UNIVERSITY OF CALIFORNIA, LOS ANGELES

(A Policy + Practice Publication)

UNION REPRESENTATIVE'S GUIDE TO NLRB RC & CA CASES

CENTER FOR LABOR RESEARCH AND EDUCATION
INSTITUTE OF INDUSTRIAL RELATIONS (Los Angeles)

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UNION REPRESENTATIVES' GUIDE TO NLRB RC & CA CASES;

A Survival Kit for Union Representatives
Exploring the Mysterious Regions of the
National Labor Relations Board

(A Policy & Practice Publication)

by

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CENTER FOR LABOR RESEARCH AND EDUCATION

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PREFACE

This handbook is intended for use by those union staff persons who have responsibility in organizing and/or for negotiating first contracts for groups of workers whose employers come under the jurisdiction of the National Labor Relations Board.

It deals only with those aspects of Board procedure involving RC (Petition for Certification as an authorized representative) or CA (Unfair Labor Practice Charges against an employer) cases, and is focused on proceedings at the Regional level.

The handbook is respectfully dedicated to those union representatives who are constantly faced with the responsibility for making decisions or taking actions which affect, not their welfare, but that of employees seeking representation rights. That responsibility is a heavy one, and it is hoped that this guide will be useful when that responsibility entails a journey through the tortuous policies and procedures of the Regions of the National Labor Relations Board.

ACKNOWLEDGMENTS

The appreciation expressed in the 1977 (first) edition of this manual to those persons whose assistance contributed to the publication deserves repetition:

> Reginald Alleyne, Professor of Law and Associate Director of the Institute of Industrial Relations, UCLA (who, during the writing of this manual, served as Chairman of the California Education Employee Relations Board) made time in his busy schedule to critique a draft of the manuscript and to note and discuss with me those sections he felt would benefit from amplification or clarification. His suggestions, advice, and support are deeply appreciated.
>
> Helen Mills produced the manuscript you see from my jumble of cross-outs, inserts and marginal scribblings which might well have been incomprehensible to one without her patience and skill. In addition, her suggestions as to content and form proved most valuable, and I'm sure many readers will be grateful to her for contributing the detailed table of contents.
>
> A less direct but very meaningful contribution to this publication was also made by those individuals on the staff of Regions 21 and 31 of the NLRB who over the years answered my questions, coped with my protests, advised me of appeal rights, and sometimes even agreed with me as, each in our own way, we sought to turn cumbersome machinery into a vehicle for protection of workers' rights.
>
> Thanks also to Felicitas Hinman, editor, and to Marna McCormick for her cover design.

In preparing this new edition, which reflects changes made in the Board's Case Handling Manual over the years, as well as certain trends that affect the way in which union representatives can best represent workers in RC and CA cases today, special thanks must be given to others:

Sharon O. Geltner, coordinator in the Institute of Industrial Relations Publications Center, edited the manuscript and designed the cover. Margaret Zamorano prepared the revised copy for publication. Theodore Horn, supervising field examiner for Region 21 of the NLRB, gave generously of his time in discussing with me significant new decisions and procedures currently in use at the regional level of the Board. However, responsibilities for interpretation, and for any inaccuracies in this present edition, rest solely on the author's shoulders.

Gloria Busman
1984

SUPPLIES NEEDED FOR THE JOURNEY TO THE REGION

Determination: (All you can fit in.)

Traveling Companions: (It's not safe to travel alone - you need witnesses who are prepared, and who will stand up under the pressures of the trip.)

Paper: (Every scrap of data you can gather, even if you can't foresee any use for it at the time you receive it. Written documentation becomes increasingly scarce the further you go.)

Basic Tour Guide: NATIONAL LABOR RELATIONS BOARD
CASEHANDLING MANUAL
PARTS ONE AND TWO

This Manual is the one which will be (or should be) used by the Board agents handling your case. It details proper procedure each step along the way under present Board policy. It helps immeasurably to know what you have a right to expect as your case is processed.

Copies of the Manual are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

Supplementary Tour Guides: A copy of the National Labor Relations Act, as amended.

A Layman's Guide to Basic Law Under the National Labor Relations Act, also for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, and generally available at Regional Offices of the NLRB.

Suggested Reading: **The Developing Labor Law.** Charles J. Morris, et al., eds. Vols. 1 & 2, 2d ed. Washington, D.C.: The Bureau of National Affairs, Inc., 1983.

How to Take a Case to the National Labor Relations Board. Kenneth C. McGuiness. 4th ed. Washington, D.C.: The Bureau of National Affairs, Inc., 1976.

Organizing and the Law. Stephen I. Schlossberg and Frederick E. Sherman. 3rd ed. Washington, D.C.: The Bureau of National Affairs, Inc., 1983.

Union, Workers and the Law. Betty W. Justice. Washington D.C.: The Bureau of National Affairs Inc. 1983.

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Road Signs

INTRODUCTION

Over the past several years, union representatives have tended to regard the regions of the National Labor Relations Board as hostile territory, and have been reluctant to set foot inside the borders.

As a result, they've at times either turned away workers who asked them to make the trip, or have turned over to legal counsel the responsibility for returning from the journey with appropriate trophies.

The fact that the workers and their unions seldom are satisfied with what comes back from the NLRB reinforces the conviction that it's a terrible place to go.

It can be. As a union representative and worker advocate of long standing, I would be the last to minimize the validity of complaints regarding the viewpoint and philosophy that the Board and more recently the Supreme Court have displayed in their decisions. Or the need for reforms both at regional and national levels to return the Board to a closer observance of what was originally to be its function: to encourage collective bargaining, and to protect workers in their efforts to achieve collective bargaining. This function is eloquently set forth in the opening paragraphs of the National Labor Relations Act:

> Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not posses full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rate and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

In 1977, when the first edition of this handbook was published, hope was high among union representatives and knowledgeable members that the United States Congress would enact "The Labor Reform Act." Amendments to the NLRA had been proposed which would have strengthened the possibility for more prompt and full protection of workers' rights. The widely supported legislation was defeated in 1978 by a Senate filibuster.

Labor law reform has high priority on labor's legislative agenda; however it seems unlikely that this goal will be achieved in the immediate future. 1984 has seen a number of decisions by the Board

and by the Supreme Court, which further narrow the interpretation of workers' right to concerted activity, and tend to limit a union's effectiveness in representing workers who have elected the protection of collective bargaining.

Until the political climate shifts, I believe that there continues to be a number of things union representatives can do to better protect the interests of their union, and workers, in dealings with the Regions of the NLRB.

The first thing you as a union representative can do is realize and remember that the NLRB is a Federal Agency; and that its employees are, in effect, your employees, since you are a citizen, a taxpayer, as well as a union representative. The Freedom of Information Act has made the Board's Casehandling Manual available to any interested person. Part One, Unfair Labor Practice Proceedings, and Part Two, Representation Proceedings, help the average layperson to determine, and to establish with the Board agent if necessary, exactly what union representatives and workers have a right to expect of the Board and its staff.

The second thing to remember is that the staff of the Region are just that - staff. They are not demigods, nor are they all-knowing and all-wise. Like you, they are subject to error or misinformation, and a question or challenge of their judgment is quite in order at any time.

There is a great deal of turnover among agents and field examiners and attorneys at the Regional Offices of the NLRB. If you've handled one case for your union, there's a good chance that you've handled one more than the Board agent assigned to your next one.

I remember feeling totally over my head the first time I filed 8(a)(5) (refusal to bargain) charges against an employer and attempted to provide solid enough evidence for a complaint to be issued. I had heard that these are the most difficult of all charges to substantiate, and in this case they involved a pattern that had developed during months of negotiations. It seemed to me that every time I spoke with the examiner assigned to the case, new roadblocks in the form of case citations or Board precedent were being thrown at me, so that I had to rush back to my books and find a counter argument.

Years after the case had been resolved, The Board agent and I confessed to each other that it had been for both of us our first experience with 8(a)(5)s, and that he, too, had ended each conversation with a mad dash to the reference books because I had seemed so knowledgeable!

The third thing is to become familiar with the Casehandling Manual. It constitutes an excellent travel guide. If you study it, you will be aware of exactly what to look for and to expect, each step along the way. Further, you're entitled to an adjustment if there is a deviation from what is promised in the Manual.

PART I. REPRESENTATION CASES
CHAPTER 1
Preparing to File

Whether or not your union has available to you an attorney to handle Board matters, a great deal of the responsibility for what happens at the Regional level of the Board rests with you, as a union representative.

You have the day-to-day contact with members of a proposed bargaining unit; you, in the process of helping to organize a group, have access to detail and information the employees can provide on an ongoing basis; you, because you're involved from the beginning, often have a head start in learning and documenting how things really work within a company before management has a chance to develop a strategy to defeat the employees' effort to organize.

But you have to know what you're looking for and what you need to prove your case, if you seek certification before the Board.

1. Does the Board Have Jurisdiction Over the Employer?

The basic criterion for establishing jurisdiction is whether the employer's business affects interstate commerce. The Board has established standards for determining this involvement, which vary from one type of establishment to another. These standards are liberal enough that most substantial employers can meet them. A summary of these standards, published by the NLRB, is reproduced below.

The Board's Jurisdictional Standards

> The Board does not initiate cases. It investigates and decides only cases which are initiated by private parties, either through the filing of petitions for representation elections, or the filing of charges of unfair labor practices against employers and/or unions. In both types of proceedings the initial filing is made with one of the Board's Regional Offices. The Board has established 31 Regional Offices and 11 field offices. In each type of proceeding the first question investigated is the question of the Board's jurisdiction. The Board has ruled that it is incumbent upon it to establish the existence of its legal jurisdiction or authority to proceed.[9] Once that has been established, however, the Board determines whether or not to proceed by determining whether the employer's operations satisfy the jurisdictional standards set forth below. In applying those standards, the Board considers the total operations of the employer, even though the particular labor dispute involves only a portion of those operations.[10] The Board has also determined that it will

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[9]Catalina Island Sightseeing Lines, 124 NLRB 813.

[10]Siemons Mailing Service, 122 NLRB 81. See also Man Products, Inc., 128 NLRB 546.

assert jurisdiction in any proceeding where the record establishes the Board's legal jurisdiction, irrespective of a showing that the applicable standard is met, if the employer fails to cooperate in the production of necessary commerce information, after proper opportunity to do so has been afforded it.[11]

THE BOARD'S JURISDICTIONAL STANDARDS ARE AS FOLLOWS:

NONRETAIL OPERATIONS: The Board asserts jurisdiction over all nonretail operations which have an annual outflow or inflow across State lines of at least $50.000, whether such outflow or inflow be regarded as direct or indirect.[12]

For purposes of applying this standard:
Direct outflow is defined as goods shipped or services furnished by the employer outside his home State.

Indirect outflow is defined as the sale of goods or services to users meeting any of the Board's jurisdictional standards, excepting the indirect outflow or indirect inflow standard.

Direct inflow is defined as goods or services furnished the employer directly from outside the State.

Indirect inflow is defined as goods which originate outside the State, but which the employer purchased from a seller or supplier within the State.

RETAIL ENTERPRISES: The Board asserts jurisdiction over all retail enterprises which have a gross volume of business of at least $500,000 per annum.[13] For purposes of applying this standard taxicab enterprises are considered to be retail enterprises.

OFFICE BUILDINGS: The Board asserts jurisdiction over all enterprises engaged in the management and operation (whether as owners, lessors, or contract managers) of office buildings, if the gross revenue derived from such operations amounts to $100,000, of which $25,000 must be derived from organizations whose operations meet any of the Board's jurisdictional standards, exclusive of the indirect inflow standards established for nonretail enterprises.[14]

TRANSPORTATION ENTERPRISES: The Board asserts jurisdiction over all passenger and freight transportation enterprises engaged in the furnishing of interstate transportation services, and all transportation and other enterprises which function as essential links in the transportation of passengers or commodities in interstate commerce, which derive at least $50,000 gross revenue per annum from such operations, or which perform services valued at $50,000 or more per annum for enterprises over which the Board would assert jurisdiction under any of its

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[11] Tropicana Products, Inc., 122 NLRB 121.

[12] Siemons Mailing Service, supra.

[13] Carolina Supplies and Cement Co., 122 NLRB 88. See also Man Products, Inc., supra.

[14] Mistletoe Operating Company, 122 NLRB 1534.

jurisdictional standards, exclusive of the indirect outflow and indirect inflow standards established for nonretail enterprises.[15]

LOCAL TRANSIT SYSTEMS: The Board asserts jurisdiction over all transit systems which do a gross volume of business of at least $250,000 per annum.[16]

NEWSPAPER ENTERPRISES: The Board asserts jurisdiction over all newspaper companies which hold membership in or subscribe to interstate news services, or publish nationally syndicated features, or advertise nationally sold products, if the gross volume of business of the particular enterprise involved amounts to $200,000 or more per annum.[17]

COMMUNICATION ENTERPRISES: The Board asserts jurisdiction over all enterprises engaged in the operation of radio or television broadcasting stations or telephone or telegraph systems which do a gross volume of business of at least $100,000 per annum.[18]

LOCAL PUBLIC UTILITIES: The Board asserts jurisdiction over all public utilities which do a gross volume of business of at least $250,000 per annum or which have an outflow or inflow of goods, materials, or services, whether directly or indirectly across State lines, of $50,000 or more per annum.[19]

HOTELS: The Board asserts jurisdiction over all hotel or motel enterprises, exclusive of permanent or residential hotels and motels, which receive at least $500,00 in gross revenues per annum. For purposes of applying this standard a permanent or residential hotel or motel is one where 75 percent of its guests may be regarded as permanent guests, that is, they remain for a month or more.[20]

NATIONAL DEFENSE: The Board asserts jurisdiction over all enterprises as to which it has statutory jurisdiction, whose operations exert a substantial impact on the national defense, whether or not the enterprises satisfy any other standard.[21]

PROPRIETARY HOSPITALS AND NURSING HOMES: The Board asserts jurisdiction over privately owned hospitals and nursing homes operated for profit when the total annual volume of revenues is at least $250,000 in the case of hospitals[22] and $100,000 in the case of nursing homes.[23]

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[15]HPO Service, Inc., 122 NLRB 394

[16]Charleston Transit Co, 123 NLRB 1296.

[17]Belleville Employing Printers, 122 NLRB 350.

[18]Raritan Valley Broadcasting Company, Inc., 122 NLRB 90.

[19]Sioux Valley Empire Electrical Association, 122 NLRB 92.

[20]Floridan Hotel of Tampa, Inc., 124 NLRB 261.

[21]Ready Mixed Concrete & Materials, Inc., 122 NLRB 318.

[22]Butte Medical Properties d/b/a Medical Center Hospital, 168 NLRB 266.

[23]University Nursing Home, Inc., 168 NLRB 263.

RESIDENTIAL APARTMENT HOUSING: The Board asserts jurisdiction over apartment house projects which receive at least $500,000 in gross revenue per annum.[24]

ENTERPRISES LOCATED IN THE TERRITORIES OR THE DISTRICT OF COLUMBIA: The Board applies the foregoing standards to enterprises located in the Territories.[25] It asserts jurisdiction over enterprises located in the District of Columbia on a plenary basis.[26]

PRIVATE NONPROFIT UNIVERSITIES AND COLLEGES: The Board asserts jurisdiction over any private nonprofit university or college which has a gross annual revenue from all sources of at least $1,000,000 (excluding contributions not available for operating expenses because of limitations imposed by the grantor).

UNITED STATES POSTAL SERVICE: Through enactment of the Postal Reorganization Act, signed by the President on August 12, 1970, jurisdiction of the Board has been extended to the United States Postal Service.[27]

ENTERPRISES OVER WHICH THE BOARD DOES NOT ASSERT JURISDICTION: Acting pursuant to Section 14(c)(1) the Board has determined that it will not assert jurisdiction over racetrack enterprises,[28] owners, breeders, and trainers of racehorses,[29] and real estate brokers.[30]

Within these broad guidelines, the Board has in recent years agreed to accept jurisdiction in certain areas where it had historically refused to do so. Non-profit organizations are now covered, based on the same criteria as proprietary institutions in the same or similar field. Professional sports organizations, symphony orchestras, art museums, law firms, and certain employers related to foreign governments have been ruled within the Board's jurisdiction.

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[24]Parkview Gardens, 166 NLRB 697.
[25]Sixto Ortega d/b/a Sixto, 110 NLRB 1917; RCA Communications, Inc., 154 NLRB 34.
[26]M.S. Ginn & Company, 114 NLRB 112: The Westchester Corporation, 124 NLRB 194.
[27]Public Law 91-375; 84 Stat. 719.
[28]Hialeah Race Course, Inc., 125 NLRB 388.
[29]Walter A Kelley, 139 NLRB 744; Meadow Stud, Inc., 130 NLRB 1202; William H. Dixon, 130 NLRB 1204.
[30]Seattle Real Estate Board, 130 NLRB 608.

In most organizing situations, no question of NLRB jurisdiction will arise. However, if you encounter a situation where a doubt exists, it's good to know that one of the functions of the Region is to provide pre-filing assistance. This may be the first occasion you use the Casehandling Manual:

11001.1 Determination Whether Situation is Covered by the Act: Approached by an individual who wants to raise a representation matter, the Board agent should explore the situation to determine initially whether, provided the proffered facts are accurate, the matter is one which is covered by the Act.

If you don't have specific data as to gross revenue or volume of the employer, indicators helpful in making a preliminary determination would include:

1. Number of employees (total, not just the unit you seek)

2. Size and location of all facilities

3. Names of suppliers or buyers who clearly are in interstate Commerce.

Again, according to the Manual, the Board agent is supposed to advise you that, even if it appears the employer is not covered, you still have the right to file a petition so that an **official** determination can be made.

> **11001.2 Situations Not Covered:** If the situation clearly is not covered by the representation parts of the Act, the Board agent should point out this fact and discourage the filing of a petition, but the individual should be advised that he still has the right to file a petition if he so desires.
>
> (If a petition is filed under these circumstances, it should be processed just as any other.)
>
> Even though no petition is filed under such circumstances, a brief memo of the salient facts should be prepared for the regional records.

It's also reassuring to know that the Region may provide assistance in preparing the petition, or in remedying defects.

> **11001.6 Assistance in Preparation:** Assistance in the preparation of a petition may be rendered to the filing party, to the extent that such assistance involves the furnishing of forms, reasonable clerical/ stenographic assistance, and wording of the petition itself.
>
> **11001.7 Assistance in Remedying Defects:** If petitions (or amendments thereto) are received in the Regional Office which contain errors on their face, assistance may be rendered in remedying the defects.
>
> In such cases docketing may be delayed pending a prompt communication with the filing party. If the filing party insists that the petition be docketed as is, his wishes should be honored. If the filing party cannot be reached by the end of the day the petition is received, the petition normally should be docketed that day.

2. Do you have "Sufficient Showing of Interest?"

Authorization from 30 percent of the employees in the unit for which you petition qualifies as sufficient for proceeding to election if that unit is found appropriate. It, of course, does not provide a basis for Board-ordered recognition as a majority organization, should that possibility develop later.

Even with the 50 percent plus one technically required to establish majority status, you may not be on the most solid possible ground, particularly if you haven't checked and rechecked the details of the unit for which you're petitioning.

There's time for argument later on if the employer contends the unit petitioned for is not appropriate; however, failure to do an accurate count, or to word your petition carefully, can destroy your show of interest or your claim to majority status at the time of first submission.

Let's suppose you are petitioning for what you presume to be a unit of 125 employees, and you submit 65 authorization cards with your petition, or within 48 hours of filing it. What can happen to your hard-won majority status?

1. Unless the petition is worded carefully, the employer can assume you are petitioning for employees doing similar types of work at a nearby location, which could double the unit.

2. Unless you are very much aware of the employer's operations and his classification system, it may be you've petitioned for a unit that includes both salary and hourly employees, but have based your count simply on the time cards.

Of course, you can amend the petition, or withdraw it and file another. But you've lost valuable time, and you've also tipped your hand. Remember, too, that a 30%, or even a 50% plus one, show of interest is not likely to result in an election win. Aside from the possibility that the unit will be enlarged, there is also the reality of at least an 11% drop off among card signers in a typical NLRB election. Turnovers, quits, layoffs, promotions, expansion of the work force and/or an effective employer campaign can erode the majority you thought you had. It's a comfortable feeling to petition with 65% or 70% of what you believe to be the appropriate bargaining unit having signed authorization cards.

3. Is the Unit for Which You're Petitioning an Appropriate One?

A number of things can happen along the way which will alter the exact size and shape of the unit, but the more carefully you define it in your own mind, and the more accurately you summarize it on the petition, the easier it will be to defend your unit in formal proceedings if you have to.

When employees want a union, they tend to want it now; they will be inclined to tell you whatever they feel will lead you to help them get it quickly. Often a push for organization centers in one department or section. If you suggest to them that it might be better or necessary to take on the job of organizing similar kinds of employees in other departments, a natural reaction will be for them to come up with a rationale that they are separate and different, and constitute a separate entity.

Take time to dig a little!

In the first place, you may be doing the employees a disservice even if you could win the small unit they suggest, because it may not be a strong enough group within the plant or office. In the second place, they've lost all chances of representation for at least a year if the Board expands your unit and you're not prepared for it and the employees lose the election.

Ask questions!

Ask the same questions of a number of people: How isolated are they, **really?** Were they hired through a different personnel department? Have any of them transferred from other departments? Is there a company personnel manual that affects them as well as other employees? Are they the only employees who use a certain time clock? Do they eat with other employees? What about Christmas and other company parties? Bowling leagues? What does the company organization chart look like? Can they get one for you? Do they receive memos from administration addressed "to all employees?" Do they receive memos addressed just to their department or section?

Keep a written record of the questions and the answers, with notes on who told you what. Keep any and all material the committee gives you that originated with the employer. Ask - insist - that the committee provide you with any and all personnel manuals, printed brochures on company group plans, promotional material they may have for the general public.

The reason for asking more than one person for information and material is that not everyone has the same experience with the employer, or even the same edition of employer-printed booklets. The quest for information also involves more members of your committee and increases their understanding of what lies ahead for them, as you seek representation through the NLRB procedures.

As the data accumulate and the questioning continues, one of two things will occur:

You, and the committee, will gradually begin to see that the unit you originally considered seeking does not have a firm enough base in terms of the community of interest and other guidelines the Board requires.

Or, you will have begun putting together a carefully documented argument in support of the unit you seek.

If the question of unit goes to hearing - whether a union attorney appears on your behalf or you handle it - all the information you have gathered will be important. It's a comforting feeling to be well aware of what evidence the employer and his witnesses may produce; it's even more comfortable to have documentation to counter potentially harmful testimony.

While you've been learning as much as possible about the company from the employees, you will also have had an opportunity to decide which of your committee will make the best witnesses to give evidence in support of the union's position. You'll be preparing yourself so that you can observe that long-standing rule - never ask a question of a witness unless you know what the witness' answer will be.

