad hoc* basis, rule on the validity of each individual ballot. The ballot itself must reflect the true intent of the voters before it should be counted. The ballot should not contain

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<sup>81</sup> Peabody Engineering Co., 95 N.L.R.B. 952 (1951), employer's attorney acting as observer, thus election set aside.

<sup>82</sup> Austill Wax Paper Co., 169 N.L.R.B. 169 (1968).

any marks or other items that would in any way identify the voter, and if a ballot does contain identifying marks, it should be voided. Either party wishing to challenge a Board agent's ruling on a ballot *must* do so at the time he makes the ruling or else such challenge or objection will be waived. After hearing the objection, the Board agent will generally not rule on the objection, but will place the ballot in a "challenged ballot" envelope and place it with the other, if any, challenged ballots in the election. After counting and tabulating all of the ballots, the Board agent will determine whether the "challenged ballots" are sufficient in number to affect the result of the election. He will then issue a "tally of ballots."<sup>83</sup> The tally of ballots contains the case name and number, the type of election, approximate number of eligible voters, void ballots, the total valid ballots counted, total number of challenged ballots and whether the challenges are or are not sufficient in number to affect the results of the election. A conclusionary statement is then contained on the "tally" stating "a majority of the valid votes counted plus challenged ballots has (not) been cast for———." The "tally" asks for the signatures of the observers indicating that the counting and tabulating of the votes were fairly and accurately done and the secrecy of the ballots was maintained. One should be cautioned against allowing his observers to sign the "tally" without a "limitation" proviso accompanying the signature. This is especially true if objections are anticipated.

If the challenged ballots are not sufficient in number to affect the results of the election, they will not be opened nor will an investigation be initiated by the regional director to determine the eligibility of the challenged voters. However, if the challenges are sufficient in number to affect the results of the election, the regional director will institute an investigation of the challenges. After he has investigated the challenges and given all parties to the proceeding an opportunity to submit evidence as to the validity of these challenges, he will issue a "report on challenged ballots" and "revised tally." If his decision results in a certification of one or the other party to the proceeding, the instrument will also contain that certification of results of the election.

Within five days after the original "counting of ballots" has been furnished, any party may file with the regional director an original and three copies of objections to the conduct of the election or conduct affecting the results of the election. Such filing must be timely whether

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<sup>83</sup> Form NLRB 760.

or not the challenged ballots are sufficient in number to affect the results of the election.<sup>84</sup> If no objections are filed within this time, if the challenged ballots are not sufficient in number to affect the results of the election and if no runoff election is to be held, the regional director shall issue to the parties a "certification of the results of the election including a certification of representatives," when appropriate. If objections are filed and challenged ballots are sufficient in number to affect the results of the election, the regional director shall investigate the challenges and the objections simultaneously.

Some of the more obvious and well established objections when supported by evidence that will be sustained resulting in an order for a new election are:

(1) either party to the election conducting a speech on company time to mass assembly of employees within twenty-four (24) hours of the scheduled time for the conduction of the election,<sup>85</sup>

(2) where the employer, some time prior to the election, but after the filing of the petition, interviews or "talks" to employees in his office in groups of two or three, and no more, in which "talk" he urges that the employees reject the union,<sup>86</sup>

(3) where either party to the proceeding shows that one of the other parties engaged in "conversations" (regardless of their content) with voters while the latter were in the polling area waiting to vote in the representation election,<sup>87</sup>

(4) where one party to a representation proceeding mis-states material facts which are within its special knowledge under such circumstances that the other party or parties cannot learn about them in time to point out the mis-statements, and the employees themselves lack the knowledge to make possible a proper evaluation of the mis-statements.<sup>88</sup>

Of course, there are other types of conduct that may be sufficient to support an appropriate objection filed by any party to a representation proceeding. However, the above are some of the more common pitfalls to avoid.

It should also be noted that when a party files objections to the conduct of an election or to the conduct of one of the parties to the

<sup>84</sup> § 102.69, NLRB Rules and Regulations and Statements of Procedure, Series 8 (1965).

<sup>85</sup> Peerless Plywood Company, 107 N.L.R.B. 427 (1953).

<sup>86</sup> Qualiton and Book Binders and Bindery Women Union Local No. 63, 115 N.L.R.B. 65 (1956).

<sup>87</sup> Milchum, Inc., 170 N.L.R.B. No. 46 (1968).

<sup>88</sup> Kawneer Co. and District No. 122 in the National Association of Machinists, 119 N.L.R.B. 1460 (1958); Celanese Corp. of America, 42 CCH Lab. Cas. ¶ 17,016, 279 F.2d 204 (7th Cir. 1960).

election, the investigations by the Board into the substance of the objections is not limited by the specific objection itself. Even where the Board finds no merit in the specific objection filed by the charging party, yet the objection discloses other conduct not objected to that would be sufficient to overturn the results of the election, the election will still be overturned as though a proper objection had been filed.<sup>89</sup>

In most instances the regional director will decide whether objections have merit by the investigative process alone without the benefit of an official "hearing" to determine the merit of the objections. There have been instances, however, where in doing so, the findings of the regional director are overturned because it was an abuse of his discretion to make determinations on the objections without a hearing at which all parties would be present.<sup>90</sup> The order of the Board in enforcing the regional director's determination that a new election is required because certain acts or omissions amounting to misconduct have destroyed the "laboratory conditions" is not a final order reviewable by a court under section 10 of the National Labor Relations Act.<sup>91</sup>

