

## **22. REPRESENTATION CASE PROCEDURES AFFECTING THE ELECTION**

We have seen that an election may be conducted pursuant to an agreement for consent election, stipulation for certification upon consent election, Regional Directors' decision and direction of election, Board's decision and direction of election, or an expedited election under Section 8(b)(7)(C). The arrangements and voting procedure in all elections are the same.

A summary of the normal procedures involving the election itself follows. In the interest of clarity, we list first the procedural steps seriatim without reference at this point to the substantive rulings which grow out of the procedural stages and usually are raised in objections cases. These will be discussed in the chapter on Interference With the Conduct of Elections.

See NLRB Casehandling Manual (CHM), sections 11300 through 11478, and the Board's Rules and Regulations, Sections 102.69 and 102.70. This chapter is designed to provide a general overview of representation case procedures. The user of this manual should refer to the cited provisions of CHM for guidance on specific procedural matters.

### **22-101 The Election Date**

**370-0700**

The selection of the time of an election is generally left to the discretion of the Regional director. *Manchester Knitted Fashions*, 108 NLRB 1366 (1954). However, 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 (see CHM sec. 11302.1). The rescheduling of an election is not in and of itself grounds for setting aside the election. *Superior of Missouri, Inc.*, 338 NLRB 570 (2002). But see section 22-106, *infra*, concerning notice of election in cases of rescheduling.

### **22-102 The Ballot**

**370-3533-5000**

**370-7000**

The ballots are furnished by the Agency. No one, other than a Board agent and the individual voter, is permitted to handle the ballots (see CHM sec. 11306). All elections are by secret ballot (see Rules 102.69(a)).

### **22-103 The Question and Choices on the Ballot**

The question on the ballot accords with the consent agreement or direction of election (see CHM sec. 11306.2). Where a self-determination election is held in which professionals are involved, see discussion in chapter 21 dealing with such elections. The choices on the ballot, like the question, accord with the agreement or direction. For the choices on the ballot in a self-determination election, see chapter 21.

### **22-104 Withdrawal From the Ballot**

**332-5000**

Whenever two or more labor organizations are included as choices in an election, either may on prompt request to and approval by the Regional Director have its name removed. In an RM or RD proceeding, timely written notice of such request must be given to all parties and to the Regional Director (see Rules 102.69(a)). See also chapter 8, Disclaimer of Interest and Withdrawal of Petition.

## **22-105 The Polling Place**

**370-1400**

**370-3567**

**370-7033**

Elections are generally held on the employer's premises in the absence of good cause to the contrary. The decision to conduct an election on or off the employers' premises or by mail or manual ballot is within the discretion of the Regional Director. *San Diego Gas & Electric*, 325 NLRB 1143 (1998). If an election is held away from the employer's premises, the initial suggestion of a place is normally made by the party proposing it, but final arrangements are made by the Board agent. The size of a polling place depends on the nature of the election, with the number of voters and the length of the voting period being controlling factors. See CHM section 11316 et seq. and section 24-421.

## **22-106 The Notice of Election**

**370-2800**

A standard notice of election form (NLRB-707) is used to inform eligible voters of the balloting details. The notice contains a sample ballot with the names of the parties inserted, a description of the bargaining unit, the date, place, and hours of election, and a statement of employee rights under the Act. Other relevant details are inserted whenever that is necessary. Copies of the notice must be posted in conspicuous places by the employer at least 3 working days before the election. Rules 103.20. See also CHM section 11314 et seq. and section 24-423.

In the case of rescheduled elections, the Board prefers that where applicable the notice state that the election has been rescheduled for administrative reasons beyond the control of the parties. *Builders Insulation, Inc.*, 338 NLRB 793 (2003).

## **22-107 Voting Eligibility**

**362-6708**

Voting eligibility is discussed in the chapter on that subject. The *Excelsior* rule is treated in the chapter on Preelection Campaign Interference. For other significant details, see CHM section 11312.