Should the unit question be resolved by consent agreement, the time you've spent is not lost by any means. It's amazing how often during the course of an organizing campaign a bit of information or a scrap of paper from the company will provide a clue to the best way of handling an anti-union rumor or an action taken by the employer.

Also during this time of preparation you've gotten to know your people better. And much of the material will prove useful to you or another union representative when it's time to begin contract proposals and negotiations.

As you formulate your position on the size and nature of the unit to seek, keep in mind the broad guideline of the Act regarding appropriate unit:

> Sec. 9(b) The board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit,craft unit, plant unit, or subdivision thereof: **Provided,** That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the

> safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Perhaps the keystone to Board unit decisions is the often reiterated policy that a unit sought need not be the **most** appropriate one conceivable, nor the most comprehensive. (See 15th Annual Report of NLRB, 39 [1950].)

This doctrine was clearly set forth in **Federal Electric Corp.:**

> Section 9(b) of the Act directs the Board to make appropriate unit determinations which will "assure to employees the fullest freedom in exercising rights guaranteed by the Act," i.e., the rights of self organization and collective bargaining. In effectuating this mandate, the Board has emphasized that the Act does not compel labor organizations to seek representation in the most comprehensive grouping of employees unless such grouping constitutes the only appropriate unit.[1]

4. Are There Questions about Individuals or Groups within the Bargaining Unit?

In addition to questions about the unit as a whole, there may be questions raised by the employer, or the Region, concerning supervisory, managerial or confidential employees, status of certain employees, eligibility of part-timers, technical personnel, etc.

You need to go through the same careful questioning and preparation regarding this issue.

In **Continental Baking** the Board articulated general criteria for unit determination:

> First and foremost is the principle that mutuality of interest in wages, hours and working conditions is the prime determinant of whether a given group of employees constitutes an appropriate unit. In deciding whether the requisite mutuality exists, the Board looks to such factors as to the duties, skills and working conditions of the employees involved, and especially to any existing bargaining history. In relevant cases, the Board also considers the extent of organization, and the desires of employees where one of two units may be equally appropriate. Where the employees of more than one plant of an employer are involved, such factors as the extent of intergration between plants, centralization of management and supervision, employee interchange, and the geographical location of the several plants are also considered.[2]

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[1] 157 NLRB 1130 (1966), 61 LRRM 1500.

[2] 99 NLRB 777 (1952), 30 LRRM 1119.

Supervisors in the Meaning of the Act

On its surface, the Board definition of supervisor seems very clear:

> Sec.2 (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Unfortunately, it's not as simple as it sounds. Employees who want representation will assure you they have no supervisory authority. Again, it pays to spend some time digging so that, whatever position you decide to take with the Board, in informal discussions or in formal hearing you'll have some facts and evidence to back that position. More and more, particularly in the white collar and technical fields, titles can be extremely misleading. There are instances when people have been given a title in lieu of a raise; or a "clerk IV" can actually function as office manager. Unless the employer and the union agree on inclusion and exclusion, and that agreement is not a blatant violation of the Board's definition, the NLRB will look to the job duties and not to the title.

Absent a careful examination of the job content, there appears to be little pattern to Board decisions. Each one hinges on what facts have been brought to light concerning the points raised in 2(11).

If the employer has decided to contest the unit and the election, it's a pretty safe bet that he will be out to prove that the employees he thinks will vote against the union are non-supervisory, and that any gray-area employees he thinks will support the union are exempt.

There's a temptation for the union to play the same game, but from the reverse position. One of the problems in doing so is the fact that the employer has a decided advantage. The NLRA definition clearly refers to an individual or group having the "**authority** to...." Thus, the union's claim that an employee does or does not perform supervisory functions can often be countered by an employer's claim that, while the individual may or may not perform certain tasks, he or she has the **authority** to do so. Since supervisory authority is proffered or withheld by the employer, testimony of the employer's witnesses normally prevails unless strong and objective counter-evidence is presented.

Often, the scraps of paper you've been accumulating will solve the problem of good evidence for you. Because of the question of authority, your best proof may be, in addition to oral testimony, a list of job duties given the employee in question by management, or a memo criticizing or praising someone's work, signed by an employee whose status is in doubt.

Confidential or Managerial Employees

The NLRA itself does not contain a definition of these two types of employees. They are, however, excluded from coverage, and are not included in a certified bargaining unit.

Generally, the Board has limited a finding of "confidential" to those employees who work with confidential material that impinges directly on labor or industrial relations, rather than some other aspect of an employer's business. Keeping of payroll records, time cards, etc., has not been found sufficient evidence of "confidentiality" to exclude an employee; taking notes from a director of industrial relations during the course of collective bargaining negotiations **will** result in that employee's being classified as confidential.

A claim of managerial status for an employee is more rare, except in white collar units. In traditional units, all parties have a rather clear idea of what constitutes management, and no claim is made to represent these employees. In an office setting, titles such as "administrative assistant" or "office manager" raise a question of managerial status. Whether or not such an employee supervises other workers, the authority to commit or speak for the employer in policy or financial matters will be grounds for exclusion.

Part-time/Casual Employees

If part-time or seasonal employees are involved, you'll want to not only get a good count of how many, but also consider the possibility that they will be included in the unit.

The NLRB has traditionally excluded what they consider "casual" employees from bargaining units, while including "regular part-time." Given the overriding requirement of community of interest, whether or not a continuing interest in employment exists has generally been the key criterion for separating the two groupings.

Recent Board decisions seem somewhat contradictory. In 1973, the Board included as "regular part-time employees" students employed by a supermarket, even though the employer testified that "they come and go all the time" and regularly terminate upon graduation;[3] while finding at Barnard College[4] and Cornell University[5] that students **should be excluded** from a unit although they did work similar to other employees, often under the same supervision, but were interested for the most part in employment only until they graduated. While temporary employees are normally excluded, the Board, in a series of cases in 1979 and 1980, found that the presumed temporary status of CETA employees did not over-ride their "community of interest" with the rest of the bargaining unit, and they were included in the units.[6]

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[3]Gruber's Star Market, Inc. 201 NLRB NO. 98, 82 LRRM 1495.

[4]204 NLRB No. 155, 83 LRRM 1483.

[5]202 NLRB No. 41, 82 LRRM 1614.

[6]Evergreen Legal Services, 246 NLRB No. 146, 103 LRRM 1028 (1979): Workshop, Inc. 246 NLRB 962, 103 LRRM 1072 (1979); Mt. Graham Hosp. 250 NLRB 433, 104 LRRM 1375 (1900); Montgomery County Opportunity Bd., 249 NLRB 880, 104 LRRM 1238 (1980).

Talk to the people involved; get a feel for where the group stands on the community of interest issue, and get specifics showing the company's pattern of recall, of length of service, of whether the employees share pro-rated benefits in common with the base of the bargaining unit.

Don't simply take one or two people's word that "they want in," "they wouldn't be interested." Size up the situation, and based on what you learn about the two basic criteria, make a decision and begin preparing to support it with facts, witnesses, those scraps of paper, and, if indicated, authorization cards.

Technical Employees

The NLRB has recently tended to accept grouping technical employees with others as appropriate units. In **American Motors,**[7] included in an office unit were employees who might earlier have been found to have technical status. This ruling adhered to the Board's earlier **holding in Sheffield Corporation**[8] that in the future technical employees would not automatically be excluded from a production and maintenance unit, but that their placement would be evaluated on a case-by-case basis.

Craft Units

One of the earlier Board decisions which was later to attain the status of "doctrine" was that involving the wishes of certain groupings of employees for representation in a smaller "craft" unit of their own, instead of being part of a larger unit which by other standards would be found appropriate.

In **Globe Machine & Stamping Company**[9] the Board provided for such a group of employees to vote not only for or against union representation, but for or against inclusion in a larger unit.

Thus reference is frequently made to the Globe Doctrine or a "Globe Election" in advocating the right of a group of employees to seek a special unit of their own.

The NLRB's 1966 **Mallinckrodt Chemical Works** decision,[10] articulating the criteria which would be observed in ruling on whether or not a craft unit might be severed from a larger unit, has also been applied to initial formation of new units:

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[7] 206 NLRB 38, 84 LRRM 1257.

[8] 134 NLRB 1101, 49 LRRM 1265 (1961).

[9] 3 NLRB 294, 1-A LRRM 122 (1937).

[10] 162 NLRB 387, 64 LRRM 1011.

1. Whether or not the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen performing the functions of their craft on a nonrepetitive basis, or of employees constituting a functionally distinct department, working in trades or occupations for which a tradition of separate representation exists.

2. The history of collective bargaining of the employees sought and at the plant involved, and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation.

3. The extent to which the employees in the proposed unit have established and maintained their separate identity during the period of inclusion in a broader unit, and the extent of their participation or lack of participation in the establishment and maintenance of the existing pattern of representation and the prior opportunities, if any, afforded them to obtain separate representation.

4. The history and pattern of collective bargaining in the industry involved.

5. The degree of integration of the employer's production processes, including the extent to which the continued normal operation of the production processes is dependent upon the performance of the assigned functions of the employees in the proposed unit.

6. The qualifications of the union seeking to "carve out" a separate unit, including that union's experience in representing employees like those involved in the severance action.[11]

Professional Units

Professional employees are another group entitled to a unit separate from other employees, if they so desire. If the employees you seek to represent include professionals and non-professionals, the professional employees will be placed in a separate unit, unless a majority of the professionals vote that they not only wish to be represented, but wish to be included in the larger unit.

Section 2(12) of the NLRA as amended includes a definition of professional employee:

> Sec.2 (12) The term "professional employee" means (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii)

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[11]Charles J. Morris, et al. (eds.), **The Developing Labor Law**, (Washington, D.C.: The Bureau of National Affairs, Inc., 1971), pp.228-229.

> of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Since the Board has asserted jurisdiction over health care institutions, universities, and law firms; as the nature of our work force changes; and as more professionals discover that they are, indeed, workers, this definition and its implications will become increasingly important to more union representatives. In the hospital industry, those classifications of employees the Board finds "professional" has been established: Doctors and Registered Nurses are clearly professionals, and are entitled to separate units. Other professionals within a health care institution will generally be grouped into a combined unit of professionals. In other areas, debate is likely to continue for some time over which classifications (or individuals within those classifications) warrant the professional designation. It is also likely that questions regarding the supervisory or managerial status of certain professionals will continue to arise.

Although university faculty units had been found appropriate over the preceding ten years, in 1980 the U.S. Supreme Court vacated a bargaining order because they found that the unit of full-time faculty members included managerial employees excluded from the coverage of the Act (444 US 672,103 LRRM 2526). Acknowledging that there may be institutions of higher education where the faculty have less control over "the product to be produced, the terms upon which it will be offered, and the customers who will be served," the Court in **Yeshiva** by a 5 to 4 vote found that the Board's argument that the faculty merely exercised "independent professional judgment" did not stand up to an industrial analogy.

CHAPTER 2
The Long Wait

Once you have filed your petition, it is assigned a "Docket Number" and a Board agent is assigned to the case.

Section 11008 of the Casehandling Manual deals with the Board agent's first responsibilities in handling initial communications to the parties.

Section 11009 details what is to be covered in the first letter to the employer:

> **11009 Initial Letter to Employer in an RC Case:** Upon the filing of a petition, The Regional Office sends a copy thereof to the employer with a letter which calls attention to the employer's right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board. Normally the letter elicits or conveys the following information:
>
> In the event he chooses to have a representative appear on his behalf, the employer is asked to have the representative complete an enclosed "Notice of Appearance" (Form NLRB-4710) and forward it promptly to the Regional Office. If the employer should also wish to designate the representative who will appear on his behalf, as agent for the service of documents, he must complete and sign an enclosed "Notice of Designation of Representative As Agent For Service of Documents In Representation Proceedings" (Form NLRB-4813) and forward it promptly to the Regional Office. The employer is usually requested to submit to the office as promptly as possible:
>
> a. An attached commerce questionnaire filled out in the appropriate sections, if he has not submitted such information in prior cases.
>
> b. Copies of correspondence and existing or recently expired collective bargaining contracts, if any, covering any of the employees in the unit alleged in the petition. (Names of any other labor organization claiming to represent any of the employees in the proposed unit are requested.)
>
> c. An alphabetized list of employees described in the petition, together with their job classifications for the payroll period immediately preceding the date of the letter.
>
> d. His position as to the appropriateness of the unit described in the petition.
>
> He is advised that, in the event an election is agreed to or directed, the Board requires that a list of names and addresses of all the eligible voters be filed by the employer with the Regional Director, who will in turn make it available to all parties in the

case. He is advised the list must be furnished to the Regional Director within 7 days of the direction of or agreement to election. The employer is advised early of this requirement so that he will have ample time to prepare for the eventuality that such a list may become necessary. (This list is in addition to the list of employees requested in the proposed unit by job classification in item [c] above.)

The letter normally explains that it has been our experience that, by the time a petition such as this has been filed, employees may have questions about what is going on and what may happen; and that, while at this point in the handling of the case we do not know what disposition will be made of the petition, experience tells us an explanation of rights, responsibilities, and Board procedures can be helpful to employees.

The employer is advised that the Board believes employees should have readily available information about their rights and the proper conduct of employee representation elections and that at the same time employers and unions should be apprised of their responsibilities to refrain from conduct which could impede employees' freedom of choice. Accordingly, he is requested to post an enclosed "Notice to Employees" in conspicuous places in areas where employees such as those described in the enclosed petition work, and to advise the Regional Director whether they have been posted. (Copies of this notice are made available to the labor organization(s) involved.) In the event an election is not conducted pursuant to the petition the employer is requested to remove the posted notice.

The employer is given the name and telephone number of the staff member to whom the case has been assigned and invited to communicate with him if the employer has any questions.

Note that the employer is **requested** to post "Notice to Employees" at this time. Unlike the Notice of Election, which he is **required** to post, the Board will not insist that the bulletin advising employees that a petition has been filed, and of their rights, be displayed on his premises.

This official confirmation that you have filed the petition, and that proceedings are underway, is extremely important to your bargaining unit members. If the employer does not post the notices (and few do), it's good to know that not only have you received a copy, but that more are available at the Regional Office.

The second paragraph of Section 11008.5 of the Manual says:

> **11008.5 Employee' Voting Rights:** Form NLRB-666 Notice to Employees, is sent to the employer with the initial communication which contains an explanation of the notice and a request that the employer post the notice. Posting of this notice by the employer is voluntary, not a requirement. The number of copies will depend on the size of the unit. Additional copies should be sent later, if needed.

> Form NLRB-666 should be made available to the labor organization(s) involved, particularly when an employer does not post these notices. The maximum number of copies to be given to a labor organization should be limited to (a) 5 copies or (b) 1 copy for each 25 employees in the proposed unit. Use whichever provides the largest number of copies. Regional Directors have the authority to permit some variation in this maximum number if special circumstances appear to warrant it.
>
> The reproduction of notices for wider distribution should be discouraged, pointing out the possibility of jeopardizing election results in all the circumstances. The leaflet "Your Government Conducts an Election for You on the Job" contains significant "Rights of Employees." Copies are available for quantity distribution.

Use this right! Get the notices to your committee members in the bargaining unit. Encourage them to show them to other employees, particularly if the notices are not posted by the employer. If you do have special circumstances, so that the 5, or 1 in 25, copies are not enough, request more.

Now begins the period of time so frustrating to union representatives and to employees seeking representation. The employer has to be notified, and has to be given time to accumulate the requested information. The Manual suggests that three days are reasonable.

The Manual suggests that the Board agent telephone the employer "as soon as possible after the filing of the petition, but ordinarily not until sufficient time has passed for the parties to have received the initial letters." (Sec. 11010)

In the early 1970's union representatives complained that the Board agents tolerated unreasonable delays on the employer's part at this stage in the proceedings. Any indication that an employer probably would agree to a consent election would result in long delays, while the employer presumably thought about it, tried to contact an appropriate attorney, found that the attorney wasn't available, and then finally, all too often from the union's point of view, reached the conclusion that serious questions existed, and it would be necessary to hold a hearing, rather than agree to an election.

Whether complaints of union representatives were responsible for the change, or whether the Carter administration's introduction of a policy tying certain merit increases to productivity accounts for it, the situation is different now, and Section 11010.3 of the Manual is being adhered to:

> **11010.3 Announcement of Imminent Issuance of Notice of Hearing:** The Board agent should make every effort to circumvent attempts to delay giving the information sought in the initial telephone calls. He should accede to and should volunteer his services in connection with other arrangements designed to transmit the information with reasonable promptness. If,

> however, it does not appear that the information can or will be furnished within a short period (circumstances of cases vary, but it is suggested that a 3-day period would normally fit this description) or if it appears that, at any rate, an election by consent is neither assured nor prospective, he should, in the initial contacts, prepare the parties for issuance of a notice of hearing, unless dismissal is clearly indicated.
>
> Explaining, if necessary, the need for expedition and giving assurance that the step is without prejudice to the parties furnishing the requested material or their entry into a consent-election arrangement, the Board agent should inform the parties that the notice will probably issue in the next day or two. He should fix an early date for hearing before contacting the parties and check with them as to acceptability of such date.
>
> If, on the other hand, initial contacts indicate that a consent arrangement within a short period is likely, the Board agent should condition his announcement of the imminent issuance of notice of hearing upon a breakdown of consent negotiations.

Thus, a date for a hearing is scheduled if any serious question exists as to whether it may be necessary to hold one. This has resulted in an average time of 14 days between filing of petition, and date of hearing in RC cases.

For the fiscal year ending September 30, 1981, the Board's Annual Report indicates that only 19.2% of representation cases necessitated hearings at the Regional level.[1] The Board's policy is to encourage consent elections, and for 1983, the current rate of consent agreement elections was 85%. The median time between petition and election was 45 days.

This doesn't mean that there won't be instances where you will still encounter stalling tactics, and a longer wait. Cases involving new or different groupings of employees, industries where the board has not generally asserted jurisdiction or instances where the employer is willing to go to any expense, use all possible delaying tactics, and all appeal rights, can still mean a long wait for employees seeking representation.

However since the Board is now pressing for quick elections, and since more management consultants are presently advising employers not to bother delaying the election, but instead to defeat the union by refusing to bargain in good faith, you should in most cases be prepared for a hearing within 14 days after filing, or, more likely, an election within 45 days.

The region is much more reluctant than in prior years to grant postponements, or to agree to a date too far in the future:

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[1] 46th Annual Report of the NLRB.

> **11082.3 Selection of Date:** If the parties have agreed upon a reasonably prompt date, their desires should be taken into consideration by the regional director, along with the needs of that office and agency goals of expedition. Consultation with the parties is not required however, and any early date may be selected which fits into the regional schedule. Agents should obtain supervisory clearance before setting a hearing date more than 18 days after the petition is filed, and clearance by the Assistant to the Regional Director and/or the Regional Director should be obtained before scheduling a hearing more than 21 days after the petition is filed.
>
> No minimum notice requirement has been established in representation cases, but it has been found to be administratively helpful to provide for at least a 5-day notice. In unusual circumstances, the Regional Director may permit less than 5 days' notice, or notice of hearing may be waived by the parties, if the waiver is written and clear.
>
> Where the parties at a joint conference in the field agree to an immediate or short hearing date and waive formal notice, the hearing may be conducted by the Board agent on the same field trip, if necessary reporting arrangements can be made.

Prompt elections generally are to the bargaining unit's advantage. A majority have indicated support, and the more quickly the issues can be resolved and an election held, the more likely a victory for representation. You as a union representative certainly will want to move things along as quickly as possible. One advantage to handling RC matters personally, rather than relying on counsel, is this matter of timing. While the region discourages postponements, they are granted for cause. A particular campaign in which a representative is involved has a priority status for him or her. When the Board agent calls to explore mutually convenient dates for either an informal conference to attempt arriving at a consent or to set a hearing date, that union representative is going to shift schedules around to accommodate the earliest possible date offered. The most conscientious counsel can't be expected to do this for any one client, because of conflicting time needs of other clients. Often, the management attorney with almost psychic wisdom manages to establish a "good faith effort" by offering the one date that is impossible for union counsel to meet. This falling through, the game of who is busier begins, and the date for conference or hearing gets pushed way into the future.

If the union can take the position, "any time, day or night, the sooner the better," and be in a position to follow through, it's bound to result in an earlier hearing date.

It may be a losing battle, but one worth waging, to insist, urge, and encourage, the Region to take a much firmer position in regard to setting early dates, and not automatically granting requests for postponements.

Sections 11142, 11142.1 and 11142.2 of the manual set forth the circumstances under which postponements can be granted:

> **11142 Postponements:** The general policy of the Regional Director should be that cases set for hearing will be heard on the day set, and that postponements will be granted only for good cause shown. Every effort should be made to acquaint parties in the Region and, particularly, parties in a given case of this fact and of the procedure to be followed in seeking a postponement.
>
> (Form NLRB-4338, with instructions for requesting postponements and with the names and addresses of the parties appearing thereon, should accompany each notice of hearing. Where this was not done because the date scheduled had been the subject of prior agreement, any party seeking postponement should be apprised of the proper procedure.)
>
> **11142.1 Request:** Postponement of the opening date of a hearing is initiated by request, or motion, for postponement by the party seeking it. The request should be in writing; original and two copies served on the Regional Director and copies served on each of the other parties. The request should contain **detailed** cause (i.e., not merely "prior commitments") and should contain suggested date(s) for resetting. Finally, except in emergency situations, it should have been filed at least 3 days before the date then set for hearing.
>
> The requesting party must ascertain in advance, and set forth in the request, the positions of all other parties to the proceeding. Where appropriate, the request may be a joint one.
>
> **11142.2 Ruling on Request:** The Regional Director rules on the request for postponement. Whenever possible, he should wait until other parties will have had the opportunity of making known their positions, perhaps until after mail delivery on the day following. Then, he should issue his ruling, serving a copy on each party. The order should appear on the printed order rescheduling hearing (Form NLRB-859) or should be "tailored" to fit the situation. (With respect to Board proceedings, postponements, rescheduling, continuing, and adjourning are used interchangeably.)

The Board agent is also expected to continue to push for a consent election, even after the hearing date is set. Of course, this is desirable if the conditions laid down for reaching agreement aren't so adverse as to reasonably preclude winning an election in a unit that will be workable.

If the Board agent presses you to accept terms you feel are prejudicial to your position, remember that the unit you sought at the time of petitioning was deemed to be appropriate on its face - otherwise the Region would have suggested that you amend it. You are under no obligation to accept something you feel is inappropriate or not in the best interests of the overall bargaining unit.

If you have a hearing date set, it often is better to stick to it than to compromise your position too far. The week you save may not be saved at all, because once you've agreed to the employer's version of a unit, you may then find the earliest date he will agree to for an election is no earlier than what would have been set if you had gone to hearing.