#### RUNOFF ELECTIONS

The runoff election arises at the original election when there are three or more choices on the ballot. There can be no runoff when there are only two choices on the original ballot. As a general rule, a runoff election is ordered when none of the choices received a majority of the valid votes cast. Such election is then determined to be an "inconclusive" election. In this case, the regional director will normally conduct a "runoff election" between the choices on the original ballot receiving the highest and the next highest number of votes. The one major exception is where there are three parties to an election, none of whom received a majority of valid votes cast in the original election. The most common examples of this exception are where:

- (1) All choices receive an equal number of votes.
- (2) Two choices receive an equal number of votes.
- (3) Two choices receive an equal number of votes, but a third choice receives a higher but less than majority number of votes. In this situation the regional director will declare the original election a nullity and conduct another "rerun" election with the same choices on the

<sup>89</sup> Thomas Products Co., Division of Thomas Industries, Inc., 167 N.L.R.B. No. 106, 1968-1 CCH NLRB Dec. ¶ 22,127 (1968).

<sup>90</sup> United States Rubber Company v. NLRB, 55 CCH Lab. Cas. ¶ 11,721, 373 F.2d 602 (5th Cir. 1967).

<sup>91</sup> A.F. of L. v. NLRB, 308 U.S. 401, 60 S. Ct. 300, 84 L. Ed. 347 (1940).



ballot. If the second election results in another such nullity, the petition will normally be dismissed. A further exception when two or more choices receive an equal number of votes out of the original balloting and the third receives no votes whatsoever, there are no challenges and all eligible voters have voted. In this situation neither a runoff nor a re-run election should be conducted, and a certification of the results will be issued. For example, if there are 42 eligible voters in the appropriate unit, 42 votes cast, Union A receiving 21 votes, Union B receiving 21 votes and no votes cast "against union representation," the Board will certify the results of the election, being that "no union" was chosen as the exclusive representative of the employees.<sup>92</sup>

After the results of an election have been certified, this certification, under section 9(c) of the Act, is treated by the Board as certain and final for a period of one year.<sup>93</sup> This "certification year" is tolled in situations where the employer commits unfair labor practices during the period of time the certification exists. The certification will be extended for a period of time equalling the time of the delay caused by the commission of the unfair labor practice by the employer.<sup>94</sup> With this in mind, the Board has developed a rule and policy that petitions, whether RC, RM or RD, will be dismissed if they are filed before the end of the "certification year." This position is known as the "Centr-O-Cast" rule.<sup>95</sup> Aside and apart from the one year certification rule is the "12 month" rule which is to be found in section 9(c)(3) of the Act. That section states that the Board is prohibited from conducting an election in any bargaining unit or subdivision thereof in which a valid election has been held during the preceding 12 month period. It should be noted that the 12 month period runs from the date of balloting and not from the date of certification, which is a major distinction between the two rules.<sup>96</sup> Note that the "12 month rule" does not bar the filing of a petition for the holding of an election in a larger unit even where there has been a previous election in a smaller unit as stated in the statute.<sup>97</sup>

#### CONTRACT BAR

There is one other item worthy of mention, the existence of a contract between an employer and a labor organization that would act as

<sup>92</sup> Tullahoma Concrete Pipe Co., 168 N.L.R.B. No. 72, 66 L.R.R.M. 1323 (1967).

<sup>93</sup> Ray Brooks v. NLRB, 348 U.S. 96, 75 S. Ct. 176, 99 L. Ed. 125 (1954).

<sup>94</sup> Mar-Jac Poultry Co., Inc., 136 N.L.R.B. 785 (1962).

<sup>95</sup> Centr-O-Cast and Engineering Company, 100 N.L.R.B. 1507 (1952).

<sup>96</sup> R.L. Polk & Co., 123 N.L.R.B. 1171 (1959).

<sup>97</sup> Thiokol Chemical Corporation, Redstone Division, 123 N.L.R.B. 888 (1959).

a bar to a petition filed by a third party requesting the holding of an election. It is a general rule that a contract will serve as a bar to the holding of an election if that contract meets certain basic requirements. This concept was originally discussed and is treated fully in the leading case *Appalachian Shale Products Company*.<sup>98</sup> In order for a contract to bar the holding of an election it must: be in writing, be signed by all parties to it, contain substantial terms and conditions of employment, be clear on its face and encompass the employees involved in the petition that has been filed, cover an appropriate collective bargaining unit and must not be a "members only" contract. That is, it cannot be a contract that purports to represent only those employees who belong to the union and not *all* those employed in the collective bargaining unit. It must also be ratified if such affirmative act is called for in the terms and conditions of the contract.

By way of summary, four major points should be emphasized:

(1) under most circumstances, do not allow a respondent-client to *assist* a Board agent by giving oral or written statements, (2) double check the Rules and Regulations for applicable time periods as to the "service" aspect of procedure before the regional offices of the Board, (3) work for your Charging Party-Client contemplating settlement, and (4) never enter into a "consent" election agreement waiving rights of appeal.

When and if an attorney finds himself in a position of representing a client in the trial of an unfair labor practice, he should read a text entitled *Trial of An Unfair Labor Practice Case Before the National Labor Relation Board*.<sup>99</sup>

This article is not intended nor will it act as a substitute for experience. It is aimed at assisting the practicing attorney in the representation of a client before the National Labor Relation Board. This article should not act as an "ending", but as a starting place so that the attorney will have a basis to avoid the "pitfalls of practice before the regional offices of the Board."

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<sup>98</sup> 121 N.L.R.B. 1160 (1958).

<sup>99</sup> LINTON, *TRIAL OF AN UNFAIR LABOR PRACTICE BEFORE THE NATIONAL LABOR RELATION BOARD*, Kellwood Co., St. Louis, Missouri, 1970.