## **22-108 Observers**

**370-4900**

Each party is permitted to be represented at the polling place by an equal predesignated number of observers, who are nonsupervisory employees of the employer. This privilege is extended to parties, not to nonparticipating unions, nor to alleged representatives of "no union" groups. (See CHM sec. 11310; Board's Rules 102.69(a); and sec. 24-424.)

## **22-109 Closing of the Polls**

**370-9167-8800**

The polls should be declared closed at the scheduled time. All in the voting line at the time scheduled for closing should be permitted to vote. At the close of the election, each observer is asked to sign the certification on the conduct of election. If a party had no observer, that fact is noted. (See CHM sec. 11324 and sec. 24-422.)

## **22-110 Mail Ballots**

**370-6300**

**370-6375**

Voting in appropriate instances may be conducted by mail, in whole or in part. Mail balloting is used, if at all, in unusual circumstances, particularly where eligible voters are scattered either because of their duties or their work schedules or in situations where there is a strike, picketing, or lockout in progress. In these situations the Regional Director considers mail balloting taking into consideration the desires of the parties, the ability of voters to understand mail ballots, and the efficient use of Board personnel. *San Diego Gas & Electric*, 325 NLRB 1143 (1998). See also *Willamette Industries*, 322 NLRB 1120 (1997); *London's Farm Dairy*, 323 NLRB 1057 (1997); and *Reynolds Wheels International*, 323 NLRB 1062 (1997).

In mixed manual-mail elections, mail ballots are sent to those eligibles who cannot vote in person. They are not sent to employees who, although eligible to vote, are ill or on vacation, or are members of the armed services. Mail ballots are not sent to employees in temporary layoff status unless all parties agree; if the parties do not agree, only the notice of election is mailed to such employees. CHM section 11336 et seq.

For a discussion of eligibility in mail-ballot elections see *Dredge Operators*, 306 NLRB 924 (1992). See also *T & L Leasing*, 318 NLRB 324 (1995), where the Board found that the Regional Director is without authority absent special circumstances to vary the terms of a Stipulated Election Agreement by conducting a mail ballot election.

Ballots received after the due date but before the ballot count should be counted. *Watkins Construction Co.*, 332 NLRB 828 (2000).

For further discussion of mail ballots see section 24-427.

The Board does not permit absentee ballots. *Cedar Tree Press, Inc.*, 324 NLRB 26 (1997), enf. 169 F.3d 794 (3d Cir. 1999). In its early days, the Board allowed absentee ballot by military personnel, but it discontinued the practice in 1941. *Wilson & Co.*, 37 NLRB 944 (1941). The policy was reiterated in *Atlantic Refinery Co.*, 106 NLRB 1268 (1953).

## **22-111 Challenges**

**370-5600**

Any observer has the right to challenge for cause. The Board agent must challenge anyone whose name is not on the eligibility list, and should challenge anyone the agent knows or has reason to believe is ineligible to vote. "The Board agent is not obligated to challenge a voter merely because this agent is aware of an eligibility dispute." *Solvent Services*, 313 NLRB 645, 646 (1994). The failure of the observer to make a timely and proper challenge is not a basis to set aside an election. *Laidlaw Transit, Inc.*, 322 NLRB 895 (1997). See also *Lakewood Engineering & Mfg. Co.*, 341 NLRB No. 101 (2004), for a summary of Board agent challenge ballot duties.

Challenges are handled as they come up. The merit of the challenge should not be argued. Persons in job classifications specifically excluded by the decision and direction of election are refused a ballot, even under challenge unless there have been changed circumstances. See Rules 102.69(a); CHM section 11338 et seq.

Generally postelection challenges are not permitted. The exception is where the party knows of the ineligibility, suppressed the facts, and would otherwise benefit from its actions. See *Lakewood Engineering & Mfg.*, supra; *Solvent Services*, supra; and *Atlantic Industrial Constructors, Inc.*, 324 NLRB 355 (1997).

A Board agent's failure to challenge the ballot of a late arriving voter should be handled as an objection, not as a postelection challenge. *Laidlaw Transit, Inc.*, 327 NLRB 315 (1998).