Should it develop that a consent election is possible, on grounds that are acceptable to you, the Manual again guides you as to what to expect:

You will be agreeing to either a "Consent Election," or a "stipulation for certification under consent election," often shortened to "stip election." The difference is explained in Section 11084.1:

> **11084.1 Difference Between Agreement and Stipulation:** The basic difference between the agreement and the stipulation is that questions which arise in connection with the election are eventually determined by the Regional Director in an agreement and by the Board in a stipulation. However, even with respect to the stipulation, disputes arising prior to the issuance of the tally of ballots are resolved by the Regional Director.

If the choice is yours, it should be based on your assessment of the Regional Director's fairness. Often the employer will insist on a stipulated consent, so that the right to appeal exists. Unless you have a strong suspicion that the employer will use any means, including frivolous appeal to avoid bargaining, this should normally not be a significant enough issue to cancel an otherwise acceptable consent agreement.

Details to be covered in the consent agreement, and the means of arriving at resolution of problems and questions, are in Section 11084.3 of the Manual:

> **11084.3 Details of Agreement and Election Arrangements:** Agreement on principle that a consent election will be held is explored and determined most often by telephonic communication with the parties; meeting of minds on details and actual execution of the instrument is usually accomplished in a joint conference of the parties. All details must be agreed upon. Failure of accord in such details as date, hours, or place of election will serve to send a matter to hearing rather than consent. However - and this is particularly apt where the agreement is reached at a hearing and the hearing officer is not the agent who will conduct the election - the parties may leave such matter "to be designated by the Regional Director," in which case, although substantially guided by the informally ascertained desires of the parties on such matters, the Regional Director may unilaterally fix the date, hours, or place.
>
> On the other hand, the determination of bargaining unit disagreements should not, in the document, be left "to the Regional Director."

> The parties should clearly set forth in full the agreed unit. Nor should approval normally be given either in the document or otherwise to any agreement of the parties that certain categories of employees should eventually be included or excluded by means of the challenge procedure. However, in determining whether to recommend approval of an election agreement where a number of challenges to eligibles may be involved, the following factors may be considered as militating in favor of approval: A strike is in progress or there is a genuine threat of a strike which the parties wish to avoid; the potential challenged ballots represent a class situation which could be disposed of as a single issue in a postelection proceeding; and questions of eligibility will probably not be resolved in a preelection hearing because of substantial credibility issues.
>
> **Norris-Thermador** agreements (see **Norris-Thermador Corporation,** 119 NLRB 1301) should be solicited, but the suggestion that such an agreement be entered into should not be permitted to interfere with obtaining an election agreement where it is clear that a party wishes to preserve its privilege to challenge some voters.
>
> The same may be said with respect to questions of voting eligibility. Normally, the Region should not place its imprimatur on a "consent" proceeding in which it is known in advance the voting status of a substantial group of employees (e.g., a group of persons who have been laid off) will be relegated to the challenge procedure.
>
> At the time of execution of the agreement, the Board agent must ascertain whether a strike exists. Also, at the time of execution of the agreement, election arrangements, such as payroll check, observers, and equipment to be furnished, should be discussed. Every effort should be made to assure that none of the parties misunderstand or have any mental reservations.

The "Norris-Thermador agreements" referred to are ones in which the parties agree, in writing, on a list of eligible voters. That list is final and binding, unless an eligibility question arises where the Act itself would preclude an employee voting. This policy has even been extended to firm and clear **oral** agreements between the parties on the eligibility status of employees.

Eligibility Date for Voters

In many organizing situations, the payroll period for establishing eligibility is extremely important. The Manual suggests, in Sec. 11086.3, that the date should normally be "a period ending shortly

before the agreement on a consent election." However, if the proceedings leading up to the consent election have been unduly prolonged, and you believe the employer has used this period of time to substantially alter the size or make-up of the bargaining unit - and especially if you petitioned with a clear majority which now has been diluted - you need not agree to the "normal" eligibility date. The same is true of any other aspect or details of the election.

Details of Consent Election Arrangements

If the date, time, and place of the election is left to the Regional Director, it normally will be in accordance with the following guidelines:

> **11302.1 Selection of Election Dates:** the date selected should be one which balances the desires of the parties and operational considerations, along with the desirability of facilitating employee participation and prompt and timely conduct of election. Where there is a choice, dates on which all or part of the plant will be closed, on which past experience indicates that the rate of absenteeism will be high, and on which many persons will be away from the plant on company business or on vacation should be avoided; so should days immediately preceding or following holidays.
>
> An election may not be held sooner than 10 days after the Regional Director has received the list of names and addresses of the eligible voters. Where the parties jointly wish a prompt election, presumably the employer will make the list available in less than 7 days. If the parties are pressing for an early election, the 10-day period can be provisionally calculated from the date it is estimated the list will arrive in the Regional Office.
>
> To avoid a situation where the list is promised early to secure a prompt election, but submission is delayed, the notice of election should not be mailed until the list is in hand. However, an election may be held on the ninth day provided that day is the day before a holiday, a weekend, or a shutdown, and further provided that all parties agree. In the event of a bona fide strike or picketing situation in which all parties desire a prompt election, and the employer has furnished the list promptly, an exception may be made to the 10-day period depending upon the facts of the case.
>
> Refusal of a petitioner to agree to an early date in a consent election (to which all other parties are willing to agree) is ground for dismissal of the petition, in the absence of valid reasons for the position taken. The petition should not be dismissed, however, if the petition is suggesting a reasonably early alternative date.

The election may stretch over **several days,** where necessary; e.g., where an entire shift of workers is off for 24 hours on any given day of the week. In such cases, the hours should be limited to those actually necessary.

An election should be held as early as is practical. Thus, the full 30 days after a Board direction of election should not normally be taken.

When, in his decision, the Regional Director directs an election, the election should not be scheduled prior to the 25th day thereafter, unless the right to file a request for review has been waived. If the 25th day is a Saturday or Sunday, then the election should be set for a later, not an earlier, day. In special circumstances, consult with the Office of the Executive Secretary. If a request for review has been filed, the office of Representation Case Appeals should be notified by telephone of the date of the election as soon as it has been set. Until the Board rules on the request for review no election may be conducted.

11302.2 Selection of Place to Hold Election: The best place to hold an election, from the standpoint of accessibility to voters, is somewhere on the employer's premises. In the absence of good cause to the contrary, the election should be held there.

If an election is held away from the employer's premises, it should be held reasonably close by - say, within one to four blocks, depending upon the season - in a public building (other than a post office), vacant building, social hall (other than one used as headquarters by any union party), hotel, school, church, or garage. A place normally used as a municipal voting place is particularly desirable. A tent may be used if other accommodations are not found, but, of course, adequate heat and light must be available.

The availability of places outside the employer's premises should be taken into consideration when one of the parties urges that the election be held off company property. At least the initial burden of suggesting such available places should be placed upon such party, but final arrangements should be made by the Board agent. Permission to use such property should be in writing.

Rental (or tent hire) expense, if any, should be borne by the Board. (See Administrative Manual for procedures to be followed in making payment.) If the Regional Director believes that, in given circumstances, an offer of the parties to shoulder the expense equally should be accepted, he should clear with the Division of Operations Management.

Whether the election be held on or off company property, the actual polling place, if feasible, should be spatially and visually separated from the scene of any other activity during the voting period. There should be adequate space for all equipment and all personnel (11308-11310). An office, a production department, or a shipping room or shipping platform are examples of appropriate places. Elections should not be scheduled to be held in the unprotected outdoors on the chance that the weather will be satisfactory.

The polling place should be reasonably accessible to all voters. Also, arrangements should be made so that it is accessible to voters who may be off duty at the time they wish to vote.

If the circumstances demand, voting at more than one place should be provided.

11302.3 Selection of Hours During Which Polls Will Be Open: The hours of election depend upon the circumstances of each case.

The time of day and length of time adopted should be adequate for all voters to cast votes either on company time or on their own time without making a trip from their homes especially to vote. (Example of possible exception: Where two or three employees in a group of several hundred work an odd shift, hours away from either the beginning or end of the shift worked by all the others.) It is better to err on the side of allowing too much time than too little.

On the other hand, the parties are prone to over-estimate the time necessary for an election. In a well-arranged election, voters can easily be handled at the rate of 250 per hour per checking table, and the parties should be made aware of this. The Board has no desire to disrupt production or to occupy the time of Board agents and observers any more than is necessary.

It is usually good practice for the polls to be open at least at and about the beginning or ending of the working hours where there is one work shift, and at and about the changes of shifts where there is more than one shift. (See 11332 for "split-session" elections.) Additional time extending into the working hours should be provided where voting may take place on company time. Where the circumstances warrant it, prolonged sessions, up to 12 or more consecutive hours, should be provided.

Within these guidelines, it is important for you to be aware of circumstances that the region may not know of, and about which the employer will not necessarily volunteer information. For instance:

Is the date being proposed right after a scheduled company picnic?

Is the proposed place or time awkward for a key section of your bargaining unit?

Is there a conflict in the proposed date with religious observances which may not be official holidays, but could adversely affect participation of portions of the bargaining unit?

If attempts at a consent agreement fail, you hopefully have a hearing date set "just in case." The work you do with your employee committee in preparing for that hearing can again strengthen their commitment, and add to your eventual chances of winning an election and getting a contract.

CHAPTER 3
The RC Hearing

Preparation

By the time the hearing date is set, you should have some idea of what position the employer will be taking, and what you will need to refute.

If a question of interstate commerce is involved, hopefully the Region has subpoenaed the necessary documents.

Ordinarily this will not be an issue, but if there are indications that the employer is refusing to cooperate in supplying the basic information the Board requests, there may be ways in which you can assist. Section 11710 of the Manual lists "Other Sources for Obtaining Commerce Information," in the case of a recalcitrant employer. One of the suggestions is that employees themselves be contacted. Should the need arise, it's amazing what sort of information a bargaining unit has at its fingertips.

Much more commonly, the employer will offer a stipulation that he does in fact meet the Board's standards for asserting jurisdiction, and the hearing will proceed to other issues.

As the Board agent has explored the possibility of a consent election in the period prior to the hearing, it is possible that something will have been learned about the employer's position on the unit question. In theory, since your petition has been accepted, on its face it seems to meet the criteria of the Act. Therefore, the employer has to have offered some objection other than "I don't like it." The employer's position has to be that it is in some way inappropriate. In **what** way? Particularly if there has been an indication that a consent election might be agreed to, you will have been advised as to the conditions the employer proposes. The employer is not bound to take the same position at the hearing that has been taken in informal proceedings, however; so, in preparing, you should anticipate any halfway reasonable contingency.

Let's suppose that the unit you seek is one of all the production and maintenance employees, excluding supervision, at an electronics component factory at a given location. The employer has indicated that there is disagreement over whether certain employees you consider lead persons are in fact supervisors. It has also been implied that a consent agreement could be reached if the unit were to include another plant owned by the employer several miles away, which manufactures similar parts. Also, something was said in passing about certain technicians whom you had not considered in describing the unit in the petition.

Start preparations with the simplest and smallest of the possible areas of disagreement: Assuming you want the lead persons in the unit, how do you argue for their inclusion?

What evidence is there that the individuals in question do, or do not, have authority from the employer to take action in the following situations, or to effectively recommend action? (Remember, the exercise of authority in each instance doesn't count if it is of a "routine or clerical nature" - to be marked "yes" it must involve independent judgment.)

	Yes	No
Hire?		
Transfer?		
Suspend?		
Lay off?		
Recall?		
Promote?		
Discharge?		
Assign?		
Reward?		
Discipline?		
Responsibly direct?		
Adjust grievances?		

Given the example we are using, your goal would be to strengthen evidence of your "no" answers and to minimize, through testimony or evidence, the importance of the "yesses."

Is one of the leadpersons willing to testify? Can that person, under oath, testify that his/her job description, as provided by the employer, does not include the above responsibilities? Can they cite specific instances where they may have tried to exert some influence in one of the categories, and have been overturned? Is the job description in writing?

Can other members of the bargaining unit testify that they have been instructed to go to persons higher in authority in regard to the points listed?

After you have worked out the best ways to present evidence in support of your "no" answers, take a cold hard look at any "yesses." The "routine clerical nature" may be your best argument on at least some of the points. An example might be that the leadpersons are instructed to keep track of absenteeism, and report to supervision when an employee is away from his or her work location on a given day. The fact that this may, somewhere up the line, lead to disciplinary action would not normally constitute substantial evidence of

supervisory function. If, for instance, you have a "yes" beside "assign work," or "responsibly direct," is there evidence to the effect that this basically consists of the leadperson's telling his or her coworkers something to the effect that "Joe says we ought to get this order ready to go before we finish the one we were working on yesterday."? In other words, is the leadperson really conveying instructions from someone else, rather than independently deciding which task takes precedence over others? If so, who can testify to this?

Can individuals who are clearly members of the bargaining unit testify that they, too, frequently relay instructions?

Anticipate what the employer's arguments will be. Will he try to make much out of the fact that he consults with the leadpersons as to how new employees are working out, and relies heavily on their judgment? If so, are there other employees who can testify that they, too, have been consulted on such matters, and their recommendations frequently followed?

Sometimes members of your committee can pick up some valid clues at work as to who will be testifying for the employer, and from this some educated guesses can be made as to what the testimony can be.

Write down what and whom you think the employer may use, and decide what the best approach is toward this testimony. What counter arguments or witnesses do you have?

Remember that anything in writing from the employer or his agents carries a lot of weight. What is **said** will be viewed with some doubt if what is **written** tends to refute it.

In preparing for the second contingency raised in the example - the possibility the employer will argue that a neighboring facility owned by the same corporation should be included in the unit - going through virtually the same steps will be helpful. Make a list of the common criteria used:

	Yes	No
Geography		
Integration of facilities		
Interchange of employees		
Similar working conditions		
Common supervision		
Same benefits		

Same rates of pay

Similar type of work

Wishes of employees

Collective bargaining
history, if any

Are the employees hired through the same personnel department? If so, are they then approved by different managers or supervisors? How many, if any, employees have transferred back and forth? Are employees ever assigned on a temporary basis to the other facility? If so, how rare an event is that?

Again, what you want to do is outline the best evidence you have, backed by written documentation where possible, and think of the best way to present it.

Next, anticipate what the employer's strongest arguments are likely to be, and work out the best way available to you to counter as much of that evidence as possible.

You will want to prepare as carefully for a possible argument that the group of technicians should be included. The same criteria as for the other plant apply, although the arguments will be different.

For instance, even though a separate facility is not involved, "geography" can still be a factor - do they have offices in a different part of the plant; are they physically isolated from the bargaining unit? Do they come to work through a different entrance? Do they use different toilet facilities?

Working conditions can include everything from punching a time clock to wearing different kinds of clothing to work.

After you've itemized your strong points for each contingency, and arrived at a tentative list of which people you plan to use as witnesses, and what written documentation you will want to present, it's helpful to **actually** prepare a "script" for yourself.

Write down the exact way in which you will word questions leading to the answers you hope to bring out. After you've handled a few hearings, you may find it's sufficient just to outline the key words or phrases, but for a first appearance at a hearing (or maybe even a third or fourth) many people undergo a sort of stage fright, and even though they're usually articulate, sometimes the words don't flow quite as freely in a more formal atmosphere.

Also, while a hearing on an RC petition is technically a nonadversary proceeding, and although you will not be bound by formal rules of evidence, it can be rather distracting to have the management

attorney objecting to the way you phrase your questions. Although the hearing officer, particularly if you remind him or her, will assist you in bringing out the facts you seek to present, (we'll talk at more length about the hearing officer's responsibility in this regard later,) there's no point in needlessly being put at a psychological disadvantage.

In phrasing questions, many people not used to the process tend to put the cart before the horse: you know the point you wish to develop and so you make a statement to that effect, and end with a "didn't you?" or "wasn't it?" For instance,

> "Now, during the course of an average work day, you don't come in contact at all with those people in the other plant, do you?"
>
> or
>
> "Some time in January of last year, you got a letter from the plant manager telling you, you were supposed to use a different bathroom from the one the technicians use, didn't you?"

At which point the management attorney will piously object that you are leading the witness. Instead, it will work just as well - even better, in terms of the record - if the dialogue goes something like:

> Question: "Do you see, during the average work day, employees from the plant on Garvey?"
>
> (Anticipated answer, "No.")
>
> Question: "Do you ever come in contact with them?"
>
> (Anticipated answer, "I suppose maybe I've met some of them once a year at the company picnic.")
>
> Question: "Did you receive a letter from the plant manager last January?"
>
> (Anticipated Answer, "Yes, sometime around January 15.")
>
> Question: "Was it addressed to you personally?"
>
> (Anticipated answer, "No, it was addressed to all production and maintenance employees at Harvard Street.")
>
> Question: "What did it say?"
>
> (Anticipated Answer: "It told us to use the bathroom just off the plant floor, and not the one going into the main office area where the technicians are.")

At this point in your script, you'll make a note to yourself:

EXHIBIT 1. You want a copy of that letter in the record. Again, in one sense it's not too important what words you use, or whether you just plain ask the hearing officer how you go about having a copy of that letter introduced into evidence. But it may make you and your witnesses more comfortable if you do it the way the so called "pros" would do it.

As a matter of courtesy and convenience, have enough copies of the letter made so that there is one for the record, one for the employer, one for your witness, and one for yourself.

Take the copies up to the court reporter, and ask that they be marked for purposes of identification, Petitioner's Exhibit 1. Tnen give one to your witness, one to the hearing officer, and one to the employer's counsel. Your **"script"** would then continue something like:

Question: "Let the record show the witness has been handed a copy of petitioner's Exhibit 1."

To the witness: "Is this a copy of the letter you were referring to?"

(Anticipated Answer, "Yes.")

Question: "Would you read it aloud, please."

At this point either the hearing officer or the employer's counsel will probably say that's not necessary, that the document can speak for itself. In this case, that's probably fine, because it may be that your witness has described the contents more graphically and dramatically than the actual letter does.

If so, the next note on your "script" would simply be a reminder to yourself to say:

"I move, then, that the letter identified as Petitioner's Exhibit 1 be admitted as part of the record of this proceeding."

Rules of evidence are infinitely more complicated than this brief discussion of "leading witnesses" and introduction of exhibits would seem to indicate.

Two other questions regarding rules of evidence which are often raised in an RC hearing involve hearsay and the rule of best evidence:

1. Hearsay evidence is admissible although direct evidence is of course preferable.

2. The rule of "best evidence" will be encouraged. This simply means, for instance, that if available, an original letter rather than a copy should be introduced.

Naturally, if the union's attorney is handling the actual conduct of the hearing, you don't need to be as detailed in outlining what you're going to present, and how.

However, it is essential that you outline for the union's counsel what key points each witness you propose using can cover, why you think they're important, and what exhibits you believe have relevancy.

Participation

An RC hearing is not technically an adversary proceeding, but rather an information-gathering one. However, the technicality often seems to get lost in the actuality. The management attorney is going to present the employer's viewpoint as effectively as possible, and is going to do what he can to destroy the union's arguments. He is going to attempt to block as much evidence as possible that he considers detrimental to his client's position. It is not unusual for management counsel to play whatever psychological games he considers appropriate in working toward these goals, including technical objections based on rules of evidence which do not apply, even occasionally advising his client not to be overly cooperative in making available employees whom you wish to call as witnesses.

It's often a good idea to arrange in advance for subpoenas for the employees you will be using as witnesses. They can then present these to their employer prior to the hearing, and usually avoid any hassle over "permission" to attend the hearing.

These subpoenas are available at the Regional Office on request (Sec. 11140.3 of the Casehandling Manual) and you can arrange for your witnesses to receive them.

As background for what can and should be expected during an R hearing, two sections of the Manual are especially helpful:

> **11180 Nature and Objective:** The R case hearing is a formal proceeding designed to elicit information on the basis of which the Board may discharge its duties under Section 9 of the Act. As such, it is investigatory and not adversary.
>
> **11184.1 Responsibility To Develop Complete Record:** It is the primary duty of the hearing officer to see that a full record is developed. Therefore, he must be aware of all issues in a given case and of the types of information generally bearing upon such issues.
>
> A second duty of the hearing officer is to keep the record as short as is commensurate with its being complete. By soliciting stipulations and by excluding irrelevant and overcumulative material, he should achieve an uncluttered record.
>
> The hearing officer has a positive duty to insure a complete record. He may cross-examine, may call and question witnesses, and may call for and introduce all appropriate documentary evidence, being limited only by the relevance of the evidence to the issues. Whenever his technical assistance is required by any party, it should be given.
>
> It should be recognized that, occasionally, the hearing officer's responsibility for the development of a complete record may lead to an appearance of undue assistance to a party which does not itself introduce evidence in support of its positions. In discharging his obligation to develop a full record he must also keep constantly in mind that to the parties he is the representative of the Board and that they expect objective and considerate regard both of their interests and responsibilities. He should exercise self-restraint, should give the parties prior opportunity to develop points, and should refrain from **needlessly** "taking over."

The hearing officer is also expected to continue the quest for a consent agreement.

> **11188 Consent Agreements:** In advance of the date of hearing, every effort should have been made to procure an agreement for a consent election. Before opening the hearing, the hearing officer should again explore the possibility of a consent election, and, if the parties indicate a willingness to execute a consent-election agreement, the opening of the hearing should be delayed until after the possibility has been

> completely explored, unless unusual circumstances are present. If the agreement is thereafter executed, the hearing should not be opened; the subsequent approval will also serve as a withdrawal of the notice of hearing.
>
> If the possibility (of consent) arises during the hearing, the hearing should be recessed for its consideration. Should agreement be reached, the hearing should be adjourned indefinitely. It is unnecessary to insert the agreement in the record. The approval of the agreement will serve as withdrawal of the notice of hearing.

In addition, before opening the hearing the hearing officer will ask that the parties fill out an appearance sheet which will be provided to them. You will also be presented with a form indicating that you wish to receive a transcript of the proceedings. You can decide this later, if you like, depending on the complexity of the hearing, and whether or not you will be submitting a post hearing brief. The Board's copy is usually available at the Regional Office on request, but, of course, it is more convenient to have one of your own to use where and when you need it.

The next usual step is the presentation by the hearing officer of the formal papers:

> **11192 Introduction of Formal Papers:** The "formal papers" consist of the petition and any amended petitions; the notice of hearing and any amendments thereto; the order transferring case to Board (if served prior to hearing); any motions on which prehearing rulings have been made which bear upon the issues to be resolved by the hearing; and affidavits of service pertaining to any of the above.
>
> In advance of the hearing, they should have been placed in chronological order from the bottom upward, and marked as Board Exhibit 1(a), 1(b), 1(c), etc., the top document, bearing the last number of the series, being an index and description of the formal documents.
>
> After the hearing officer has made his opening statement, he should say (as example):
>
> > I now propose to receive [instead of offer] the formal papers. They have been marked for identification as Board's Exhibit 1(a) through 1( ), inclusive, Exhibit 1( ) being an index and description of the entire exhibit. This exhibit has already been shown to all parties. Are there objections?
>
> Objections or lack thereof should be affirmatively placed in the record.
>
> > (Objections may be voiced, but, normally, they will be withdrawn upon the giving of explanations. It should be explained, if necessary, that the papers in question constitute a routine introduction of the hearing; that admission of the documents does not irrevocably establish the truth of

> any allegations therein; that any relevant evidence may be introduced irrespective of such allegations; and that, in any event, the (Regional Director) (Board) will pass on the validity of this and any other evidence.)

The hearing officer's inquiry as to the correct and complete name of your union is the appropriate time to request that a shorter, more familiar name also appear on the ballot, if this is your wish.

Stipulations will be sought throughout the hearing in an effort to shorten proceedings. Ordinarily, first on the agenda is the entering into the record stipulations that the employer meets commerce standards, that the union is a union within the meaning of the Act, and other routine matters.

The Manual describes the method of securing stipulations in Sections 11222, 11222.1, 11222.2, 11222.3, 11222.4:

> **11222 Stipulations:** The hearing officer should endeavor to secure stipulations, wherever possible, in order to narrow the issues and to shorten the record.
>
> **11222.1 Off the Record:** A suggested method of procuring, constructing, and receiving stipulations follows: Whenever it appears to the hearing officer that a stipulation could or should be procured, he goes off the record to explore the possibilities; he assists in fashioning and recording the stipulation; and, finally, on the record, he recites the stipulation and receives the verbal acquiescence of all parties.
>
> **11222.2 Supporting Testimony:** Care should be taken that the contents of stipulations are not so "conclusionary" that the Regional Director or Board might hesitate or be unable to adopt and follow them without "primary" foundation. For example, a stipulation that the Board has jurisdiction over the parties is worthless without a recital of supporting facts. To insure an adequate basis, it may be necessary to "back up" a stipulation with some brief supporting testimony by a witness.
>
> **11222.3 Relevance and Admissibility:** It is possible that the parties will be willing to stipulate to certain facts, although one of the parties contends they are irrelevant and asks that the stipulation be rejected. The hearing officer must, of

> course, rule on the relevance and, hence, the admissibility; but (as in the case of all proffered evidence), where there is substantial doubt by the hearing officer, the doubt should be resolved in favor of receiving the stipulation.
>
> **11222.4 Joinder of All Parties Necessary:** All parties should join in each stipulation. If one party "has no knowledge," e.g., if a union has no knowledge of commerce facts, it should be asked for an affirmative or negative answer to the question of whether it will join in the stipulation. In the absence of joinder of all parties, competent testimony should be received.

Pattern for the order of presenting evidence is discussed in Section 11218 of the Manual:

> **11218 Order of Presentation:** There is no set order of presentation applicable to all R cases. The petitioner should be prepared to proceed with introducing material evidence; next, the other parties; and finally (if necessary), the hearing officer. However, if this procedure detracts from obtaining an orderly and concise record, the hearing officer has the discretion to alter this arrangement and, if necessary, to call and examine witnesses. Nor should parties be limited (except for considerations of materiality and overcumulativeness) from reopening their cases to present additional facts. The completeness of the record should not suffer on the basis of technicalities.
>
> Parties to the hearing should succinctly state on the record their position as to the issues to be heard prior to the presentation of evidence/witnesses, and also after all such testimony/evidence has been received into the record.

Often, particularly if the employer has taken the position that an entirely different and larger unit than the one for which you petitioned is the "only appropriate one," it will be found reasonable that he present his case first. If the hearing officer doesn't suggest this, you might wish to do so, on the grounds that, since you are not seeking to represent all these employees, you have little or no information regarding them, or what it is about the company structure that would seem to justify the employer's position.

For your own witnesses, you have your "script." You have clearly in mind what points you wish to bring out. You have discussed with your witnesses what you wish to establish, and what facts they have that will help to build your case. Hopefully, you have even "cross-examined" them in conversation, to make sure they're giving you the true and the complete story, and to avoid any discrepancies which employer's counsel might bring out.

For instance, if you're hoping to prove that an employee does not have supervisory status, it's helpful if, **before** the hearing, you haven't simply accepted his statement that he's never been asked to supervise other workers. Instead you have asked, "You're sure there's never been an instance the employer can cite when you've been left in charge?"

It may develop that during a flu epidemic several months ago, when a number of employees, supervisors, and foremen were absent, your witness had, in fact, "worked out of classification" to get the necessary work done.

Knowing this, you can decide whether or not to bring it out in direct examination of your witness. But in any event you and your witness won't be surprised if the employer brings it up under cross-examination, and your questions - and your witnesses' answers - will have been phrased in such a way that the witnesses' credibility won't be damaged on cross-examination.

What is expected of witnesses is spelled out in the Manual, Section 11220.

> **11220 Witnesses;** Each person called as a witness should be sworn in, prior to his testifying, by the hearing officer. The hearing officer should receive from the witness, who is standing with right hand upraised, an affirmative answer to the question: "Do you solemnly swear that the testimony you are about to give shall be the truth, so help you God?" (Affirmation may be used where requested.)
>
> Each witness is subject to cross-examination by each of the parties other than the one calling him.
>
> Upon recall in the course of a case, a witness need not be resworn. He should merely be asked to signify, on the record, that he understands that he is still under oath.
>
> The hearing officer should rule on his objections to questions, including objections to his own questions, as they are raised.
>
> The refusal of a witness at a hearing to answer any question which has been ruled to be proper shall, in the discretion of the hearing officer, be ground for striking all testimony previously given by the witness on related matters.

> All motions to strike, whether on the grounds just stated or on other grounds, must be ruled on by the hearing officer.

While it is not mentioned in the Manual, it is common practice when the cross-examination is completed to clarify some points with your witness. Thus, before the witness is dismissed, you tell the hearing officer you'd like to ask additional questions on "redirect."

While strict rules of evidence don't apply, ordinarily cross-examination is limited to questions dealing with matters brought out in direct testimony. If employer's counsel starts delving into matters too far afield, an objection is in order. His line of questioning may not be relevant, or there may be other witnesses forthcoming who can better testify to the subject raised.

Also, since this is a "non-adversary" proceeding, an objection would be in order if you feel the employer's counsel is attempting to browbeat or harass your witness.

During either your direct or re-direct examination of your witness, employer's counsel may object to your line of questioning as being irrelevant.

Sometimes the hearing officer will simply say that he considers it relevant, and would like to hear the answers; at other times he may ask you to explain why you consider the testimony relevant, or what you believe it will lead to or establish.

If you've done your homework, you know why you thought it was important, and what you think it proves.

> "I believe it goes directly to the issue of whether so-called supervisory responsibilities are strictly routine and clerical in nature."

or

> "Similar working conditions have direct bearing on community of interest, and my question deals with that issue."

If the hearing officer should rule that a certain line of questioning and testimony is irrelevant, and you feel that it is important and to the point, you can make an "Offer of Proof."

> **11226 Offers of Proof:** Upon rejection by the hearing officer of proffered testimony, or line of testimony, a party may make an offer of proof, or be asked to do so by the hearing officer.
>
> The offer, in essence, is a statement that, if the named witness (or witnesses) were permitted to testify on the matters excluded, he would testify to specified facts. The facts should be set forth in detail; an offer in summary form or consisting of conclusions is insufficient.
>
> An offer of proof may take the form of an oral statement on the record, a written statement to be included in the record (copies and service as

with motions, see 11202), or with permission of the hearing officer specific questions of and answers by the witness.

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

In deciding what questions, if any, to ask of the employer's witnesses, several considerations are important:

How damaging to your case was the testimony? If the witness was doing little more than expressing an opinion which is contradicted by hard evidence, such as written directives, etc., the record will speak for itself and you may not need to waste time and effort in an attempt to get him to change his testimony.

If the witness has introduced a new element into the hearing, which seems important and for which you have no better conflicting evidence, you need to consider a way to reduce its impact.

What were the weak points in the evidence? Did the witness exaggerate or stretch the truth by using such phrases as "we do it all the time," or "there is constant interchange?" If so, and your bargaining unit has assured you that such is not the case, it may be wise to ask the witness just what is meant by "all the time" and "constant." Does it happen everyday? Every month? Once a year? How many specific instances can he recall? Assuming that your bargaining unit has leveled with you (and this must be a solid assumption), you will probably be successful in establishing that "all the time" really means "once in a great while," or that "constant interchange" means that two employees out of three hundred changed work locations.

When should you use documentary evidence that tends to refute the witness' testimony? To continue with the same example, suppose a member of the bargaining unit has provided you with a letter from the witness, written in response to the employee's request for transfer, in which he states that it is not company policy to grant such transfers, and that the employee would have to apply to the manager at the other plant if he wished to start work there as a new employee: Do you stick to your original plan, and introduce the letter later through your own witness, or do you confront the employer's witness now? The temptation will be strong to engage in a little "courtroom drama." The strategy may work well; the witness may be flustered, and admit that he was "mistaken" in earlier testimony. On the other hand, he may blithely state that the company policy has changed since the letter was written, or that it was written over his signature by a new employee who didn't understand the situation.

Your decision should be based on your own evaluation as to how the witness will respond, remembering that while a red face or a quavering voice may give you some satisfaction, in an RC hearing it won't have any effect on the outcome, since only what appears in the written transcript will be given official consideration.

Perhaps a safer way to build the record you desire would be to ask the witness to describe the company policy regarding transfers; to ask how he would respond to an individual employee's request for a transfer. If in response he indirectly confirms the contents of the letter, you've weakened the impact of his earlier testimony, and can still introduce the letter as reinforcing evidence through your own witness. If he testifies that transfers are readily given to any and all requestees, your introduction of the letter later will cast doubt on his credibility in this matter, and perhaps on other aspects of his testimony.

In general, there ought to be a very strong reason (or an extremely strong hunch) to deviate from the basic rule of cross-examiners: "Don't ask questions unless you know what the answers will be."

After all witnesses have been presented by the parties, and an opportunity has been given for cross-examination, re-direct and re-cross, the hearing officer will ask whether the parties have anything further to present. This is the time for you to make an oral argument if you wish to do so.

If the issues in the hearing are relatively simple and the evidence is clear, the record should speak for itself. If the case is a complicated one, it is probably better to waive oral argument and prepare a written brief, after you've seen the transcript, and carefully thought out what points you wish to make, and the best manner in which to present them. If management is represented by counsel, they will undoubtedly forego oral argument and opt for a written brief.

The hearing officer will suggest a date for receipt of the briefs. The Rules and Regulations of the NLRB provide that the parties automatically have seven days. Ordinarily an extension of one or two weeks will be granted at the request of either party, particularly if the hearing has been long, or the issues complicated. (See Section 11244.3 of the Manual).

CHAPTER 4
Preparing the Brief

Although we're vaguely familiar with the word "brief" as it's used in court proceedings, the average person tends to freeze if it's suggested that a non-lawyer should write one.

On the other hand, if the hearing officer for the NLRB were to ask, "Would you like to write a brief memo, pointing out what you consider to be the key facts in support of your position in this matter?" You might not particularly **want** to take the time to do it, but you wouldn't be intimidated by the prospect.

Black's Law Dictionary defines "brief" as "the vehicle of counsel to convey...the essential facts of his client's case, a statement of the questions of law involved, the law he would have applied, and the application he desires made of it by the court."

You are the counsel, which simply means advisor or advocate, and the applicable law is the National Labor Relations Act. The above definition rather completely outlines the points you want to cover.

The form has become standardized over the years, but that doesn't mean there is only one way to effectively tell your story. However, whether you write your "memo" formally or informally, you will want to cover certain basic points. If you read through several briefs that have been submitted by your union, you will begin to pick up the pattern that most people find most efficiently sets forth those points in an orderly way. It may also help in outlining the material to be included in your brief if you are familiar with the summary report the hearing officer is asked to complete for the Regional Director:

> **11252.1 Full Report:** An example of an outline of a fuller type hearing officer's report is as follows:
>
> 1. **Pleadings:**
>
> (a) Petition filed on _____ (date)
>
> (b) Hearing on _____ (date) at _____ (date)
>
> (c) Parties:
>
> Employer
> Petitioner:
> Intervenor:

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

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

3. **Procedure:** Were any rulings made as to which the hearing officer is in doubt: Yes_____

   No_____ (If "Yes" describe briefly below.)

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

4. **Labor organizations:** Was status contested?
   Yes_____ No_____

   (If "Yes"state facts briefly.)

   If the parties stipulate or there is uncontested testimony in the record that the unions involved are labor organizations within the

meaning of the Act merely check "No." If such status is contested, however, check "Yes" and briefly state facts including position of the parties.

5. **Jurisdiction:** Contested? Yes _____ No _____
(Briefly state jurisdictional facts.)

If jurisdiction is stipulated, conceded, or not contested check "No." However, whether or not jurisdiction is stipulated, conceded, or contested, it is necessary to briefly state or summarize the jurisdictional facts. Where gross volume of business is the sole test for asserting jurisdiction, include commerce data on inflow, outflow, franchise, etc., sufficient to establish **de minimis** statutory jurisdiction.

6. **Questions concerning representation:** In Issue? Yes_____ No _____ (If "Yes" state facts.)

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

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

7. **Appropriate unit:** Is unit stipulated? Yes_____ No_____

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

8. **Other issues or problems:** Yes_____ No_____
(if "Yes" state facts.)

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

9. **Name union desires to be designated as:** (See 11198.1.)

10. **Briefs:**

a. Will briefs be filed?

b. Was extension of time requested? By whom? Ruling and reason therefor.

c. Briefs due date_____.

11 **Reporter's estimate of transcript pages:** (_____pages)

In preparing your own "report" or "brief," first comes a section often titled **"Background."** This answers the question "How did this all come about?" Your petition to the Board, requesting certification as representative for a group of employees started the whole thing, right? So you set forth the facts; when you petitioned for what group of employees of which employer. Attempts to reach agreement on holding a consent election did not work out, so a hearing was scheduled and took place on a certain date, before a certain hearing officer of a certain Region of the Board. You appeared for the union, the employer appeared, and the hearing proceeded.

The first time you mention the union, you should spell out its full name; then, so that you don't have to continue with all that verbiage, add a parenthesis "(hereinafter referred to as the "Union")." The same pattern should be followed for the employer, and any other parties to the hearing.

Next comes **"Position of the Parties."** Did you agree, either before or during the hearing, to any changes in the unit for which you're petitioning? If so, now is the time to mention them, giving a page reference indicating where the changes you agreed to appear in the official transcript. Even minor alterations in the original petition should be listed, such as a substitution of the phrase "technical personnel" for technicians, etc. You also want to mention any agreement or change in position reached regarding individual employees who may have been in contention: perhaps at the beginning of the hearing, there were five employees whom you felt were not supervisors; on the basis of evidence presented, at some point during the hearing you agreed that one of these individuals did in fact appear to be a supervisor. Report this, and give a page reference from the transcript. Then sum up your final position: that the unit petitioned for, amended as you have stipulated, is an appropriate one within the meaning of the Act, and is the unit you seek.

That employees, A, B, C, D are not supervisors and should be included in the bargaining unit. You will also wish to state the employer's position, **as you understand it,** based on the transcript. It should be stated quite early in the record, when the hearing officer first inquired. If the employer has, during the course of the hearing, modified his position, you should also make a note of that. Often, the hearing officer will have asked, immediately prior to the close of the hearing, if there is any change in position. The responses of the parties to this question will usually provide your best summary. If you have been asked by the hearing officer whether or not you wish to proceed to election in the event the Board finds only a very different unit appropriate, your response should be included in this section.

Under **"Statement of Facts,"** you will want to excerpt from the transcript all those points which strengthen your position on each of the issues in question. In the example we've been using, everything from the different bathroom facilities for technicians to the difficulty in transferring from one facility to another to the fact that there was only one occasion - and that an emergency - when the four "leadpersons" assumed what could be considered meaningful supervisory responsibilities, should all be documented and commented upon. You may also want to make some reference to certain of the employer's testimony which on its face seems damaging to your position, but which can be minimized or countered by other testimony or exhibits.

Technically, the "Statement of Facts" section should include only those facts which are in the record from the hearing. Exhibits which have been admitted are part of the record, whether or not they've been read **into** the record. It can be important to quote from these written exhibits since their content and the points you feel they make can be easily overlooked if no specific reference is made to them in your brief.

Finally, you make your **"Argument"** in support of your position. Using the criteria set forth in the landmark cases of the Board discussed earlier under "appropriateness of unit," you should first make a general case for your requested unit. You will also want to point out any problems you see in effective representation if the employer's proposed unit were to be adopted. You then can deal specifically with each of the points at issue. It's good to mention specific cases which are similar to the present one where the Board has found appropriate a unit like the one you're requesting.

You may know, or other members of your union staff may know of Board-ordered elections within your own area of representation where the unit closely parallels the one presently at issue. The pattern of your particular industry in terms of collective bargaining units is very meaningful. Even if these cases were decided at the regional level, and not in Washington, they are relevant so long as representation rights were obtained through a Board-ordered election,as opposed to a consent election or voluntary recognition. If your union represents nearly identical groupings of classifications in an

overwhelming majority of the firms involved in collective bargaining with your union, and that grouping is identical to the unit for which you are petitioning, figures substantiating that fact may be worth including in your argument, regardless of how the unit determination was made.

Unless the issues involved are clear and the rational arguments all on you side - as in cases where an employer has pursued his right to go to hearing simply in an effort to buy time and not because any significant questions existed - you will also wish to take a look at the standard reference books listed as "suggested reading" at the front of this publication and find cases to cite which deal with the significant issues raised. Such a check would make you aware of a case in which the Board rules that filling in for a supervisory employee who is absent does not constitute supervisory status.[1] It's also a good idea to stop by your Regional Office of the NLRB and check through their library to make sure there are no very recent cases which deal with similar ~~cases.~~ issues.

Your "Summary" or "Conclusion" can be a separate section, or can be the last paragraph of your "Argument." Here, you request the Board, because the facts are as they are, and because of the arguments you have made, to find in your behalf, and order an election for the unit you seek.

When you've finished this section, you've completed your brief.

A form provided by the NLRB, #4669, gives you the final instructions as to how many copies of the brief, to whom, and by when, you need to prepare and distribute.

Now all you have to do is stay in touch with your bargaining unit, keep up their morale, counter the employer's actions, and wait for word from the NLRB that they're ordering an election, hopefully among those employees you wish to represent.

In the usual course of events, you will receive within a month after the briefs have been filed, a decision from the Regional Director. It will define the unit found appropriate, including resolution of any issues involving the status of individual workers which was questioned.

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[1]Muscle Shoals Rubber Co., 157 NLRB 829.

CHAPTER 5
Election Preparations

There can, of course, be a request by either party for review of the Regional Director's decision (see Section 11274 of the Manual); however, under most circumstances, the election will proceed as scheduled. There may be a delay in **counting** the ballots or resolving challenges until the Board has had time to review.

Within the thirty-day time frame following the election order, an attempt will be made to reach agreement among the parties as to the date, time, and place of election; absent ready agreement, the guidelines to the Regional Director or his staff are set forth in the Manual, quoted earlier.

The same care should be taken by the union representative as in a consent election to bring to the attention of the Region any special circumstances which require different or additional arrangements to ensure that all eligible employees will have easy access to the polling places.

The **eligibility list,** usually referred to as an **Excelsior List,** is to be supplied not less than ten days before the election. In an ordered election, the instructions from the Region to the employer will read as follows:

> **11312.1 (b) Directions of Elections**
>
> In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear Inc.,** 156 NLRB 1236; **N.L.R.B. v. Wyman-Gordon Company,** 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region ___ within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, (address), on or before (date). No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review

> operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Any union representative who has ever had an election lost by one vote, or hung up on challenges, can realize the tremendous importance of checking, and rechecking with a committee, the names and addresses on that list. Even if your campaign is so "together" that you don't **need** the list, take plenty of time to verify each and every name and address. For one thing, a large number of errors on the part of the employer could be an indication of bad faith; for another, the election is going to run much more smoothly if all the eligible names appear, and no ineligible names clutter up the list.

You'll be asked by the Region to make this check, and if there are discrepancies, an attempt will be made to resolve them in the following manner:

> **11312.4 Preelection Check:** Once the list is on hand, the Regional Office should have the parties check and approve the list promptly, to allow maximum time for ironing out eligibility questions and thus reduce the number of challenges. (If the number or nature of challenges raised is significant, consideration should be given to withdrawal of Regional Director's approval of the election agreement or to reconvening the parties for clarification (11094).) An arrangement should be worked out for keeping the list(s) up to date, with a final check presumably made at a preelection conference.
>
> The parties should be encouraged to air and to "talk out" their questions. Any agreed-upon changes may be made on the face of the list, all such changes being initialed by representatives of all parties. Finally, the original list - each page - should be initialed as "inspected." If specific agreements as to eligibility can be reduced to signed writings, so much the better; but such agreements must not only be **written** and signed, they must also **expressly** provide that the eligibility issues resolved therein are final and binding on the parties, and they must not, in whole or in part, be contrary to the Act or established Board policy, in order to be considered by the Board to be final determinations of the issues involved. Where statutory inclusions or exclusions are concerned - e.g., supervisors - the stipulation should not be one only as to the ultimate legal question of eligibility to vote, but rather should be a factual stipulation of the duties and authority, or lack thereof, of the individuals involved.
>
> After inspection, the Board agent should retain custody of the original eligibility list.

> Observers may bring to the election only lists of employees they intend to challenge. They shall not maintain a list of those who do or do not vote.

Although the duty of the employer to provide an accurate list, with addresses, is well established, there are still times when he refuses or stalls. The Manual goes into some length to set forth the steps to be taken in each eventuality:

> **11312.5 Timely Filing of Eligibility List:** The list of names and addresses must be received by the Regional Director within the period required. The 7 days begins to run on the day following date of direction of election or of the Regional Director's approval of the election agreement. For example, an election is directed or an agreement approved on Monday, March 14; you start counting on March 15; accordingly the list of eligible voters is due back in the Regional Office by close of business, Monday March 21. Should the seventh day fall on a nonwork day, the first working day thereafter should be used for final date or receipt of the list.
>
> An extension of time to file this list should not be granted by the Regional Director except in extraordinary circumstances. Failure to file the list timely shall be grounds for setting aside the election whenever proper objections are filed.
>
> Where the list is received, but not in timely fashion, e.g., on the eighth day, the Regional Director should proceed with the election. If a request **not** to proceed to election is filed in such an instance, seek advice.
>
> **11312.6 Refusal To Furnish Names and Addresses:**
>
> a. If the employer in an R case advises in advance that he will furnish names within 7 days, but not addresses, or that he will not furnish any list until shortly before the election, he should be advised that such failure to comply with the requirement constitutes grounds for setting aside the election.
>
> If the parties enter into an election agreement anyway, the Regional Director should approve the agreement. The language of the covering letter to the parties should be modified as follows:
>
> > I have approved this agreement subject to the requirement with respect to election eligibility lists, of which you have previously been advised. In order to assure...etc. (11312.1 a.)

b. If the employer refuses to furnish the list of names and addresses yet is willing to agree to an election, but the petitioner or a union with a blocking interest is not, notice of hearing should issue.

c. If the employer refuses to furnish the list in an RM case, request advice from the Board through the Office of the Executive Secretary.

d. If the employer refuses to furnish the list in an RD or UD case, the Regional Director should proceed to an election unless requested not to by the **petitioner.** Frequently the incumbent union already has all the names and addresses of the employees. However, in any case where this assumption is false, i.e., certified union has never gotten first contract, etc., a request not to proceed from the incumbent should be honored and advice sought.