## **22-112 The Count**

**370-7700**

For the details of the counting of ballots, see CHM section 11340 et seq.

## **22-113 The Tally of Ballots**

**370-7737**

The tally of ballots is on Form NLRB-760. A sample tally of ballots is reproduced in CHM section 11340, together with instructions on how to prepare and serve it.

## **22-114 Runoff Elections**

**355-1167**

**362-3375**

Where there are three or more choices on the ballot, and in the election none of the choices receives a majority of the valid votes cast, the results are deemed “inconclusive,” and the Regional Director conducts a runoff election between the choices on the original ballot receiving the highest and the next highest number of votes. See CHM section 11350 and the examples contained therein. Note the “Exception” discussion to this policy. CHM section 11350.1, also Rules 102.70.

See also section 23-220.

## **22-115 Resolution of Challenges**

**370-7750**

**393-7022**

**393-7033 et seq.**

Challenges are investigated if made before the questioned ballots were dropped into the ballot box and must have been sufficient in number to affect the results of the election. Postelection challenges are not permitted. *NLRB v. Tower Co.*, 329 U.S. 324 (1946); and *Poplar Living Center*, 300 NLRB 888 (1990). There is a limited exception to this rule in situations where the party benefiting from its application knew of the ineligibility of the voter and suppressed the facts. *Solvent Services*, supra and *Atlantic Industrial Constructors, Inc.*, supra. Although the Board requires specificity in challenges, it will accept as valid a challenge that is sufficient to raise the eligibility issue and deals with the duties that prompt the challenge. See *Nichols House Nursing Home*, 332 NLRB 1428, 1429 fn. 6 (2000).

The investigation is nonadversary, insofar as the Agency is concerned. The Regional Director has the authority to conduct a hearing or to have one conducted. Resolution of the challenges by agreement is permitted. At the conclusion of the investigation, the Regional Director issues a report or decision, whichever is appropriate, setting forth fully the basis for the findings. A report is used where the election was held pursuant to a consent agreement or stipulation, and may be used where the election has been directed. A supplemental decision may be used where the election was directed by the Regional Director or by the Board. In a consent agreement, the report contains a final determination. In a stipulation for certification, the Regional Director may either issue a report containing a recommendation to the Board or issue a notice of hearing thereby transferring the case to the Board, or a combination of these. In directed elections, the Regional Director may either issue a supplemental decision containing a determination or a report containing recommendations and transferring the case to the Board. See Rules 102.69; CHM section 11360 et seq. For a discussion of Agency guidelines for handling challenge ballots see *Paprikas Fono*, 273 NLRB 1326 (1984).

Generally, a challenged ballot envelope cannot be opened until eligibility is determined. But there are very limited circumstances in which the Board may permit opening without such a

determination. Compare *Ladies Garment Workers*, 137 NLRB 1681 (1962); and *Monarch Federal Savings & Loan*, 236 NLRB 874 (1978). See also *United Insurance Co. of America*, 325 NLRB 341 (1998). For further discussion of this procedure see section 24-426.

Review of reports on challenged ballots is obtained by filing exceptions with the Board or by filing a request for review of the Regional Director has issued a supplemental decision within 14 days of the issuance of the report. Rules 102.69 (c)(2); 102.69 (c)(4). The decision is final and binding unless the Board grants a request for review. Provisions are made for decisions after hearing on challenges (CHM sec. 11376), a count of overruled challenged ballots (CHM sec. 11378), and for a revised tally of ballots (CHM sec. 11378.1).

In *Pine Shores, Inc.*, 321 NLRB 1437 (1996), third party misconduct was directed at those who opposed the Petitioner's and the challenges were determinative. Consistent with its practice, the Board resolved the challenges first, holding that it would only direct a new election if the Petitioner won the election. See also *Skyline Builders, Inc.*, 340 NLRB No. 13 (2003).