11312.7 Failure To Furnish Eligibility List: If the election is to be held notwithstanding the refusal of the employer to comply with the **Excelsior** list requirement, and the employer refuses to furnish even a list of names for voter eligibility purposes, he should be informed of the possibility of subpoena or, alternatively, of the affidavit voting procedure (11328). If he persists in his refusal, the Regional Director may decide whether to issue an appropriate subpoena or make arrangements for voting by affidavit.

11312.8 Request Not To Proceed to the Election: If a list of names and addresses is not received at all, or a list of names only is received, the Regional Director should proceed with the election unless requested not to, in writing, by the petitioner or an intervenor with a petitioner's showing of interest; i.e., 30 percent or the equivalent.

An intervenor with less than 30 percent showing can file objections to the election, even if he cannot block it. The Board **may** set the election aside on grounds of failure to supply the list.

Where a request not to proceed to election is received, a subpoena to obtain the **Excelsior** list should issue.

11312.9 Refusal - Second Election: If the employer refuses to comply with the **Excelsior** requirement in a second election, and the first one was set aside for that reason, the Regional Director should **not** proceed to an election, even

> if the parties wish to. In such cases, a subpoena to obtain the **Excelsior** list should be issued, and enforcement proceedings instituted if appropriate.
>
> **11312.10 Subpoena Enforcement Problems:** Problems on subpoena enforcement should be referred to the Assistant General Counsel for Special Litigation; a copy of the report or memorandum should be sent to the Region's Assistant General Counsel.

Unlike the "Notices of Petition," which the employer is **requested** to post, the "Notice of Election" **is to be posted** by the employer.

> **11314.3 Posting and Distribution of Notice:** Copies of the notice should be posted in conspicuous places by the employer before the election. Posting places include, but are not limited to, bulletin boards and timecard racks.
>
> Under some circumstances, the posting may be done by the Board agent; if a complaint of insufficient posting is lodged, he should investigate personally and take appropriate action. But care must be exercised with respect to the **authority** of the Board agent in this respect. Technically, the notice posting is subject to the permission of the controller of the premises; however, his consent to post and/or remedy defective posting can usually be gained by arguments geared to the expression of desires to avoid objections by other parties and to avoid **estoppel** of objections on the part of the party who makes adequate notice impossible.
>
> Notices should be distributed by mail or in person, to eligible or disputed eligible voters if the Board agent thinks this advisable; e.g., to persons not actually working during the posting period (11336. 1). Where newspaper or radio publicity is recommended, because, for example, personal notification is made impossible because of lack of information as to voters' whereabouts, there should be clearance with the Division of Operations Management.

It is important that the union committee carefully check on whether or not the employer has complied with the instructions to post, and that, if they are warranted, complaints be made as called for in the above section. These notices seem to be extremely important to bargaining unit members, and ordinarily if you let the committee know when they are expected, and that the employees have a right through the union representative to insist that they be posted, they'll be diligent in keeping you informed of any failure to adequately do so.

CHAPTER 6
The Election

Observers for the Election play an important role in the NLRB election process. Although each party selects their own observers, subject to certain restrictions placed by the Board, they are asked to walk a quite narrow line between being partisans, and actual assistants to the Board in the conduct of the election. It is important that the bargaining unit members selected to be union observers be given adequate opportunity to learn and become comfortable with their rights and obligations. The Manual sets forth the bare bones of what will be required of them in Section 11310.

> **11310 Observers:** Each party may be represented at the polling place by an equal, predesignated number of observers. The observers not only represent their principals but also assist in the conduct of the election. There may be one observer per party per checking table and one observer per party at the ballot box, plus observers necessary for relief, ushering, and other assistance.
>
> Nonparticipating unions should not be permitted to have observers. Nor should alleged representatives of "no-union" groups be permitted to act as or to select observers.
>
> Parties may waive the opportunity to be represented by observers, either expressly or by default (no observers appearing), but care must be taken, in any doubtful case, to accord each party every opportunity for representation.
>
> Observers must be nonsupervisory employees of the employer, unless a written agreement by the parties provides otherwise.
>
> The names of the proposed observers should be submitted to the Board agent in charge of an election early enough to permit a check of nonsupervisory status. If a claim is made that an observer is ineligible to act, the matter should be discussed and the parties made aware that the use of an ineligible observer may result in the election being set aside. An alleged 8(a)(3) is eligible to serve as an observer.
>
> If possible, at least one observer should be empowered by the party he represents to enter into binding agreements respecting election

questions. Where each party is represented by more than one observer, one of them should be designated as **head observer**, both for this and for other "housekeeping" purposes, such as a communication channel, task assignment, etc.

Observers should be given instructions either at a special meeting held in advance of the election date, or just before the election itself.

The official badge to be worn by observers is the one provided by the Board. It is preferred, although not required, that no other insignia be worn or exhibited by the observers during their service as observers. This, of course, does not apply to regular company identification badges, the wearing of which is required by the company.

If observers are to work in shifts, or to relieve each other, all such arrangements are to be made and policed by the head observers.

If it is to be a large or complicated election, it is worth the effort to attempt to persuade the Board agent to hold the preelection conference, and instruction session for the observers, at least a day prior to the actual voting. If it is scheduled for the morning of the election, too often an instance of tardiness, a bit of confusion, a stuck voting booth, means that the observers are expected to function and the election to proceed without any opportunity to provide the specified instruction.

Electioneering: The Manual sets forth a strict prohibition against electioneering by agents of the parties in the polling place, or in the line of employees waiting to vote. (Section 11326) Sub-paragraphs .1 through .5 deal with some of the more common questions regarding what can and cannot - legally - be done during voting hours:

11326.1 Observer Insignia: It is required that all observers wear the official observer badge. It is preferred, but not required, that they wear no other insignia (see 11310).

11326.2 Observers May Not Electioneer: Election observers may not electioneer during their hours of duty, whether at or away from the polling place. In order to remove any possibilities of electioneering, an observer away from the polling place for any reason during his duty hours should be accompanied by observers representing the other parties. Observers should not be permitted to engage in conversation with incoming voters.

11326.3 Voters: Voters need not remove insignia, even though they constitute "electioneering" material. Nor need their conversations be policed, unless there is talk loud enough to constitute a disturbance.

> **11326.4 Area Surrounding Polling Place:** In some exceptional situations it may be desirable for the Board agent, before the polls open, to determine an area surrounding the polling place in which all electioneering is forbidden. But he should not undertake to set up such an area which he or his associate cannot police. The Board agent periodically should check the voting area and booths for electioneering material including defaced notices of election.
>
> **11326.5 Distribution of Literature; Sound Trucks:** There should be no prohibition (on the part of the Board agent) of factory gate distribution of literature on the day of election even though it takes place during the voting hours. However, electioneering materials visible from the polls should be removed.
>
> If electioneering from a sound truck should penetrate to the polling place during the voting the Board agent, if possible, should take appropriate steps to have the sound lowered.

Your observers should also be aware of these rules so that they can call any serious violations to the attention of the Board agent, or so that they can defend certain activities of union supporters which are permissible under the rules.

Two other situations which are often causes of controversy during the voting time are covered in the Manual, and it can be helpful to have the appropriate section numbers at your fingertips:

Section 11330.4 clearly provides that supervisors are **not** to be the ones to release employees for voting.

In Section 11338.3 "Proper Time to Challenge," the Manual expresses a preference for challenges being made early, but also states"... a challenge voiced at any time **before** the ballot is dropped into the ballot box should be honored."

Counting of the Ballots often is a hair-raising experience, but it usually runs smoothly. Whatever objections you may have to the election (or its outcome), the actual tallying is seldom the basis for those objections. On most occasions, therefore, there will be no problem about you or one of your observers signing the "Tally of Ballots." The union, in so signing, is merely certifying "that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above." This certification in no way jeopardizes any objections to other conduct involved in the election which you may wish to file. Of course, if there **has** been a problem or question as to the tallying itself, or inclusion or exclusion from the count of certain unchallenged ballots, you have the right to withhold signature in the space provided, and simply acknowledge receipt of a copy of the tally. (Section 11340.9)

The section in the Manual dealing with "runoff" or "rerun" elections includes a number of examples which illustrate the sort of situations in which another election must be held. While fervently hoping no one reading this will ever need to refer to this section, the reference is included - just in case:

11350 Runoff Elections

11350.1 Occasion: There can be no **runoff** of an election in which there are but two choices on the ballot. In a one union election, the results are final (once all determinative challenges are resolved) if "Yes" receives a majority of the valid votes cast or if "No" receives at least 50 percent of the valid votes cast. Likewise in a severance election, where there are but two choices on the ballot, either "Yes" or "No" or, both of them unions, a tie vote would not result in a runoff. It would result in a pooling of votes with the residual election, if there was one; in a dismissal, if there was none.

Where, on the other hand, there are three or more choices on the ballot, an election in which (after any determinative challenges have been resolved) none of the choices receives a majority of the valid votes cast is considered an **inconclusive** election. In such case, the Regional Director should conduct a runoff election between the choices on the original ballot which received the highest and the next highest number of votes.

Exception: Where, in the original election, all choices receive an equal number of votes, or where, two choices having received an equal number of votes, a third choice receives a higher but less-than-majority vote, the Regional Director should declare this election a **nullity** and conduct another (rerun) election with the same choices on the ballot. If the second election results in another such nullity, the petition should be dismissed; if the results of the second election require a runoff pursuant to the principles set forth in the preceding paragraph, a runoff should be conducted. See Rerun elections, 11450 - 11456.

Further exception: Where two or more choices receive an equal number of votes, another receives no votes, there are no challenges, and all eligible voters have voted, neither a runoff nor a rerun election should be conducted. A certification of results should be issued.

As indicated in item 11340.8, the Board agent in charge of an election, the results of which call for a runoff, should so indicate on the tally of ballots.

No runoff election should be held with respect to a severance election.

11350.2 Examples of election results illustrating the principles set forth in item 11350.1. No challenged ballots are involved:

a. **Runoff** election should be held:

(1)	Eligible	17	(3)	Eligible	10
	Union A	8 (x)		Union A	4 (x)
	Union B	8 (x)		Union B	4 (x)
	Neither	1		Neither	0
(2)	Eligible	77	(4)	Eligible	19
	Union A	36 (x)		Void	1
	Union B	0		Union A	9 (x)
	Neither	36 (x)		Union B	9 (x)
				Neither	0

b. **A Nullity, rerun** election should be held:

(1)	Eligible	17 or 15	(4)	Eligible	16
	Union A	5		Union A	4
	Union B	5		Union B	4
	Neither	5		Neither	8
(2)	Eligible	16	(5)	Eligible	40
	Union A	4		Union A	10
	Union B	4		Union B	10
	Union C	4		Union C	5
	None	4		None	15
(3)	Eligible	16 or 17			
	Union A	5			
	Union B	5			
	Neither	6			

c. **No runoff** indicated. Certification of results should issue.

(1)	Eligible	18	(3)	Eligible	16
	Union A	9		Union A	0
	Union B	9		Union B	8
	Neither	0		Neither	8
(2)	Eligible	77	(4)	Eligible	17
	Union A	36		Union A	4
	No Union	36		Union B	4
				Neither	9

11350.3 **Time of Runoff:** A runoff election should not be held during the period in which objections to the original election may be filed, unless all parties, in writing, waive their rights to file objections. If objections to the original election are timely filed, the holding of any runoff election is postponed until such objections have been disposed of. If

they are thus filed, subsequent objections - e.g., objections timely filed with respect to the runoff election - will not be considered to the extent that they relate to the circumstances preceding or surrounding the original election.

11350.4 Attempt To Withdraw: An attempt to withdraw the petition or withdraw from the ballot between original and runoff election should be dealt with in accordance with the principles set forth in items 11098 - 11116. If the withdrawal from the ballot of one of the only two unions on the runoff ballot is permitted, the choices on the ballot should be converted to "Yes" or "No" with respect to the remaining union.

11350.5 Procedure for Conduct of Runoff: A runoff election should be held as soon after the original as it can be arranged (but not before the expiration of the objection period).

Those eligible to vote in a runoff election are those who were eligible to vote in the original election and are still in an eligible category as of the date of the runoff election. No one who was not eligible to vote in the original election can be eligible to vote in the runoff election.

The eligibility list used may be the one used at the regional election or a duplicate thereof. Parties should be made aware of any changes. (Note that the list can only change **downward**; i.e., names may be eliminated.) The same general principles apply to insuring the accuracy of a runoff list as to a list in an original election.

If the Regional Director is of the opinion that a different, more recent eligibility list should be used in the runoff, he should seek advice from the Board through the Office of the Executive Secretary.

The standard notice of election, when used in a runoff election, should be modified so that the description of the voting unit spells out the exclusion "employees who have since (the eligibility date) quit or been discharged for cause and who were not rehired or reinstated prior to the election held on (date of original election)...." In addition, the fact that this is a runoff election should be noted on the notice of election, certification on conduct, and tally of ballots.

Arrangement of polling places, duties and responsibilities of personnel, order of voting, challenge procedure, and counting procedures may be the same for runoff elections as they are for original elections.

There can be no runoff of a runoff election. There can however, be a rerun of a runoff.

CHAPTER 7
Resolution of Challenges

If the election is close enough that challenged ballots could affect the outcome, those challenges will have to be resolved by the Regional Director, or, in some cases, by the Board itself.

An investigator is assigned by the Regional Director. His or her role is to be neutral and nonpartisan, and to bring to the Regional Director "...all of the available facts. In the reconciliation of these principles (to the extent that they may appear to conflict), **he must place the primary burden of sustaining their contentions upon the parties themselves,** only directing his efforts toward 'filing in' the picture." (Section 11362) (Italics added) The investigator has the responsibility of interviewing any witnesses suggested by the parties and, if indicated, reviewing any pertinent records. It is the obligation of the Regional Director to order a hearing if "substantial and material factual issues exist which, in the exercise of...reasonable discretion, (the Regional Director) determines may more appropriately be resolved after a hearing...."

In assisting during the investigation, it obviously is in your interest to produce the best arguments in support of your position regarding the challenged ballots as you possibly can. Ordinarily a written statement of your position will be requested, and should certainly be supplied.

Attempts may be made to resolve the challenges by agreement. Such agreement must be entered into by **all** parties, who also waive the right to file exceptions to the Regional Director's findings.

Options open to the Regional Director in an ordinary situation are several:

> **11368.3 Determination v. Recommendation:** In an agreement for consent election case, the Regional Director's report should contain a **final determination.** In a stipulation for certification upon consent election case, the Regional Director may elect to issue a report containing a **recommendation** to the Board, or he may issue a notice of hearing, thereby transferring the case to the Board, or take such a combination of the two courses of action as circumstances may require. In cases of elections directed by the Board or Regional Director, the Regional Director may either issue a supplemental decision containing a **determination,** or a report containing **recommendations** and transferring the case to the Board.

An exception to his report may be filed by the parties and the Board requested to review his findings. The Board may either decline the request, conduct a review, and/or order that a hearing be held on the matter.

At such point in time as a determination is made - when no exceptions have been filed, or when appeal procedures have been exhausted - the ballots of any employees where the challenge was overruled will be counted, the tally adjusted accordingly, and the results of the election finally certified.

.....UNLESS OBJECTIONS TO THE ELECTION HAVE BEEN FILED.....

CHAPTER 8
Objections to the Election

Similar in many ways to the filing and processing of unfair labor practice charges, the rules governing handling of objections allow for some options which can be helpful to a bargaining unit, and to the union attempting to represent that unit.

Investigation and/or hearings may be conducted simultaneously, in consolidated proceedings, with unfair labor practice charges and an investigation of challenged ballots.

As is true of resolution of challenges, the Regional Director's decision is final in the case of a consent election. In the instance of a stipulated consent election, or a Board-directed election, the investigation is the responsibility of the Regional Director, whose report and recommendations may or may not be appealed.

Because the Board has always placed such a high priority on maintaining an atmosphere in which employees are free to vote under "laboratory conditions," an election may be set aside and rerun, due to circumstances which might not have been found serious enough to warrant a finding of an unfair labor practice.

Any events or conduct, by the Board agents, the employer, the community, or the union, which are found to jeopardize a free and uncoerced choice of the employees, can be grounds for setting aside an election.

The events or conduct must have occurred after the petition was filed, although, as with unfair labor practice charges and their six-month limitation, earlier circumstances can be considered as background.

The objections must be filed within five working days of the election.

The way in which the Board computes those five days can be crucial:

> **11392.1 Objections Timely Filed:** Objections, to warrant consideration, must have been filed by the close of business on the **fifth** working day following the close of the election; i.e., the service of the tally of ballots.
>
> In circumstances where it has been necessary to serve the tally on a party by mail, because the party did not have a representative present at the count, that party's period for filing objections should begin 3 days after the tally is deposited in the United States mail. (See Rules, Sec. 102.114.) Where an error was made in the tally which did not involve a material

> change affecting the outcome of the election and a **corrected** tally has been issued, the filing period commences upon service of the **original** tally. Objections must be timely whether or not challenges are sufficient in number to affect the results of the election; objections filed timely with respect to a **revised** tally of ballots, but not with respect to the **original** tally of ballots, have validity with respect to, and should serve as the basis for investigation of, only those circumstances leading up to and surrounding the **revised count,** not those leading up to and surrounding the election itself.
>
> When a party which has missed its deadline can show that the objections were mailed in reasonable time for the document to have been timely received, the Regional Director should reopen the case if he has closed it, and he should investigate the objections rather than submit the question to the Board. The party should have the burden of showing deposit in the mails sufficiently in advance of the deadline to give it the right to expect timely delivery; in close cases, the Regional Director may need to check mailing schedules with the post office. **Rio de Oro Uranium Mines,** 119 NLRB 153.

As will become apparent in the section dealing with unfair labor practice charges, one of the most difficult issues to prove is the **intent** of the employer in committing unfair labor practices. Intent need not enter into consideration of objections filed. It can be found that "something" happened which interfered with the laboratory conditions required for an election without any implication of a deliberate attempt to jeopardize the election.

In the Board's publication, **A Layman's Guide to Basic Law Under the National Labor Relations Act,** are examples of conduct the Board considers to interfere with employee free choice:

> Threats of loss of jobs or benefits by an Employer or a Union to influence the votes or union activities of employees.
>
> Misstatements of important facts in the election campaign by an Employer or a Union where the other party does not have a fair chance to reply.*
>
> An Employer's firing employees to discourage or encourage their union activities or a Union's causing an Employer to take such action.
>
> An Employer's or a Union's making campaign speeches to assembled groups of employees on company time within the 24-hour period before the election.
>
> The incitement of racial or religious prejudice by inflammatory campaign appeals made by either an Employer or a Union.

> Threats or the use of physical force or violence against employees by an Employer or a Union to influence their votes.
>
> The occurence of extensive violence or trouble or widespread fear of job losses which prevents the holding of a fair election, whether or not caused by an Employer or a Union.

*The Board has changed its mind several times in recent years regarding whether or not misstatements constitute grounds for setting aside an election. As of this writing, the latest ruling, Midland National Life Insurance Company,[1] provides that elections will no longer be set aside solely because of misleading campaign statements or misrepresentations of fact. The reasoning is that workers can decide for themselves whether or not to believe propaganda. An exception is to be made, Midland says, if documents are forged, or if Board documents are altered "in such a way as to indicate an endorsement by the Board of a party to the election." However, in a still latter case, Midwest Hospital,[2] the Board has ruled that NLRB documents are to be treated by the same standards as other material.

Regarding the investigation of objections, the instructions to the investigator contained in the Manual follow very closely those for challenges. The duty to furnish evidence is very clearly that of the party filing the objections, and it becomes obvious that the duty must be taken seriously when you read the section of the Manual dealing with that duty:

> **11392.5 Duty To Furnish Evidence:** It is incumbent upon the party filing objections to do so by the close of business on the fifth working day following the close of the election, and to furnish evidence sufficient to provide a **prima facie** case in support thereof before the Region is required to investigate the objections. In addition to identifying the nature of the misconduct on which the objections are based, the party filing objections is required to submit evidence in support thereof at the time the objections are filed or **forthwith** upon request from the Regional Director. This should include a list of the witnesses and a brief description of the testimony of each. An objecting party normally should not be permitted to "piecemeal" the submission of evidence but should be required to disclose promptly all the evidence in support of his objections. Absent the **prompt** receipt of evidence, the Regional Director should overrule the objections.
>
> However, any conduct which amounts to an abuse of the election process, whether or not the subject of objections, warrants investigation by the Regional Office (11394).

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[1]Midland National Life Insurance Company, 263 NLRB No. 24, 110 LRRM 1489 (1982).

[2]Midwest Hospital, 264 NLRB 146

Also important to remember is a paragraph in Section 11394 dealing with the nature and scope of investigation. Here, somewhat different from what is expected of a Board agent in investigating unfair charges, the investigator is instructed to **ignore** what might otherwise be relevant evidence, unless objector has made allegations along those lines; or unless the Regional Director **at his discretion** finds them "serious."

> **11394 Nature and Scope of Investigation:** ...Where, however, the investigation reveals circumstances which were not alleged by the objector but which were or reasonably could have been within the knowledge of the objector, the Regional Director, in his report or supplemental decision, should not sustain or recommend sustaining the objections on the basis of these circumstances; in accord with Board precedents, he should overrule the objections on procedural grounds. On the other hand, if, in the Regional Director's discretion, the additional circumstances reveal a serious abuse or violation of Board processes which raises substantial and material issues with respect to the conduct of the election he should include this aspect in his report or supplemental decision and should recommend or determine accordingly....

In addition, at the discretion of the Regional Director (or the Board if they take jurisdiction) is the question of whether a hearing should be held. There is no mandatory requirement, as in the case of unfairs where a complaint is issued, or in representation proceedings where consent agreement is not possible.

When a hearing is conducted, it is because the Regional Director or the Board believes "'...that substantial and material factual issues exist which, in the exercise of...reasonable discretion (the Regional Director) determines may more appropriately be resolved after a hearing....' **No** investigation of any kind or degree is required of a Regional Director before he reaches that conclusion, for if he is in error and orders a hearing he will err on the side of granting due process. If, for example, it is apparent on the face of the objections alone that a hearing is warranted, notice of hearing may issue **without conducting any investigation.**" (Section 11396.2)

Often a hearing officer will be one of the Region's agents. There are at least two sets of circumstances when this is not appropriate, for obvious reasons:

> **11424.2 Hearing Officer:** The hearing officer should be a Board agent from the Region in which the hearing is to be held, except:
>
> a. If a hearing is directed by the Regional Director or the Board where an issue involves the conduct of a Board agent.
>
> b. If a hearing is directed by the Board concerning credibility findings by the Regional Director.

Unlike a hearing on a representation petition, the hearing officer in a case dealing with objections will **not** have access to the Region's case file. He is obligated to attempt to get a complete record, but without prior knowledge of any background other than the official pleadings in the case. Presumably this is because (also unlike an RC hearing) he **will** be expected to make findings, conclusions, and recommendations.

Since in these proceedings the hearing officer is acting in a judicial capacity, provision is also made for the Region to have a counsel of its own. His role is described in Section 11424.4 of the Manual:

> **11424.4 Counsel for the Regional Office - Functions and Duties:** The primary function of counsel, if one is utilized, is to see that evidence adduced during the Region's investigation becomes part of the record.
>
> He may voice objections, cross-examine, call, and question witnesses, and call for and introduce appropriate documents. If the information in his possession warrants it, he should seek to impeach the testimony of witnesses called by others.
>
> Counsel for the Regional Office should not offer new material until it is certain it will not be offered by one of the parties. Moreover, in this respect and in attacking evidence which has been presented, he must exercise self-restraint, he must be impartial, and he must display the appearance of impartiality.
>
> Counsel for the Regional Office should be thoroughly familiar with the contents of the regional case file and, during the hearing, should have it in his possession and should assure that the evidence adduced during the investigation is made part of the record.
>
> In this connection, it should be noted that counsel for the Regional Office does not have the duty of **sustaining** the Regional Director's report or supplemental decision.

At the hearing itself, the Regional Counsel is first called upon by the hearing officer, and is supposed to deliver the following statement which further describes the role he is to play: "I am here as representative of the Regional Office to see that the evidence adduced during the investigation is made available to the hearing officer/Administrative Law Judge. In pursuance of this function, I may ask some questions and, if necessary, call witnesses. I want to say that I am not here to support any preconceived positions. My services are equally at the disposal of the hearing officer/Administrative Law Judge and all parties." (Section 11428.2)

The party who filed the objections then presents his or her case, calling witnesses, having an opportunity to redirect, etc. Then the other parties have the same opportunity to present evidence in sup-

port of their position. The Regional Counsel, as well as other parties, has the right to cross-examine during each presentation. Finally, the Regional Counsel has an opportunity to present evidence, but only if "the evidence involved is essential to the completeness of the record." (Section 11428.4)

Briefs may or may not be called for or permitted, depending on the circumstances which caused the hearing to be ordered. (See Section 11430)

The hearing officer then makes his report and recommendations. Exceptions may be filed to these. Again, eventually, all appeals unused or exhausted, a final decision will be rendered by the Board or the Regional Director, and the election will, or will not, be rerun.

CHAPTER 9
Conclusion of the Representation Tour

Each time you file an RC petition, there are going to be new and different experiences awaiting you, some more frustrating than others. No visit to the Board is quite like any other.

What has been attempted here is to travel through the main way stations that are encountered on nearly every representation trip through the Region, and particularly to point out ways in which the Board's own Manual can be used to guide the group of employees you seek to represent as successfully and as rapidly as possible along the road to collective bargaining.

Becoming familiar with the Manual, forming the habit of checking its contents whenever a Board agent tells you "this is the way things are done" can make a real difference in your effectiveness in dealing with the Board at a regional level.

An example: for several years, union representatives had been frustrated by Board agents' refusing to honor a challenge made after the voter had received his ballot but before it had been deposited in the ballot box.

Availability of the Manual to interested citizens made it easy to check out that section, and learn that such a challenge **is** to be honored.

As you encounter a new or different situation, or as a new Board agent gives you an interpretation that doesn't fit with what you had understood, take time to check it out - in the Manual. You won't find it dry or abstract reading - each paragraph directly impacts on what's going to happen to you and the people you want to represent.

Fortunately the table of contents is very detailed, so that, glancing through it, it's easy to zero in on the section you need to know about.

The Board, it seems to me, has put the cart before the horse, so that the Manual we've been using until now, the one on Representation Proceedings, is their "Part Two."

Hopefully, a union representative will be thinking about Representation Proceedings before getting involved in "Unfair Labor Practice Proceedings," which the Board has numbered "Part One." Union organizers are optimists, or they wouldn't be union organizers. It's necessary to be realists, too, so we'll now move on to our "Part Two," in which we'll refer to the Board's "Part One."

PART II. UNFAIR LABOR PRACTICES PROCEEDINGS

CHAPTER 1
Charges

A union representative **senses** the day the employer begins committing unfair labor practices. No big thing needs to happen; there's just a different feeling in the air. One of the key committee members can't make a meeting. The openness with which employees have responded to telephone calls is replaced by "not ins" while the worker's voice is heard in the background, or an evasive "I'm not really turned on to that sort of thing."

Gradually the pieces fit together. There have been a few spot "merit" raises. A supervisor has been overheard talking to a foreman, telling him the company is finally going to do something about the dental insurance - they've been meaning to for a long time, and it's finally getting going unless this union nonsense interferes with the plans. One committee person has been called in for a chat and given the impression he's in line for promotion if he proves his loyalty; another member of the committee has been warned he'd better improve his attitude, or find a job somewhere else.

It's begun, the intimidation and the bribes.

It's unfair, but under today's Board rulings, does it constitute "unfair labor practices?"

The language of the Act seems so clear. Even the wording used in the Board's own **Layman's Guide to the NLRB** would seem to prohibit the sort of activities most of today's employers engage in as they first attempt to block organization by their employees:

> **Examples of violations of Section 8(a)(1)**
>
> Section 8(a)(1) forbids an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Any prohibited interference by an employer with the rights of employees to organize, to form, join, or assist a labor organization, to bargain collectively, or to refrain from any of these activities, constitutes a violation of this section. This is a broad prohibition on employer interference, and an employer violates this section whenever it commits any of the other employer unfair labor practices. In consequence, whenever a violation of Section 8(a)(2), (3), (4), or (5) is committed, a violation of Section 8(a)(1) is also found. This is called a "derivative violation" of Section 8(a)(1)

Employer conduct may of course independently violate Section 8(a)(1). Examples of such independent violations are:

- Threatening employees with loss of jobs or benefits if they should join or vote for a union.

- Threatening to close down the plant if a union should be organized in it.
- Questioning employees about their union activities or membership in such circumstances as will tend to restrain or coerce the employees.
- Spying on union gatherings, or pretending to spy.
- Granting wage increases deliberately timed to discourage employees from forming or joining a union.

You know the employer is interfering with workers' rights; the employees know they've been promised some benefits if they give up the idea of a union; others know very well what the employer means when he talks about "improving your attitude or finding another job." But so far the employer has been subtle enough that - unless something else occurs, he's probably home free.

A charge filed alleging that the employer has engaged in conduct prohibited by Section 8(a)(1) of the Act because he has threatened loss of benefits if employees should join or support the union, and has granted wage increases in an attempt to discourage forming or joining a union **could** be filed, and would be processed.

But at this point, the Board agent's initial inquiries of your witnesses would probably indicate there is no solid proof that the employer has taken the actions referred to **because of his intent to defeat the union.**

The Board agent can guess what the employer's response would be at this point:

> How was he to know whether the employees who received raises were for or against the union? The supervisor was simply carrying on a private conversation with the foreman, expressing his own opinion, and not intending to be overheard. There **is** going to be an opening for several leadpersons if a major job bid comes through - surely there's nothing wrong in encouraging one of his good workers to bid for it! And as for the reprimand to the employee who happens to have his name plastered all over the union literature, all you have to do is take a look at his record - he's been observed away from his work station half a dozen times in the past few days; he was insubordinate to his foreman on two occasions, and a coworker complained that he had been bothering him.

You have little if any proof to the contrary. In all probability, you would be told you had failed to establish a **prima facie** case.

Black's Law Dictionary says, "A litigating party is said to have a **prima facie** case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. A **prima facie** case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side."

What seems strong evidence to you and me seems circumstancial at best to someone else.

You might also be told your "four corners" didn't add up to a case.

Another side trip to **Black's Dictionary** would tell you that "To look at the **four corners** of an instrument is to examine the whole of it, so as to construe it as a whole, without reference to any one part more than another."

At this point, if you pursued the dialogue further, you would be reminded that for an unfair labor practice charge to be sustained, it is necessary to establish that:

1. The employer had knowledge not only of a union campaign, but if the charges involve discrimination against employees, knowledge of their support of the campaign.

2. The employer demonstrated animus - **intent** to do something - in this case, to block the organizing drive.

3. The employer did in fact commit certain acts, **because** of that intent.

Intent, or **animus**, is usually the most difficult of the three to prove. If an employer is going to commit unfairs, it would certainly make life simpler for the union representative if he would set forth his intentions in writing - a letter to all employees, telling them either that they'll be fired if he finds out they're having anything to do with the union, or that they'll all be amply rewarded if they tear up their union cards.

Unfortunately, few employers who have the intent provide that clear a record. Sometimes a confidential memo comes to light, or the employer or one of his agents gets carried away and makes statements in front of more than one witness that clearly spell out his intent. In most situations, if you're in the sorry position of having to prove unfairs, that's about the most conclusive evidence you'll get.

That doesn't mean you should disregard these early incidents, which in and of themselves are probably not enough to constitute a finding of unfair practices. Far from it! If this is the worst the employees encounter, they can probably survive it and go on to gain collective bargaining. But if the employer's campaign steps up, somewhere along the way you may not only have valid charges, but decide you must file them. When you do, things which standing alone would not have been strong enough will help to round out your "four corners."

DON'T TRUST TO MEMORY! DON'T RELY ON OTHER PEOPLE'S MEMORY! GET THE DETAILS IN WRITING WHEN THE INCIDENTS OCCUR!

Date, time, place, witnesses to each incident, and a summary of what they can testify to.

It's a good idea to go over your notes with the witnesses, and have them initial the notes. This way, if they're called on to testify or make a formal deposition at a later date, there's no problem in their openly referring to those notes to refresh their memory.

8(a)(2) Charges

A technique long used by employers and currently enjoying a new surge of popularity is that of creating "in-house" associations which supposedly have all the advantages of unions and none of the alleged disadvantages.

The Board's own **Guide** says:

> An Employer violates Section 8(a)(2) by:
>
> . Taking an active part in organizing a union or a committee to represent employees.
> . Bringing pressure on employees to join a union, except in the enforcement of a lawful union-security agreement.
> . Allowing one of several unions, competing to represent employees, to solicit on company premises during working hours and denying other unions the same privilege.
> . Soliciting and obtaining from employees and applicants for employment, during the hiring procedure, applications for union membership and signed authorizations for the checkoff of union dues.

Often, if you move quickly, you can pin down the company involvement in a seemingly spontaneous push for a "let's have our own private union" campaign. If one of your committee questions one of the "newly emerging leaders" in a non-hostile way as to the pros and cons, he or she will often be reassured that, not only will the company not oppose such an independent union, but has actually encouraged it, for the employees' own good of course. They have even offered to make an attorney available to help draw up by-laws. A leaflet announcing the planning meeting may have been run off on company equipment, using company paper.

Later on, it would be difficult to get this sort of evidence. Management will clean up its act pretty quickly in most cases. But in the beginning, the first converts to the new cause will be so eager to win new recruits that they will freely stress what they perceive as their strong point - namely, management's blessing.

The in-house movement may not get off the ground, or it may do serious damage to a campaign. In any event, again it's important to learn as much about it as you can, keep records of everything you learn, have witnesses or participants in conversations initial notes of those conversations, and collect memos, notices, or bulletins. Even if **you** have the memory of the proverbial elephant, you're probably getting much of the information second-hand, and so would not be the best witness. **Get the first-hand reports in writing.**

8(a)(3)Charges

The **Guide** says, "In general, the Act makes it illegal for an employer to discriminate in employment because of an employee's union or other group activity within the protection of the Act....Discrimination within the meaning of the Act would include such action as refusing to hire, discharging, demoting, assigning to a less desirable shift or job, or withholding benefits."

It cites as examples:

Examples of illegal discrimination under Section 8(a)(3) include:

- Discharging employees because they urged other employees to join a union.
- Refusing to reinstate employees when jobs they are qualified for are open because they took part in a union's lawful strike.
- Granting of "superseniority" to those hired to replace employees engaged in a lawful strike.
- Demoting employees because they circulated a union petition among other employees asking the employer for an increase in pay.
- Discontinuing an operation at one plant and discharging the employees involved, followed by opening the same operation at another plant with new employees because the employees at the first plant joined a union.
- Refusing to hire qualified applicants for jobs because they belong to a union. It would also be a violation if the qualified applicants were refused employment because they did not belong to a union, or because they belonged to one union rather than another.

The Key word in all this is **"because."** Proving an employer took whatever discriminatory action he did **because** of the employee's union activity, and not for some other reason remains the key stumbling block to successful processing of unfair labor practice charges. There's no easy way.

Occasionally, and again more likely when an employer first learns of a union drive, **animus** or intent can be established through documented reports of conversations with management personnel. If union activists who get involved in conversation with management can try to have a coworker present during the discussion, it can be helpful in establishing credibility later on.

Absent firm proof of intent, the sheer weight of circumstantial evidence can prevail. There can be only so many "coincidences." That's why it's so important to detail each and every incident from the very beginning. While one carefully timed increase, or one questionable discharge or change in shift assignment would probably not stand alone as proof of intent, a **series** of seemingly isolated instances can build a case.

Gather the shreds of evidence. Hope you won't need to use them, but build up the largest, firmest supply you can.

8(a)(4) Charges

Ordinarily, you would be listing 8(a)(4) as one of the sections of the Act violated if the events occur after an RC petition is filed, or more often after other unfair charges have been filed. The examples of 8(a)(4) violations given in the **Layman's Guide** include:

- Refusing to reinstate employees when jobs they are otherwise qualified for are open because they filed charges with the NLRB claiming their layoffs where based on union activitity.
- Demoting employees because they testified at an NLRB hearing.

The Board tends to be zealous in protecting the impunity of its witnesses. However, that fateful word **"because"** again requires some evidence that the giving of testimony was in fact the reason for whatever adverse action the employer took.

8(a)(5) Charges

Charges alleging refusal to bargain in good faith are generally applicable only after the union has been certified as the bargaining representative. Examples listed in the **Layman's Guide** include:

Examples of violations of Section 8(a)(5) are as follows:

- Refusing to meet with the employees' representative because the employees are out on strike.
- Insisting, until bargaining negotiations break down, on a contract provision that all employees will be polled by secret ballot before the union calls a strike.
- Refusing to supply the employees' representative with cost and other data concerning a group insurance plan covering the employees.
- Announcing a wage increase without consulting the employees' representative.
- Subcontracting certain work to another employer without notifying the union that represents the affected employees and without giving the union an opportunity to bargain concerning the change in working conditions of the employees.

There is another set of circumstances when such charges are in order, and when substantiated can result in an order for the employer to bargain with the union, even if the union has lost an election, or when there has not been an election:

1. **If** the authorization cards are so worded that they clearly authorize the union to represent the signers, and are not solicited merely for purposes of holding an election, and

2. **If** the union has an appropriate demand for recognition on the employer, and

3. **If** the union had a majority of authorization cards in an appropriate unit, and

4. If the employer subsequently engages in other unfair labor practices which the Board finds might have made a free election impossible, or have adversely impacted on an election which was held.

There were a number of cases, some of which eventually reached the Supreme Court and which, taken together, add up to the fact that, if the above conditions are met, the Board can order a recalcitrant employer to negotiate with the union his employees have selected. Three of the key cases were: **NLRB vs. Joy Silk Mills, Inc.; NLRB vs. Gissel Packing Company; and Bernel Foam Products Co.**

The possibility of needing to follow such a route to win certification is another reason for making sure at the time you file that you have a healthy majority in an appropriate unit, that the authorization cards were properly obtained, and contained true **authorization** language.

Of course, all of the data you've been so carefully collecting regarding employer violations will be vital in establishing that the employer has, through illegal acts, eroded your majority.

In United Dairy (1979), for the first time, the Third Circuit Court found that there could be exceptional cases marked by "outrageous and pervasive unfair labor practices" where, absent a majority showing, it should be concluded that, had it not been for the employers' conduct, the union would have achieved a majority in a free and uncoerced election. The Court remanded the case to the Board, to determine whether such conduct had occurred. On remand, the Board issued a bargaining order.[1]

Subsequently, the Board in Conair Corp., ordered an election where the union never achieved majority status, after finding that the employer's "massive and unrelenting" violations precluded any possibility of a fair election.[2]

These cases are important, as a long range expansion of workers' rights, but the circumstances are so extreme, and the time lag so long, that they do not represent a solution most union representatives should count on, or hope for.

If the refusal to bargain occurs after the certification, you're dealing with a somewhat different matter, and need another kind of evidence.

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[1]United Dairy Farmers Cooperative Association; 242 NLRB 1026, 101 LRRM 1278 (1979), aff'd and remander for reconsideration of bargaining order issue, 633 f2d 1054, 105, LRRM 3034 (CA 3, 1979), on remand, 257 NLRB No. 129, 1981.

[2]261 NLRB 178, 110 LRRM 1161 (1982).

If an employer intends to refuse to bargain, again it would be simpler if he simply wrote you a letter telling you so. This rarely happens. Instead, you are likely to encounter a series of delays in establishing a meeting date and place. The material you have a right to request and receive is not forthcoming, but generally is not refused outright - it just isn't available, or easy to prepare, or the employer's chief negotiator doesn't see why you need to know anything about certain subjects, and hours of discussion go on as to the relevancy of the information. Counter proposals are slow in coming. When you do receive them, they seem so far off base that you begin to wonder if the employer is trying to make you and your committee so angry that you stalk away from the bargaining table. So called negotiation sessions consist of your arguing for your position, and/or making concessions while the employer's negotiator hums, hahs, calls lengthy caucuses, returns to the table just before adjournment to tell you they'll try to have an answer for you at the next session. You begin to suspect he can't do more than grunt or growl without checking with someone else.

The question at this point is whether he's engaging in what is called "hard bargaining," or whether he's refusing to bargain in good faith.

If this pattern of conduct continues, and especially if it's accompanied by unilateral changes in working conditions, or management attempts to go around the union and communicate the "reasonableness" of their position to members of the bargaining unit, it may be time to file "refusal to bargain" charges.

They're hard to prove, if the employer has been half way subtle in his conduct.

Written records are essential. When you request information concerning members of the bargaining unit, fringe benefits, wage schedules, etc., make the request in writing. If you don't get it in a reasonable time, ask for it again, both in person and in writing. Keep a written record of requests you make by phone or in person.

Confirm in writing any cancellations of negotiation sessions made by the employer.

Detail in the notes taken at the bargaining table such specifics as length of employer's caucuses, verbal refusals to provide information, evidence of the negotiator's inability to make even minor changes without checking with some person or persons who are not at the table.

It helps greatly if the record also shows that you've been prompt, responsive, and available to come to the table at reasonable times.

If 8(a)(5) charges are filed, the Board will take a look at the total picture.

While the Act makes it clear that good faith bargaining is not dependent on the employer agreeing to any one proposal, if he's refused to agree to **anything,** or anything significant, that can be an indication of bad faith.

He is responsible for providing a negotiator who is knowledgeable and who has authority to negotiate in his behalf in a meaningful way.

He has an obligation to meet at reasonable times, without excessive delay.

He may not legally refuse to bargain on those subjects which directly impact on the wages, hours and working conditions of the employees.

He may not legally engage in "surface bargaining." (This one is hardest of all to prove. It consists of going through the motions - coming to the table and **appearing** to consider the union's proposals while not in fact doing so.)

This sort of conduct, as well as the more specific examples shown earlier from the **Layman's Guide,** will be factors in any findings of refusal to bargain.

CHAPTER 2
Timing of Charges

In nearly every campaign, somewhere along the line, employees are going to be pressing you to "go to the Board." They've been told what the employer cannot legally do, and he seems to be doing it.

Charges can be filed at any time within six months of the events giving rise to them. Things that happened earlier than six months prior to filing can be considered, but only as "background."

In an ideal campaign, by the time the employer learns his employees are organizing for collective bargaining, you have your majority of authorization cards, and the bargaining unit members are so solid, so together, so determined, that they won't be shaken by intimidation or bribes. In this ideal situation, the only time you'd even need to **consider** charges would be if the employer took discriminatory action that actually did economic harm to a member or members of the bargaining unit.

Obviously, not all campaigns are ideal. If conduct of the employer which you believe is illegal is seriously affecting the morale of the employees, and their campaign is faltering, you have some difficult decisions to make.

If charges are filed before the union has a clear majority of authorization cards, you've jeopardized your right to a possible "order to bargain" somewhere down the line.

If you file charges before the election, the election will probably be delayed until the Region investigates and rules on the charges. The only way to save your early election date is to file a "request to proceed" form where you ask the Board to go ahead with the election.

If the charges are found by the Region not to have merit, the confidence of the bargaining unit in their rights (and in the judgment of the union) can be severely shaken.

If, in spite of all these "ifs," the decision is made that charges should be filed, it's time to turn to the Board's Casehandling Manual, Part One, for guidelines as to what you have a right to expect from the Regional Office and its staff, and what your obligations as "charging party" are under the present rules and regulations.

CHAPTER 3
Assistance in Filing

This section of the Manual covers a number of unfair labor practice proceedings, including ones charging a union with unfair or illegal conduct. We are dealing here only with "CA" cases, those alleging violation of Section 7 rights, which are set out in the Act in Section 8(a)(1) through (5).

You can mail in the charges to the Regional Office, or you can call at the Regional Office, discuss your charges, and receive assistance in drafting them.