## **22-116 Objections to Election—Filing Requirements**

### **393-7011**

Generally, the validity of an election may be questioned by filing objections to the conduct of an election or to conduct affecting the results of an election. Both types are discussed *seriatim* at some length in the chapters which follow. Objections may have the effect of invalidating an election. If this occurs, the election may be “rerun” and the 1-year rule of Section 9(c)(3) will not run against the invalidated election.

Objections must be filed within 7 days after the tally of ballots has been made available. Service requirements are set out at section 102.114(a) of the Rules. See also *Medtrans*, 326 NLRB 925 fn. 2 (1998). For other details, see CHM section 11392.1. Objections may be filed only by the following: the employer involved, the petitioner, or any labor organization whose name appears on the ballot as a choice. They must contain a statement of the reasons therefor, couched in specific, as distinguished from conclusionary, terms. The party filing objections must furnish evidence sufficient to provide a prima facie case in support therefor before the Region is required to investigate the objections. *Howard Johnson Co.*, 242 NLRB 1284 (1979). This includes a list of the witnesses and a brief description of the testimony of each. See CHM section 11392, et seq. and Rules 102.69. See also *Heartland of Martinsburg*, 313 NLRB 655 (1994); and *Holladay Corp.*, 266 NLRB 621 (1983). This evidence must be filed within 7 days of filing objections unless the Regional Director allows additional time. *Craftmatic Comfort Mfg. Corp.*, 299 NLRB 514 (1990); and *Goody's Family Clothing*, 308 NLRB 181 (1992).

In one unusual case, the Board accepted as objections, unfair labor practice charges that were filed within 7 days of the election. The Board found that the employer acted consistent with an intent to file objections. *Avis Rent-A-Car*, 324 NLRB 445 (1997).

See section 24-100 et seq. for further discussion of objections procedures.

## **22-117 Investigation of Objections**

### **393-7022**

As part of the investigation of a representation question, the investigation of objections is nonadversary, insofar as the Agency is concerned. Where the investigation reveals circumstances which were not alleged by the objecting party but which were or reasonably could have been within its knowledge, the objections are overruled on procedural grounds. But if, in the Regional Director's discretion, the additional circumstances reveal matters that are related to the alleged objectionable conduct (*Renco Electronics*, 325 NLRB 1196 (1998)) or which raise substantial and material issues affecting the conduct of the election, this aspect is included in the report or decision. *Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984); and *Burns Security Services*, 256 NLRB 959 (1981). The Regional Director issues a report or supplemental decision, whichever is appropriate, at the conclusion of the investigation. See CHM section 11394 et seq.

## 22-118 Hearing on Objections

### 393-7033

Where an election was held either pursuant to an election agreement or direction of election, the Regional Director is authorized to conduct a hearing or to have one conducted if there are substantial and material factual issues. (Rules 102.6 9(d). See also *Regal Dodge*, 324 NLRB 665 (1997). If a hearing is held pursuant to a stipulation for certification election, the Regional Director is permitted to direct a hearing subject to special permission to appeal. Rules 102.69(i)(1); CHM section 11396.1. This preserves the right of any party to object. Special permission to appeal should be requested promptly. Objections may be adjusted by voluntary agreement of the parties.

Where, in the same case, there are dispositive challenges as well as objections, the hearing generally covers both aspects. If there are objections and unfair labor practice charges, both of which cover, in whole or in part, the same grounds, the practice, except in special circumstances, generally is to consolidate both for hearing before an administrative law judge. *Framed Picture Enterprise*, 303 NLRB 722 (1991). Appropriate recommendations are then made in the decision and, except in the case of an election held pursuant to a consent-election agreement, the case is transferred to the Board. Where a consent agreement is involved, the cases are severed and the representation case is transferred to the Regional Director for further processing.

The objections/challenges hearing is conducted by a hearing officer or an administrative law judge. The Regional Director may assign an attorney as counsel for the Region at the hearing. The functions and duties of the official conducting the hearing are spelled out in CHM section 11424.3, and that of counsel for the Region, if there is one, in CHM section 11424.4. Questions of postponements are handled in CHM section 11427, and hearing procedures are detailed in CHM section 11428 et seq. Where necessary the Board will provide interpreter services at Agency cost in representation hearings. *George Joseph Orchard Siding, Inc.*, 325 NLRB 252 (1998).