The Board agent, often the "Officer of the Day," is instructed to proceed as follows:

> **10012.1 Determination Whether Situation Is Covered by the Act:** Approached by an individual who believes he has a "case," "complaint," or "grievance" which is cognizable under the Act, the Board agent should explore the situation to determine initially whether, provided the proffered facts are accurate, the matter is one which is covered by the Act.
>
> **10012.2 Situation Not Covered:** If the situation is clearly not covered by the Act, the Board agent should point out this fact and discourage the filing of a charge. But the individual should be advised that the individual still has the right to file a charge if the individual wishes. In drafting such a charge, the specific conduct about which the individual complains should be used. As in all situations, the individual should be specifically advised of the 6-month statute of limitation set forth in Section 10(b) of the Act.
>
> (If a charge is filed under these circumstances, it should be processed just as any other.)
>
> Even though no charge is filed under such circumstances, a brief memo of the salient facts should be prepared for the regional records.
>
> **10012.4 Situations Covered by the Act:** If an individual seeking prefiling assistance from the Agency relates a state of facts which, if true, indicates that there may have been a violation of the Act, the individual should be advised of the right to execute a charge before a formal affidavit is procured or other steps taken. The individual should be told that our processes are invoked by the filing of a charge.
>
> (This is not to be construed as **requiring** anyone to file a charge before information is given the individual. **Nor is it to be utilized as a device for an unwarranted buildup of "statistics."**)

> Upon the filing of such charge, the Region, having procured a docket number, should immediately commence the investigation. Thus, absent extenuating circumstances, the Board agent rendering prefiling assistance, or another Board agent, should take an initial in-depth affidavit at the time the charge is filed in order to provide for expeditious processing of the case. If after affidavit has been taken, it appears, and the charging party becomes convinced, that further proceedings are not warranted, a withdrawal request may be solicited, received, and processed without service on or notification to other parties. Except where the charge has been filed contrary to the counsel of the Board agent such withdrawals should be rare since the precharge interview should be of sufficient thoroughness to disclose weaknesses in the case to the individual before the charge was docketed. (See sec. 10012.2.) If it appears that the charge needs correction," a new not an amended charge may be substituted.

The Region can provide certain assistance in the actual preparation of the charge:

> **10012.6 Assistance in Preparation:** Assistance in the preparation of a charge may be rendered to the filing party to the extent that such assistance involves the furnishing of forms, reasonable clerical/stenographic assistance, and wording of the charge itself.

If you have prepared the charge (five copies of NLRB form 501), the Regional Office has an obligation to point out what they believe to be obvious errors:

> **10012.7 Assistance in Remedying Defects:** If charges (or amendments thereto) are received in the Regional Office which contain errors on their face, for example, a charge which uses the wrong numbers of the sections alleged to have been violated or which incorporates supporting affidavits by reference, assistance may be rendered in remedying the defects.
>
> In such cases, docketing may be delayed pending a prompt communication with the charging party. If the 10(b), 6-month period is involved, no delay should be incurred on this account. If the filing party insists that the charge be docketed as is, his/her wishes should be honored.

Whether or not Board personnel assist in drafting the charge, the Manual provides some guidelines for what that charge should allege:

> **10020.1 Allegations in General:** In all C cases, the facts alleged in a charge to constitute the unfair labor practices should be set forth with some specificity but should not contain detailed evidentiary matter.

> A charge should not incorporate, by reference, affidavits or other documents submitted in support of the charge. Where discrimination is alleged, all known discriminatees should be named. Where the names of all are not known, the charge should expressly state that the discriminatees include, but are not limited to, those named.

At the time of filing, if it is done in person, you will be asked for a written statement providing more detail as to the facts than is contained on the face of the charge. If the charge has been mailed in, or you are not prepared at the time you make the charge, you have an obligation to provide a written statement promptly:

> **10040.2 Obtaining Facts From Charging Party:** If the charging party has not submitted, at the time of or prior to the filing of the charge, a written account of the facts and circumstances surrounding the matters complained of in the charge (giving details such as dates, names, and places, telling of the account, and attaching whatever statements in support of the allegations which were then available), the initial letter should contain a request that such information be submitted by **return mail....**

CHAPTER 4
Initial Statement in Support of Charge

At a minimum, this summary should contain a "who, when, where, what and how" of the specific acts or events which brought about the filing of a charge.

Copies of any written evidence which support the charge should be included. For instance, if you're alleging that a known union activist has been denied normal overtime as punishment for union activity, "before and after" pay stubs might be enclosed, remembering that it's going to be necessary to prove the employer had knowledge of the employee's union support. Have the names of your organizing committee been listed on leaflets the employer has had an opportunity to see? If so, enclose one, and tell briefly how broadly they were distributed.

Have you written the employer, advising that certain of his employees are members of the organizing committee? If so, enclose a copy of that letter, which contains the name of the discriminatee.

If the employer has verbally accused the employee of union activity, list the names and addresses of any witnesses to that conversation.

You may also want to include written statements from the key witnesses. While the Board agent will undoubtedly take fresh affidavits from the witnesses, there sometimes is an advantage in supplying copies of those original notes taken and initialed by the employees when it first began to appear that unfairs were being committed.

CHAPTER 5
Investigation

The Region will send acknowledgment of the filing of the charge, and will notify the employer that charges have been filed, of his right to representation, and request that the charged party submit his version of the facts surrounding the charge.

While waiting for a reply, the investigation will begin. At this point, the only assumption to be made by the Region is that if the facts are as alleged, (including knowledge and intent of the employer), employees' rights under the Act have been violated.

The investigation is to proceed as follows:

> **10050 Objective:** The purpose of the investigation is to ascertain, analyze, and apply the relevant facts in order to arrive at the proper disposition of the case. Among the items to be considered in the course of the investigation are the following:
>
> a. Legal correctness of details on face of charge, such as proper identification of parties, applicability of section numbers.
>
> b. Jurisdiction of the Board.
>
> c. Timeliness of the charge.
>
> d. Determination of sources of factual materials.
>
> e. Gathering of the relevant facts.
>
> f. Legal analysis of available factual materials.
>
> g. Resolutions of conflicts in available factual materials.
>
> The above order is used advisedly. In appropriate circumstances matters on this list need not be considered if the charge does not merit further action under earlier named factors. Specifically, invalidity of the charge, on the basis of factual errors on its face, obviates an investigation into the merits; so do lack of jurisdiction and untimeliness.

Assuming points (a) through (c) are in order, the Board agent is ready to turn to the gathering of facts leading to support of dismissal of the charge. The scope of that investigation is important; the seriousness with which it is undertaken is vital.

Because the Board agent has authority under the law to conduct this investigation, facts and evidence not usually available to a union representative may be available to him or her. Under certain circumstances, the Board agent has an obligation to share that information with the charging party:

> **10054.2 Violations of the Act Other Than Those Alleged:** Investigation should be limited to the specific allegations of the charge, matters relating thereto, and matters bearing on their truth or falsity. In the event investigation indicates that violations not litigable under the charge may have been committed, the charging party should be given the opportunity to file appropriate amendments; in the absence of amendment, there should be no further investigation of the additional possible violations, unless they bear specifically on the truth or falsity of the allegations contained in the charge.

An example of when this section should come in to play would be a situation where charges alleging 8(a)(1) and 8(a)(3) violations have been filed. On a second interview with a witness, the employee mentions that the employer has given him a very rough time since learning that he had given a statement to the Board agent. If that "rough time" can be established, it would seem to open up the possibility of including an 8(a)(4) violation in the charge.

Procedure for handling this sort of situation is set forth in Section 10064.5:

> **10064.5 Where ULP Not Specified in Charge Uncovered:** In cases where investigation uncovers unfair labor practices not specified in a charge, regional personnel responsible for the handling of a given case must determine whether the charge is broad enough to support complaint allegations covering the apparent unfair labor practices found. If the allegations of the charge are too narrow, the charging party (or attorney of record) should be apprised of the deficiency in the existing charge and should be informed that it can be remedied by amendment. Should amendment not be filed, the case should be reappraised in this light, and the complaint issued, if any, should cover only matters related to the specifications of the charge.
>
> The scope of the charge may be great enough to cover the practices found, but if, on the other hand, this is questionable, the Region should notify the charging party (or attorney of record) of the facts and of the potential deficiency. Here again, the charging party should be informed that he/she may remedy the situation by amendment. Absent amendment, the case must be reappraised and the eventual complaint, if any, should cover only matters supported by the allegations of the charge.
>
> Where appropriate, when a charging party (or attorney of record) is advised that amendment of a charge is desirable, he/she should be apprised of the effect of the suggested amendment as well as the effect of failure to amend and he/she should also be advised specifically that, in the event he/she declines to file an amended charge, the Board will proceed to process the meritorious allegations of the charge.

(Where the investigation discloses that an unnamed party has committed or has participated in the commission of companion unfair labor practices, the charging party should be apprised of his/her rights under the Act. For example, if the investigation of a CA case discloses the existence of "companion respondents" or the existence of a companion CB case, or vice versa, the charging party should be so informed.)

CHAPTER 6
Interviewing of Witnesses

Even if it means delaying the filing of charges for several days after you've decided they must be filed, it's better to delay than to proceed before you're ready to follow through on presenting your evidence and your witnesses. Section 10056.1, particularly the third, fourth, and fifth paragraphs, spells out the charging party's obligations:

> **10056.1 Witnesses of Charging Party:** As soon as possible, the Board agent should arrange to interview witnesses of the charging party.
>
> The initial letter to the charging party has requested an account of what happened. The contact should be made whether or not an answer to the initial letter has been received. If it has not been received, the Board agent at the time of the contact should remind the charging party of this fact and should insist upon prompt receipt regardless of the fact that interview arrangements are being made. The burden of having witnesses available at a date which is the earliest available to the Board agent should be placed on the charging party. (But see sec. 10056.3.)
>
> Where the Region has been advised that the charging party is represented by counsel or other representative, the charging party's counsel or representative, upon request, should be permitted to be present during the interview of the charging party or any supervisor or agent whose statements or actions would bind the charging party. This policy will normally apply in circumstances where during the interview counsel or other representative does not interfere with, delay, or impede the Board agent's investigation.
>
> The charging party, whether or not represented by counsel or other representative, should be ready to submit proof of the basis of the charges.
>
> In the event the charging party initially delays in the presentation of the evidence without good cause, written notice should be sent to the charging party, or to counsel, if represented, requesting presentation of evidence and reminding them of their duty to cooperate in the investigation and/or the submission of a withdrawal request by a certain date with the admonition that if the noted deadline is not met the charge will be dismissed for lack of cooperation. There are situations, e.g., "stalling" charges, where very prompt action will be called for. In appropriate cases and with the supervisor's approval, a "proof deadline" of 72 hours, or less, may be imposed.

The process of investigation takes long enough at best; the Regions try to complete investigations and reach a decision within 30 days. That month can seem like an eternity to a restless, apprehensive bargaining unit. If new evidence comes to light, or if the employer

finds ways to block proceedings during the investigation, that can stretch out the month to two or more. The charging party not only saves some time, but betters the union's chances of having a complaint issued if from the beginning, he or she has been not only cooperative but prompt and efficient in expediting the investigation.

Board agents are human beings. Their responses are bound to be affected by intuition and attitude. If they sense you're not ready to go all out to prove your case, even if no "proof deadline" is imposed, their diligence is likely to be less than what would otherwise be true.

The ideal, from the Board's point of view, is that the charging party and its witnesses can establish the **prima facie** case.

> **10056.2 Interviews of Witnesses of Charging Party:** Pursuant to the initial arrangements described above, the Board agent should meet with and interview witnesses offered by the charging party.
>
> Wherever possible, the charging party's case, if one exists, should be established through interviews with the charging party and with witnesses offered by the charging party. Suggestions may be made by the charging party with respect to other witnesses or sources of information, but these should be adopted only upon a showing of possible advantage therefrom; for example, a suggestion that the Board agent interview a number of named persons, perhaps unfriendly but at least inaccessible to the charging party, should not be undertaken unless the suggestion is fortified by a reasonable explanation of (1) what such persons would say, and (2) how it would be pertinent. It is the responsibility of the Board agent to avoid unnecessary expenditure of time and energy.
>
> Where a witness, whether offered by the charging party or the charged party, who is not a representative or an agent of any party to the proceeding is represented by counsel or other representative and the witness requests that counsel or other representative be present during an interview, the interview should be conducted with counsel or other representative present so long as this presence does not delay or hamper the interview. This policy will normally not prevail where counsel or other representative also represents a party to the case unless the Region, in the exercise of its discretion, wishes to proceed with the interview under such circumstances. In the event the Region declines to proceed with the interview of the witness in the presence of counsel or other representative, the witness should be advised that he or she may submit documentary evidence or a statement which, if timely submitted, will be considered.

Just as in any litigation, it's much more difficult to build a case if you're depending on hostile witnesses or the opposing party to do it for you. There are times when that's the way it must be done if it's to be done at all, and the Manual provides for that:

> **10056.4 Obtaining Evidence From the Charged Party:** Only when the investigation of the charging parties' evidence and pertinent leads **point to a prima facie case** should the charged party be contacted to provide evidence. In such cases the procedures of 10056.5 should be followed.

First, however, come the interviews with **your** witnesses.

There are problems with these interviews. The Manual contains a long section (10058.4) suggesting ways in which the Board agent can create an atmosphere of confidence and trust, and the care which must be taken in reducing the statement to written form (10058.5).

In spite of the precautions recommended, and assuming a sensitive and well intentioned Board agent, it isn't often easy for an employee witness to present his case fully and effectively.

For many witnesses, it will be the first time they've been asked to give a formal affidavit. It may be the first time they've had dealings with "The Government." If there **has** been earlier contact, it may have been hostile, intimidating, or frustrating. In addition, a worker's language is seldom the language of the law, or of bureaucracy.

Suppose, for instance, that one of your key committee people has been pressured and harassed by the foreman. You and he believe it's a deliberate attempt by the employer to (1) discourage his union activity and (2) discredit him in the eyes of his coworkers so that they won't want to be on "his," i.e., the "union's" side.

He eagerly comes forward to tell his story to a representative of the Government who is, in his mind, supposed to "do something about it."

He tells the Board agent, "This dude jumped all over me when he found out I was on the union committee. He's been down on me ever since."

Board agent: "You mean he physically assaulted you?"

Witness: "No, that's not the way it was. I mean he's really been riding me."

An attempt is made to get specifics. After they've been covered, comes the question:

Board agent: "Is it your testimony that as a result of the foreman's conduct you have not felt free to exercise your rights under Section 7 of the Act?"

Witness: "What?"

Board agent: "Has the foreman's conduct made you reluctant to openly support the union?"

Witness: "Hell, no. I'm not going to let that little runt bully me."

This inadvertent "macho" response, if included in the formal affidavit, may somewhat weaken the allegation of intimidation and interference.

After a long and "informal" interview, it's time to reduce the statement to written form.

The Board agent painstakingly proceeds, in longhand or with a hunt-and-peck system at the typewriter, to put the essence of the interview on paper, starting with the traditional, "Now comes_____ _____who, under oath deposes and says." There follows name and address, length of employment, history of job titles, raises, any disciplinary actions, date and circumstances of first contact with the union. There may be some specifics the witness can't be sure of, which makes him uneasy - was it May or June of last year that he got the nickel raise, and what difference does it make anyway?

By the time the Board agent gets around to writing the details of what the witness came in to tell about, the hands on the clock have gone full circle once, maybe twice. The Board agent's hand is tired, the air is blue with smoke (or the witness is nervous because he's been trying to observe the neat "thank you for not smoking" sign on the agent's desk), and it's nearly time to get to the playoffs of the company bowling league where the witness hopes to score some points for the union. That part of the affidavit describing the run-ins with the foreman is set down as:

> "On or about February 13 of this year (I can't be sure of the date), Charles Bronson, who is foreman of my section, called me in to his office. He did not ask me to sit down, as he did on previous occasions. He said, 'Since you've gotten involved with that union your work has slipped,' (or words to that effect). I can't recall his actual words. He told me that If my production record did not improve he would have to recommend a cut in pay. (I have been receiving the bonus rate for high production for the last three months.) I said I thought I was putting out as much as ever, but that I had been getting inferior material to work with. He did not agree. The interview concluded with his warning me to try harder. I left his office. Since that date I have continued to receive what I believe to be the least desirable assignments within my classification. I have continued to support the union, talking with my coworkers before and after work, and on lunch and coffee breaks."

The taking of the statement proceeds, finally concluding with, "I have read the above, consisting of ____pages, and under oath, say to the best of my information or belief it is true."

The Board agent then gives the statement to the witness to read, duly advising him that he is free to make any changes or corrections, and initial them, before initialing each page and signing the statement.

The witness reads the statement. It doesn't sound quite right, but it's hard to know how to go about changing it to **make** it right. There's nothing **untrue** in it; it just doesn't seem to tell it the way it really was. The witness hesitates before signing off the page that tells about his being called in to the foreman's office:

Board agent: "Is something wrong?"

Witness: "Well, it doesn't tell how the foreman acted."

Board agent: (Patiently) "What is left out?"

Witness: "He was different, that's all. Always before he's kidded around. From then on, he's been cold as ice."

Board agent: "Did he frown, raise his voice?"

Witness: "He sure as hell didn't smile!"

Board agent: "Would you like to insert, 'He didn't smile at me.'"?

Witness: "Yeah, I guess so."

The insertion is made, the page initialed, and eventually the statement is signed off.

The Board agent has been conscientious; so has the witness. The statement has nevertheless lost something in translation. It would have been even more difficult if English had been a second language for the witness.

At best, the taking and giving of affidavits is a tedious and frustrating experience. In spite of the best intentions on everyone's part, it can be an intimidating one - and factors which shouldn't interfere sometimes do.

Even though the Board agent is in all probability going to take a statement from the witness, it probably helps in a number of ways to submit written statements done at the time of the incident or incidents:

1. Details are fresh in the witness' mind.

2. The witness will not be surprised (and therefore intimidated) by the form an affidavit takes if he's gone through a similar process in a less authoritarian setting, with you.

3. Since you and the witness are more likely to share a common vocabulary, you can make it easier for him to understand what the Board agent seeks in terms of objective, factual statements rather than impressions, no matter how valid they may be. In other words, there may be a more accurate phrase than "he didn't smile at me" to replace "he jumped all over me."

CHAPTER 7
Reluctant Witnesses

There are many times when an important element in your charges requires the cooperation of an employee who is fearful about testifying, or has changed his/her mind about supporting the union. You can't produce that witness at the Board agent's office, or even get him or her to agree to have the Board agent call at home.

If you have the earlier statement taken at the time of the incident, and when the witness **was** available to you, it can help document your case, and also give the Board agent something to go on, if and when an interview takes place.

Often, the Board agent is going to be reluctant to follow through on attempts to reach reluctant or hostile witnesses. His obligation to do so under certain circumstances is set forth in Section 10056.3 of the Manual:

> **10056.3 Pertinent Lines of Inquiry Should Be Exhausted:** All promising leads should be followed. It is the responsibility of the Board agent to take steps necessary to ascertain the truth of the allegations of a charge. He should exhaust all lines of **pertinent** inquiry, whether or not they are within the control of, or are suggested by, the charging party. (As indicated earlier, the latter's burden is limited to that of full cooperation within his means.) In close cooperation with the supervisor, the Board agent should take all investigative steps, short of "fishing," in areas reasonably calculated to bring results. Where necessary, the investigative subpoena should be used (**Subpoenas.** 11770-11806). Depositions may not be used in connection with precomplaint investigations (**Depositions.** 10352). In cases involving postsettlement unfair labor practice allegations, activity prior to a settlement agreement may be considered in assessing a respondent's postsettlement conduct.

There also is an obligation to contact "neutral" people who have or are likely to have, knowledge of the facts:

> **10056.6 Rank-and-File Employees and Unbiased Third Parties:** All others (rank-and-file employees, union members) known or believed to have knowledge of the facts in question should be interviewed. Unbiased third parties are apt to be the most fruitful sources of information.
>
> Questions opened up by investigation of the "defense" case should be pursued even if reinterviews of witnesses are required.

Board agents are instructed to discourage group interviews, where one witness' testimony may be colored or affected by that of others, or by peer pressure. (Section 10058.3)

The Region maintains some discretion over whether or not a witness is interviewed alone, or in the presence of the union (or management) representative. Ordinarily, a request by the **witness** to have his/her representative present will be honored.

Section 10056.5 provides, however, that the **charged party** is to be advised of his right to have counsel or a representative present at interviews with offered witnesses whose testimony would bind a respondent.

In deciding how important it is to insist on being present while your witnesses are giving their affidavits, you will have to weigh several factors; relative ability of the witness to remember and articulate the key points to be offered, and the degree of persistence he or she will have in seeing to it that the statement accurately reflects the testimony; relationship with and confidence in the Board agent assigned; how much of the pertinent testimony based on first-hand knowledge can be incorporated in your own or others' affidavits, if necessary, or offered through exhibits.

If the witness is apprehensive about the giving of an affidavit and personally requests of the Board agent that the union representative be present, this often resolves the question.

The Manual also states that a copy of the affidavit is to be given **to the witness, if the witness requests it.**

Remind your witnesses of the importance of making this request. Should they forget, a telephoned request to the Board agent from the witnesses will be honored. Some time is lost this way, since technically the statement can only be given (or mailed) to the witness, and it can be important for you to read through it, and be aware of any gaps that need filling while the interviewing of witnesses is proceeding.

If on reviewing the affidavits, you find that a report of events you consider important in building the case has been omitted, it's a good idea to check first with the witness, before complaining to the Board agent or asking that a supplemental affidavit be taken. Occasionally, when a witness is faced with swearing or affirming to the truth of a statement, there will be second thoughts about whether an event **really** happened in quite the way it was reported to the union.

Where accurate and relevant information **has** been omitted from an affidavit, you should contact the Board agent promptly, and state that you've seen the witness' statement, and are concerned about the omission. It may be that the witness simply forgot to include the information; it may be that the way in which the subject was approached did not indicate to the Board agent its relevance; it may be that the Board agent had writer's cramp by the time the information was introduced, and a spur of the moment decision was made that it really wasn't all that vital. In any of these three instances, a reinterview seems indicated, and should be requested - insisted upon if necessary.

CHAPTER 8
Witnesses Who Are or May Be Supervisors

If the charged party (in this discussion, the employer), is "co-operating" with the Board in its investigation, supervisory witnesses, because they are considered the employer's "agents," will normally be interviewed in the presence of the employer's counsel.

There are situations where this need not be so, and where you will be anxious that it **not** be so.

> **10056.5 Interviews of Respondent and its Agents:** This policy does not preclude the Board agent from receiving information from a supervisor or agent of the charged party where the individual comes forward voluntarily, and where it is specifically indicated that the individual does not wish to have the charged party's counsel or representative present. Similarly, in cases involving individuals whose supervisory status is unknown, this policy would not be applicable.

This section would certainly apply if a known supervisor is willing to come forward and schedule an appointment with the Board agent. If you have reason to believe a given superior would prefer testifying away from the employer's presence, it would seem that the Board agent has an obligation to **privately, and in advance,** inquire of the supervisor if that is in fact his or her wish.

If no RC hearing has determined the supervisory status of certain employees, and there is a question regarding that status, this section would seem to make it incumbent on the Board agent to interview such employees without employer presence or involvement.

CHAPTER 9
Credibility

What happens when your witness says one thing happened, and the employer's witness reports that something quite different occurred?

Of course the difficulties are reduced if two or more employees saw or heard the same incident.

If a question of credibility exists, here's what the Manual instructs the agents to do:

> **10060 Credibility:** In the event of hearing, credibility questions may be critical. In view of this, the following points should be kept in mind.
>
> On the basis of its investigation, the Regional Office is expected to resolve factual conflicts.
>
> Often a factual conflict arises out of the misunderstanding of the questions or out of the conclusionary nature of the questions asked or the answers given. The repetition of questions in different forms may help to resolve the conflict. Emphasis should be placed upon obtaining factual details rather than the opinions and conclusions of the witnesses. Probing into details otherwise deemed to be insubstantial may be called for in order to determine whether there is a propensity for a "careless" handling of detail.
>
> Where a witness has been contradicted on a relevant fact since he last gave testimony, he should be reinterviewed. And, to the extent further reinterviews of witnesses will help to resolve the issues, they should be undertaken.
>
> Finally, in situations where factual issues are close, it may be appropriate to have a reinterview conducted by a second Board agent (typically, an attorney assigned to the case).
>
> It should be kept in mind that a witness' appearance and behavior at the time of interview, the existence or nonexistence of discrepancies in irrelevant details, and even the consistency of prior statements or the witness' general reputation are only **indicators.** Nor does an unwillingness to sign or to swear to the

> truth of a statement have significance except when related to the reasons for the refusal. The best indications of truthfulness lie in the **probabilities** inherent in a given story (as opposed to another story) viewed in the light of the **entire pattern** of available evidence.
>
> In the infrequent case in which (1) applying all relevant principles, the Region is unable to resolve credibility, and (2) the resolution of the conflict **means the difference between dismissal and issuance of complaint,** a complaint should be issued. This is not to be construed, however, as permitting the avoidance of the making of difficult decisions.

The last paragraph of Section 10060 is a key to the issuance of a complaint in many cases. Many union representatives have felt that the Regions were reluctant to issue a complaint unless the objective evidence was solid enough to make almost certain that the Regional judgment would be upheld when they prosecuted the case before an Administrative Law Judge. The feeling has been that, while this builds a good "win" record for the Region, it lets a great many employers off the hook too easily.

If there is merit in this concern, it could be because the Regions have not paid enough attention to the advice that a **complaint should be** issued when the decision hangs on the question of credibility.

CHAPTER 10
Presentation of New Evidence

At any time during the investigation - or even after a complaint is issued - when new evidence or supportive evidence comes to light, the Board agent in charge of the investigation should be notified at once.

If the wording of the charge needs to be broadened to encompass the new events, that can be done by amendment. Description of the procedure is given in Sections 10064.1 and 10064.3 of the manual:

> **10064.1 Preparation:** A charge is amended by typing "Amended" (or "Second Amended," "Third Amended") before the word "Charge" in the regular charge form and by rewriting the contents of the charge to include the desired charges. An amendment merely referring to the existing charge and stating what is being added to or dropped from that charge is proper, but it is better form to repeat all allegations as amended.
>
> **10064.3 Assistance in Connection With:** The charging party, on his/her own initiative and irrespective of developments in the pending investigation, may add to or subtract from his/her original, or last amended, charge. Assistance to the extent permitted in connection with original charges may be rendered in connection with the filing of such amendments.

CHAPTER 11
Regional Decision on the Charges

Withdrawal

Unlike RC cases, where the Board agent assigned simply gathers the relevant facts and conducts a "non-adversary" hearing if necessary, but makes no recommendation as to rulings, in the case of unfair charges the Board agent who conducted the investigation (sometimes with the assistance of an attorney also assigned to the case by the Region) **does** make a written report recommending a course of action to the Regional Director.

If it is his judgment that issuance of a complaint is not warranted, he will have so advised you, and will have sought from you a **withdrawal** of your charges. If this is his tentative decision, the Board agent is obligated to follow procedures set forth in Section 10120.3.

> **10120.3 Solicited Withdrawal:** (See sec. 11751 for cases that are to be submitted before soliciting withdrawals.)
>
> A charging party should be given the opportunity to withdraw a charge voluntarily before the charge is dismissed (sec. 10122.3). The charging party should be informed that, unless the charge is withdrawn within a stated reasonable time, the Board agent will recommend that the charge be dismissed.
>
> Normally the charging party should be advised, orally or otherwise, in detail of the reasons for solicitation of withdrawal. In the event of a refusal to withdraw, the charging party must be informed, at the time of such refusal, that a summary report setting forth the reasons for dismissal will be included in the dismissal letter, unless it is requested that such report be excluded. The charging party must also be informed that the charged party will receive a copy of the dismissal letter, containing the summary report. (See also sec. 10122.3.)
>
> The Board agent should prepare and place in the file Form NLRB-4549, Information to Charging Party on Reasons for Proposed Dismissal.
>
> A reasonable period for submission of a withdrawal should be given before dismissal action is taken. If the withdrawal request is received, the report and recommendation thereon should contain the reasons for soliciting the request.

In spite of the wording of this section, which makes it appear that the Board agent's decision is final, it is important to remember that the **Regional Director** has the responsibility for disposition of the case. If you sincerely feel that the investigation has not been thorough enough or has in some way been mishandled, or that the

credibility issue has not been evaluated in accordance with Section 10060, you may wish to request a conference with the agent's supervisor, with one of the Region's attorneys, or with the Regional Director before you make a decision on withdrawing your charge. Section 10120.1 of the Manual says:

> **10120.1 In General:** This subsection refers to withdrawal prior to issuance of complaint. A C case may be closed by withdrawal of the charge at any time. Withdrawal is not automatic, however, it must be approved by the Regional Director.

While this approval will be automatically given except in unusual cases, it does not need to be automatic if you feel there are arguments to be made in behalf of the charges which the Board agent is ignoring.

If you are convinced that the Board agent is correct in his evaluation, and that at this time there simply is not enough evidence to sustain the charges, it may be best for you to withdraw as requested. If you do so voluntarily the withdrawal is **without prejudice,** which means new charges covering the same allegations may be filed and will be considered anew, so long as they are filed within six months of the illegal actions.

Dismissal

If you do not request withdrawal, and the Board agent proceeds to recommend **dismissal** of the charges, you may wish to continue your informal verbal "appeal" to the Region for reconsideration of the Board agent's report.

If the dismissal proceeds, you may have one last chance to "voluntarily" withdraw. This possibility is set forth in Section 10120.6:

> **10120.6 Withdrawal Request After Dismissal:** If a withdrawal request is received **after** the charge has been dismissed but **during** the 10-day (or 3-day) period for appeal of the dismissal and if good cause exists for approving the withdrawal request had it been filed prior to the dismissal, the dismissal should be **revoked** and the withdrawal request should be put in effect.
>
> If a withdrawal request is received while the case is pending on appeal, the Regional Director should immediately notify the Office of Appeals before he issues his letter revoking the dismissal and approving the withdrawal.

The most likely reason for exercising this option would be in a situation in which you did not intend to make a formal appeal, but wished to keep alive the option to file charges later, containing some or all of the same allegations.

Recommended Settlements

In some cases, during the course of the investigation a settlement agreement may be proposed. In CA cases this normally occurs where the employer (or his counsel) feels there is a good chance of a complaint being issued and of the Board upholding it. Then, without "admitting guilt" the employer agrees to do certain things to correct the damage done by his actions.

A proposed settlement agreement normally includes a provision that the agreement will be posted for all employees to see, guaranteeing that the employer will not interfere with their rights under Section 7 of the Act. If 8(a)(3) charges are involved, the agreement will provide for the employer "making whole" those employees who have suffered a loss in wages, hours or working conditions. A general description of settlement agreements appears in Section 10104 of the Manual:

> **10106 Recommended Settlement Agreements:** Where all parties have entered into an agreement in settlement of a charge, the Board agent responsible for progress of the case will make a written or oral report and recommendation thereon. The report shall be concise, containing only the basic essentials. If the proposed settlement falls short of a full remedy, the deviation should be explained.....

If a Board agent believes a settlement is possible which **comes close** to providing a full remedy, pressure on the union representative to enter into the agreement will be strong. It often is in the best interests of the bargaining unit and the union that a case be resolved in this manner. If a complaint is issued and a hearing scheduled, the time involved, plus the possibility of appeals available to the employer, may delay the possibility of remedies similar to those offered by the settlement for so long that the employees and the union are left with a paper victory, that is, no meaningful and timely relief and no union contract.

As is true of RC's, the policy of the Board and the office of the General Counsel is to encourage settlements, both before and after a complaint is issued:

> **10126.1 Initial Steps To Achieve Settlement:** The desirability of voluntary disposition at an early stage in the life of a charge cannot be overemphasized. The process to obtain such voluntary disposition deserves the devotion of sincere effort, and no case can be considered well investigated unless all attempts to settle a meritorious charge at the earliest stage possible have been made. Thus, it is incumbent upon the Board agent investigating the case to take the initial steps to achieve settlement. If, at the conclusion of the investigation, the Board agent and his supervisor are convinced that the charge allegations, in whole or in part, have merit, the initial steps to effectuate a proper settlement should be taken by the Board agent. The taking of such action is, of course, subject to whatever restrictions the Regional Director and/or the Regional

Attorney may place upon members of the regional investigatory staff. In certain cases in which the charge allegations clearly have merit, the Board agent may take indicated action to settle the matter without expressed clearance through his supervisor. It is the responsibility of the Regional Director to police this type of action and place such restrictions on individual Board agents as may be required; i.e., requiring advanced telephonic authorizations or imposing any other appropriate limitations on the scope of settlement authority possessed by individual Board agents.

When initial approach to achieve settlement, discussed above, precedes regional determination as to the merits of the case, the Board agent, during the initial settlement interview, should make clear to the parties that the proposal of settlement is based on the investigator's conclusions in the matter and that any agreement reached would be subject to the Regional Director's adoption of the investigator's recommendation.

10126.2 Further Efforts Prior to Complaint: If settlement efforts prior to regional determination fail, and if it is ultimately determined to issue complaint, further efforts to achieve settlement should be made prior to actual issuance of the complaint. Indeed, experience has indicated that quite often this period has been critical and fruitful in consummating settlements. The investigative agent, in conjunction with his/her supervisor, and the Regional Office settlement coordinator, is directly responsible for making these settlement efforts. Because of the settlement coordinator's relatively long years of experience in regional operations, the stature he/she has achieved through such experience, the settlement coordinator's role in the settling of cases may be likened to that of an "elder statesman" and for this reason would presumably increase the possibility of settlement during the 15-day period between regional determination and issuance of complaint.

Of course, issuance of complaint should not be unreasonably delayed during the 15-day period and, where it is clear from the outset that settlement at this stage will not be achieved, complaint should issue immediately. Conversely, the assistant to the regional director should be given a reasonable period of time during the 15-day period to effectuate settlement before complaint issues. Normally, the charged party should feel satisfied that discussions up through the assistant to the Regional Director constitute a full exploration of settlement possibilities and at that time will make a determination whether or not to settle. In certain situations, however, where, for example, there are indications that the charged party feels that his settlement offers have not been fully explored or where the assistant to the Regional Director believes that further settlement efforts may prove fruitful, the assistant to the Regional Director should at this time make known the availability of the Regional Director for further settlement negotiations.

Terms of any settlement agreement will vary, depending on the strength of the evidence. The manual states it may not **exceed** that which would be expected from a fully favorable Board decision. (Section 10124.3)

A settlement agreement involving 8(a)(3) charges normally provides for payment to employees, who have suffered discrimination, of the difference in what they have received in wages, and what they would have received had the employer not discriminated against them. Policy of the Board now includes possible payment of interest on this sum, computed as follows:

> **10130.1 Generally:** Settlements are as varied as the circumstances of cases and no standards can be set down which will cover all cases. The principles appearing in this subsection are offered as guides for action.
>
> Problems involving reinstatements, computation of backpay, interest, deductions and withholdings, and lump sum settlements are substantially the same as those encountered in compliance with administrative law judge decisions, Board orders, and court judgments, and substantially the same principles should be applied. (See Compliance Manual.)
>
> In preparing settlement agreements, both formal and informal, which provide for interest on backpay be sure to include the following footnote:
>
> > Interest computed at the adjusted prime interest rate in effect per annum shall be added to (here insert backpay, dues, fees, and/or assessment, as appropriate) to be computed in the manner set forth in **Isis Plumbing & Heating Co.**, 138 NLRB 716 (1962).
>
> A lump sum settlement should be based on the combined estimate of net backpay and interest (sec. 10623.4). Note: Social security and withholding taxes are deducted on the amount of backpay but not on the interest. Interest payments are not "wages" subject to these taxes.

In some cases, an employer may be willing to reach settlement on some but not all of the allegations found to have merit. Section 10155 covers that possibility:

> **10155 Settlement of Less Than All of Related Charges:** Where there is either a bilateral or unilateral settlement of some but not all of the related charges, the settlement should provide that it does not cover or settle the allegations of the other charges.

If a settlement agreement is proposed and is implemented, the charging party has three options regarding concurrence:

> **10134.2 Charging Party:**
> a. Normally, the charging party should be a party to the settlement.

b. **Unilateral settlement:** Where the respondent agrees to take action which will effectuate the purposes of the Act, an agreement may be consummated without the participation of the charging party. (See sec. 10152 on informal settlements and sec. 10164.7 on formal settlements.)

c. Where, for reasons of his/her own, the charging party does not wish to enter into the agreement but has no real objections to the remedial action proposed, he/she may be willing to sign a separate document to the effect that he/she is aware of the contents of the agreement and that he/she has no objections to it or will not appeal from a dismissal based on it.

Recommendation for Issuance of Complaint

If attempts at reaching a settlement agreement fail, or succeed only in part, and the recommendation of the Board agent is that a complaint should be issued, you may at this time be asked to amend your charge.

It may be that in the Region's opinion, a solid case exists in some of the actions about which you've complained in the charge, but not all. If you choose not to amend your charge, the Region can issue a dismissal of **part** of the charge, and a complaint based on a portion. This makes appeals possible for **both** parties, and institutes unusual procedures on appeals, etc.:

10122.5 Partial Dismissal: Where the Region finds only a portion of the charge to have merit, the remaining nonmeritorious allegations may be dismissed. In such case the dismissal letter should make it clear that the meritorious allegations are not dismissed and that, as to the portion of the charge dismissed, the usual opportunity to file an appeal is afforded.

a. Complaint may issue as to the meritorious allegations, but if the partial dismissal is appealed hearing should not be held until after disposition of the appeal.

b. If a settlement agreement as to the meritorious allegations is entered into, approval thereof should be withheld until after the expiration of the time for filing an appeal from the dismissal, or until after the disposition of an appeal.

In cases involving closely related cross-filings, e.g., 8(a)(5)-8(b)(3) or 8(b)(7)-8(a)(5) situations, where the Region finds merit to one of the charges but dismisses the other, the issuance of complaint should be withheld, unless otherwise instructed by Washington, until after the expiration of the time for filing an appeal, or until after disposition of an appeal.

Note: In each of the foregoing situations, the Office of Appeals should be notified of the pending settlement or complaint so that the appeal may be expedited.

Since, once a complaint is issued, the Region will shift from the role of investigator to one of prosecutor, the Regional staff's approach to suggesting narrowing of the charges is now geared to consideration of what they think will make the **best,** strongest case. Therefore, once you are told the Region plans to issue a complaint, their recommendations should be considered in this light.

Of course, there is always the possibility that each and every one of your allegations will have been found to have merit, and a complaint will be issued on each particular.

Regional Director's Decision

After the Board agent, probably in consultation with his supervisor and/or a Regional attorney, has made a recommendation to (1) dismiss the charges, (2) approve a solicited withdrawal, (3) issue a complaint, or (4) approve a settlement, the disposition is the responsibility of the Regional Director.

He may accept the recommendation of the Board agent, and authorize implementation of his recommendation; he may send the matter to the NLRB in Washington for advice; he may order further investigation and assign responsibility for such investigation; or he may refer it to a Regional Committee Meeting.

> **10112 Regional Committee Meetings:** The regional committee may consist of the Regional Director, Assistant to the Regional Director, the Regional Attorney, Assistant Regional Attorney, the examiner and/or attorney assigned to the matter under consideration, and the supervisor(s)....

When the decision is made, the parties are notified. Either side has ten days to appeal. If the decision has been to dismiss, the charging party will receive instructions on how to properly appeal:

> 10122.8 ...Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C. and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on (month-day-year). Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

Regional Director

cc: Respondent
Other parties
General Counsel
(If related to 8(b)(7) charge, copy to other interested labor organization[s].)

During the appeal period, if the decision was to dismiss, the Regional Director may change his mind and revoke his dismissal, advising the parties that "the matter is deemed to be remanded to the undersigned for further processing."

Also during the appeal period, if the decision was to dismiss, the charging party may decide to request that the charges (and therefore the appeal) be withdrawn. Such a request is normally honored.

CHAPTER 12
Complaint Procedures

If, as a result of the Regional Director's decision or as a result of appeal of that decision, a complaint finally issues, the role of the Board shifts from one of investigator to that of prosecutor.

Although you or the union's attorney are invited to assist in the preparation of the case and the hearing itself, responsibility for following through now rests with the Board.

Section 10250 describes in general terms the duties of the trial attorney assigned:

> **10250 General:** (If charge is partially dismissed, see 10122.5 for permissible action if dismissal is appealed.) After a decision has been made that unfair labor practices have been committed, and that a complaint should issue, the case becomes the responsibility of the attorney to whom it is assigned (herein called the trial attorney). The trial attorney is charged with:
>
> a. The preparation of the complaint.
>
> b. Preparation of the General Counsel's pretrial motions and of opposition, if any, to the pretrial motions of other parties.
>
> c. The preparation of the case for trial.
>
> d. The trial of the case as the representative of the General Counsel.
>
> e. The making of oral argument to the Administrative Law Judge were appropriate.
>
> f. The preparation and filing with the Administrative Law Judge of a brief, where appropriate.
>
> g. The filing with the Board of exceptions and/or a brief in support of the Administrative Law Judge's decision, where appropriate.
>
> It is the responsibility of the trial attorney to be aware of and to call to the attention of his superior any circumstances which might have an effect, one way or the other, upon the case.

> (Examples: Availability of new or unavailability of old witnesses; the discovery of new evidence or of legal theories not previously considered.) If new developments warrant it - at any point - the trial attorney, through his superior, should initiate appropriate regional action, through a regional committee meeting or otherwise.

The Manual continues to detail each step of the procedures through Section 10452. Since, however, your case has now become the Board's case, no attempt will be made here to summarize or highlight those steps, or to quote extensively from the Manual, except in those instances which relate directly to the role of the union's representative or counsel.

First of these occasions arises in connection with continued attempts at a settlement, which the Board is obligated to pursue, unless in their judgment the attitude of the employer makes such attempts useless. (Section 10254) Should settlement be reached, the union as charging party will of course have to have been involved.

Section 10275.1 states in part:

> ...If an informal settlement agreement is entered into by all parties, withdrawal of the complaint should be part of the agreement (10148.3). Upon an approvable request for withdrawal of the charge (10276), the complaint should be dismissed by an order which includes approval of the withdrawal request....
>
> (Upon the execution of a **formal** settlement agreement at this stage, the complaint is neither withdrawn nor dismissed. See 10164-10174.)

If, during preparation for the hearing, events occur which weaken the case to such an extent that the Regional Director wishes to withdraw the complaint, or to withdraw a portion of it, the union has certain rights in this regard:

> **10275.2 Protested Withdrawal of Complaint:** With respect to partial withdrawal of complaints or amendments deleting allegations of the complaint over the objections of the charging party, written notice should be served on all parties of the Regional Director's intention to move for such withdrawal or amendment of the complaint at the hearing. Thereafter, at the opened hearing, counsel for the General Counsel should make an appropriate motion to the administrative law judge stating the reasons therefor. The charging party will then have an opportunity to argue its objections to the administrative law judge. **(Leeds & Northrup Company v. N.L.R.B.,** 357 F.2d 527 [3d Cir. 1966].)

A copy of the document withdrawing the complaint or the dismissal letter, whichever document most fully sets forth the reasons for the withdrawal of the complaint, should be sent to the Division of Operations Management.

Should the union, after a complaint has been issued, wish to withdraw the charge, the Board will take a very careful look at what has occasioned the request:

10276 Postcomplaint Attempts To Withdraw Charge: A withdrawal request filed by the charging party after issuance of complaint should be closely scrutinized. The motivation behind the request, including the extent to which the act is a voluntary one, is significant. If the request is based on a "private settlement," the terms should be examined; if the charging party has "lost interest," the case should be reexamined as to its strength (1) without his testimony or (2) with his reluctant subpoenaed testimony. The request should be denied if, on all the circumstances, the purposes of the Act appear to require the continuation of formal action.

If the request for withdrawal is approved, the complaint will be dismissed by the Regional Director, the Administrative Law Judge, or by the Board, depending on the stage of the case at the time such request if filed (10275; also, Rules and Regulations, 102.9).

The role of the union, during the hearing itself, is defined in the Manual:

10380.3 Responsibility for Prosecution of Case: The attorney's position **vis-a-vis** the charging party is a delicate one. During the hearing, the charging party or counsel may make suggestions or give advice; or he/she may wish to embark along lines of his/her own. The trial attorney must determine which suggestions to adopt, which embarkations should be resisted. He/she must be tactful but firm, keeping in mind that the primary responsibility for the prosecution of the case is his/hers. Although the charging party is entitled to examine witnesses and to introduce or adduce additional evidence on his/her behalf, the trial attorney should oppose, either informally or, when necessary, by proper objection on the record, anything which in his/her sound discretion either will jeopardize the prosecution of the complaint or is unnecessarily cumulative.

Chapter 13

Conclusion

Overcrowded schedules of Administrative Law Judges - and further avenues of appeal open to an employer even after the Board has found him guilty of unfair labor practices - often delay justice until in truth it becomes justice denied.

The impact of Supreme Court decisions over the years on Board decisions and policies has been greater than the sum total of those decisions. Historically, Congressional action in amending the National Labor Relations Act has reached farther than the actual changes. Board personnel are bound to be influenced in their day-to-day decisions by their perception of "which way the wind is blowing."

A political climate hostile to workers' rights will not only result in appointments to the Board or the Supreme Court which impact adversely on the protection of those rights when cases reach that level, but will condition the responses of Regional staff as they consider issues of a more routine nature.

A large backlog of cases, delaying tactics of employers, and what union representatives have perceived as an unsympathetic or at best reluctant-to-go-out-on-a-limb-on-behalf-of-employees attitude of NLRB staff, have created a situation where union representatives are reluctant to proceed with RC or CA cases except in the most clearcut instances.

"No point in filing (or appealing) - we'll just get turned down after we've wasted a lot of money" is increasingly heard.

On the other hand, if decisions negating valid positions go unchallenged, no record will be built documenting need for change and reform. The building of a record isn't easy. It calls for painstaking detail and patient determination. It isn't always exciting and doesn't always result in victory. But knowledge of what the present rules and regulations are, imagination in dealing with the tools available, and persistence in insisting that Regional staff honor the mandate of the Act as set forth in Section I, can increase the protection or expansion of workers' rights while the long-range battle is waged to improve the Act, and/or the rules and regulations.