For a discussion of the authority of the hearing officer to consider unalleged conduct see, *Precision Products Group*, 319 NLRB 640 (1995). Compare *Pacific Beach Hotel*, 342 NLRB No. 30 (2004), distinguishing *Precision Products Group*.

The hearing procedure calls for a report on objections and/or challenges. The order directing a hearing specifies, as a rule, that, within 14 days of the issuance of the report, any party may file exceptions with the Board or with the Regional Director. See CHM section 11434.

Occasionally, a refusal-to-bargain case based on a certification will be remanded to the Board by the court of appeals for the purpose of holding a hearing on a representation case issue. For a discussion of the appropriate procedure in such a case, see *Salem Village I, Inc.*, 263 NLRB 704 (1982).

#### *a. Subpoenas*

Subpoenas are available to the parties subject to the standards set out in Rules 102.66(c). They are available from the Regional Director or the hearing officer. Upon proper motion they may be revoked. In at least one case, the board approved the hearing officer's refusal to supply a subpoena. *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879 fn. 2 (1999). See *Best Western City View Motor Inn*, 325 NLRB 1186 (1998), and 327 NLRB 468 (1999), for a discussion of service and enforcement of "R" case hearing subpoenas. In *Associated Rubber Co.*, 332 NLRB 1588 (2000), a divided panel affirmed the decision of the hearing officer not to require enforcement of the subpoena.

In *Marian Manor for the Aged*, 333 NLRB 1084 (2001), the Board affirmed a hearing officer who refused to seek enforcement of a subpoena in a preelection hearing. In doing so the Board found the evidence sought was relevant and necessary but noted that there was no showing that the information could not be obtained from the employer's own employees and that preelection

hearings are investigatory, do not permit credibility resolutions, and require expeditious handling. Accord: *Skyline Builders, Inc.*, 340 NLRB No. 13 (2003).

### ***b. Board agent testimony***

Parties seeking the testimony of a Board agent in a representation case hearing must request General Counsel approval for the testimony. See Rules 102.118. See *Millsboro Nursing & Rehabilitation Center*, supra, fn. 2 and the cases cited there for discussion of the Board policies with respect to requests for such testimony.

### ***c. Witness statements***

Under the Board's Rules (Sec. 102.118(b)(1)), parties to a postelection hearing may request copies of witness statements for purposes of cross-examination. These statements must be returned by the end of the hearing. See *Wal-Mart Stores*, 339 NLRB 64 (2003), an unfair labor practice case.

## **22-119 The Decision**

### **393-7077**

A decision is made by the Board, or the Regional Director, whichever is appropriate, after having considered the hearing officer's or administrative law judge's report on objections and/or challenges and the exceptions thereto.

While the matter is pending, and after briefs are filed, a party may call the Board's attention to cases that have come to the parties' attention after filing a brief. *Reliant Energy*, 339 NLRB 66 (2003).

The Board's decision may sustain or overrule the objections, in whole or in part. If the objections are sustained in any part, the original election is set aside, and the direction of a "rerun" election provides for a new election to be held at such time as the Regional Director deems appropriate. The "eligibility period" is customarily the latest completed payroll period preceding the issuance of the notice of rerun election. See CHM section 11436.

## **22-120 Rerun Elections**

### **355-1133**

### **393-7077-6050**

A rerun election is conducted when the original election is a nullity by virtue of its results or because it is set aside either by the Regional Director or by the Board. Neither the passage of time nor employee turnover between the time of the first and a rerun election are sufficient basis to withhold direction of a rerun election. *Sheraton Hotel Waterbury*, 316 NLRB 238 (1995); and *Vemco, Inc.*, 315 NLRB 200 (1994), or to require a new showing of interest. *River City Elevator Co.*, 339 NLRB 616 (2003).

The timing and conditions for a rerun election are described in CHM section 11452. The standard notice of election, where modified to explain why the original election was set aside, is found in CHM section 11452.3. The voting procedures are the same, as are the count, tally, and other details, except that the tally indicates that the election was a rerun. There can be no "runoff" (see sec. 22-114 above) of a runoff or severance election, although otherwise the results of a rerun may call for a runoff (see CHM sec. 11456). The usual objections procedures apply.

Ordinarily, information not provided prior to the decision is not considered. See *Gannett Satellite Information Network*, 330 NLRB 315 (1999).

The Board will not permit a new party to intervene and appear on the ballot in a rerun or runoff election. *Waste Management of New York*, 326 NLRB 1126 (1998).

See also section 23-230.

## **22-121 The Certification**

**393-7077-2060**

**393-7077-6067**

**393-7077-6083**

If a union receives a majority of the valid votes cast, a certification of representative is issued. If not, a certification of results is issued. A certification issued by the Regional Director has the same force and effect as one issued by the Board. In all cases of elections conducted pursuant to a consent agreement, the certification is issued by the Regional Director. CHM section 11470.

Where an election is conducted pursuant to a stipulation for certification of election, the Regional Director issues the certification where no objections are filed and challenges are not determinative of the results; the Board issues the certification where objections are filed or challenges are determinative. For an exception to the latter, see CHM section 11472.2(b).

Where an election is directed by the Regional Director or Board, the certification is issued by the Regional Director where no objections are filed and challenges are not determinative. Where objections are filed or the challenges are determinative, a certification may be issued by the Regional Director based on the administrative investigation or hearing, or by the Board after consideration of the Regional Director's report or the report of a hearing officer or administrative law judge. See CHM section 11470, et seq.

## **22-122 Expedited Elections Under Section 8(b)(7)(C)**

**355-5500**

**578-8050-6000**

**578-8075-6000**

Under Section 8(b)(7)(C) the Board is required to conduct expedited elections when a petition is on file and the union is engaging in 8(b)(7)(C) picketing for less than 30 days. The rationale, as well as the basic ground rules and conditions necessary to trigger the 8(b)(7)(C) expedited election machinery, are spelled out in *C. A. Blinne Construction Co.*, 135 NLRB 1153 (1963). Thus, as indicated by the Board, Section (8)(b)(7)(C) represents a compromise between a union's picketing rights and an employer's right not to be subject to blackmail picketing. Unless shortened by a union's resort to violence, see *Eastern Camera Corp.*, 141 NLRB 991 (1963), 30 days was defined as a reasonable period, absent a petition being filed, for the union to exercise its rights. Picketing beyond 30 days is an unfair labor practice. the filing of a petition stays a 30-day limitation and picketing may continue during processing of the petition.

As the Board made clear in *Blinne*, however, a union cannot file a petition, engage in recognitional picketing, and obtain an expedited election unless a 8(b)(7)(C) charge is filed. A union cannot, of course, file an 8(b)(7)(C) charge against itself. *Blinne*, supra at 1157 fn. 10.

In short, the expedited election procedure represents a compromise which seeks to balance competing rights. This compromise extends an option to an employer faced with recognition or organizational picketing. Thus, on the commencement of such picketing, an employer may file an 8(b)(7)(C) charge and an RM petition, thereby setting in motion the proviso's expedited election machinery. Or, an employer may, if it prefers, endure 30 days of picketing and then seek injunctive relief by filing an 8(b)(7)(C) charge.

By the plain language of the first proviso to Section 8(b)(7)(C), the expedited election procedure is available *only* where a timely petition is filed, i.e., no more than 30 days after the start of picketing for an 8(b)(7)(C) object. Neither a showing of interest nor an *Excelsior* list is required for an expedited election. *Excelsior Underwear*, 156 NLRB 1236, 1242 fn. 14 (1966).

Petitions filed *after* 30 days are processed under normal "R" case procedures and do not serve as a defense to 8(b)(7)(C) picketing which has exceeded 30 days. See *Crown Cafeteria*, 135 NLRB 1153, 1185 fn. 4 (1962); and *Moore Laminating*, 137 NLRB 729, 732 fn. 6 (1962).



