

11360-11438 POSTELECTION CHALLENGES AND OBJECTIONS

Postelection situations in which challenges and/or objections and related unfair labor practice charges are being processed are discussed in Secs. 11407 and 11420.1.

11360–11367 RESOLUTION OF DETERMINATIVE CHALLENGES

11360-11363 INITIAL CONSIDERATIONS

11360 Challenges

11360.1 Context

Conducting an election is the decisive point in the processing of a representation case. By the time employees vote in an election, the issues necessary to scheduling the election have been resolved and the employees, the parties, and the Agency have expended significant energy and resources. In some cases, however, certification of the employees' choice in the election is delayed by challenges and/or objections. In this context, the prompt resolution of challenges and/or objections should be given priority attention.

11360.2 Treatment

The postelection portion of the Manual contains Sections first on challenges, 11360 through 11367, and then on objections, 11390 through 11397. Although the different Sections on challenges and objections parallel each other in certain respects, they are treated separately, since either challenges or objections may arise without the other. Notwithstanding this separate treatment, it should be recognized that when both challenges and objections are involved in the same case, they should be regarded as two aspects of one overall matter.

11360.3 Processing of Challenges With Objections

If challenges and objections arise in the same matter, they ordinarily will be processed simultaneously. However, under appropriate circumstances they may be treated separately. For example, the resolution of some or all challenges may make moot the objections of one party. Clearly meritorious cross-objections or objections based on third-party or Board agent conduct may indicate that the election will be set aside regardless of the outcome of determinative challenges, making the challenges moot. Thus, if it appears that the overall more expeditious resolution of the entire matter would result from holding objections in abeyance, while challenges are being processed, or the reverse, that is the course that should be followed.

11361 Methods of Resolution

11361.1 Administrative Investigation or Hearing

Under Section 102.69(d) of the Rules and Regulations, a Regional Director is authorized to process challenges through either an administrative investigation or a hearing. Thus, at the outset of the processing of challenges, the Regional Director should give consideration to the choice between an administrative investigation (Sec. 11364) and a hearing (Sec. 11365). Also to be considered is whether a portion of the challenges may be suitable for processing by administrative investigation and the balance, simultaneously, by hearing.

The foremost consideration in making these determinations is expeditious processing through all levels of the Agency's deliberations. Although the process of scheduling and holding a hearing and thereafter preparing a hearing officer's report may be time consuming, an administrative investigation may also involve complex scheduling of numerous witnesses and the review of extensive evidence. Further, a hearing may ultimately be necessary even after the administrative investigation has been conducted. Sec. 11365.1. These factors should be carefully reviewed at the outset to determine whether to follow the administrative investigation route, the hearing route, or a combination of both, with the goal of obtaining the most expeditious overall resolution of the matter.

Also see Sec. 11367, Bifurcated Proceedings, for a discussion of related considerations that may arise during processing.

11361.2 Voluntary Resolution

Possibilities of voluntary adjustment may arise while challenges are being processed.

A challenger may wish to withdraw a challenge. The Regional Director may approve such withdrawal, notwithstanding the objection of any other party. *Fred Wilkinson Associates*, 297 NLRB 737 fn. 2 (1990). The Regional Director should thereafter open and count the challenged ballots at an announced time and place and issue a revised tally.

The party/ies other than the challenging party may wish to agree to the ineligibility of a challenged voter. Written agreement of the other party/ies to such disposition should be secured. It is not necessary to state the basis thereof in the agreement; merely the result is sufficient. Written agreement of the challenging party is not required. In the agreement, the party/ies other than the challenger should waive its/their rights under the Board's Rules to a Regional Director's report or supplemental decision, to file exceptions to a Regional Director's report or a request for review of a supplemental decision and to any right to a hearing in the matter or to a Board decision. The agreement should provide that upon its approval by the Regional Director, he/she may proceed to issue a revised tally and when appropriate a certification.

The Regional Director should not approve any withdrawal or agreement which is clearly contrary to the facts independently known by the Regional Office.

11361.3 Partial Resolution of Challenges

In addition to voluntary resolutions, there may be other circumstances in which a sufficient number of challenges may be readily resolvable, thereby making it unnecessary to resolve the remainder. For example, challenged ballots of late arriving employees (Sec. 11324.1) or “not on the list” challenged ballots (Sec. 11338.2(b)) may be more easily resolved than other challenges made by the parties; the readily resolvable challenges may be of sufficient number to render other challenges nondeterminative. The tally of ballots and the list of challenges should be carefully examined at the beginning of processing to discover if any such partial resolutions are possible.

11361.4 Opening Challenged Ballots Prior to Resolution

If challenged voters are also alleged discriminatees in an unfair labor practice case, then under the following circumstances challenged ballots may be opened and counted prior to a determination of the voters’ eligibility: the voters have clearly waived their right to secrecy and requested that their ballots be opened; and the tally of ballots reveals that, if some or all of the challenged ballots have been cast for the union, the union will receive a majority regardless of how the challenges are ultimately determined. *Ladies Garment Workers Union*, 137 NLRB 1681 (1962).

11362 Initial Consideration of Challenges

11362.1 Generally

To warrant consideration, challenges to voters must have been made before the questioned ballots were dropped into the ballot box. Sec. 11338.3. Furthermore, challenges must have been sufficient in number to affect the results of the election. Sec. 11340.8.

The merits of postelection challenges, whether filed as such or in the guise of objections, should not be considered. Sec. 11392.5.

11362.2 Nature and Scope of Processing

The processing of challenges is nonadversarial, insofar as the Agency is concerned, since it is part of the resolution of a representation question. The role of the Board agent is completely nonpartisan; he/she is responsible for bringing to the Regional Director all the available facts.

Although the challenging party has the initial burden of supporting its challenges, thereafter the Regional Director must be independently satisfied that all the available facts have been obtained.

In the reconciliation of these principles (to the extent that they may appear to conflict), the Board agent must place the primary burden of sustaining their contentions on the parties themselves, directing his/her efforts toward “filling in” the picture.

In situations in which the Board in its ruling on a request for review has directed that challenges be made at the election, and these challenges are among the determinative challenges under consideration, express consideration should be given during processing of these challenges to the contentions made in the request for review of the Regional Director's Decision and Direction of Election.

11363 Procedures Applicable to Challenges

Initial procedures are the same whether for a consent, stipulated or directed election.

Consideration of challenges should be initiated while awaiting the expiration of the period for filing objections. Within a few days of receipt of the evidence and/or statements of position submitted with respect to the challenges, a determination should be made as to whether a hearing or an investigation is appropriate. Sec. 11361.1. Objections, if any, and evidence regarding such should also be considered during this determination. Potential ways in which the issues could be resolved should be discussed. For example, the resolution of certain challenges either by agreement or otherwise may eliminate the need to resolve others (Sec. 11361.3) and/or render objections moot (Sec. 11360.3). All such avenues should be thoroughly explored.

Where these initial efforts to resolve the issues are not successful and the parties' submissions appear on their face to raise substantial and material factual or legal issues requiring a hearing (Sec. 11365.1), no further investigation should be conducted and a notice of hearing should issue as expeditiously as possible setting the challenges for hearing. Sec. 11365.2.

11364 Administrative Investigation

11364 Generally

As described in Sec. 11361.1, the Regional Director must decide at the outset whether to resolve challenges by administrative investigation, by hearing, or by a combination of both. Sec. 11365 discusses the hearing route. This Section discusses the administrative investigation route.

11364.1 Investigation Methods

All challenges ordinarily should be investigated. However, under appropriate circumstances some may be left unresolved if it appears that the resolution of some of the challenges will render unnecessary the resolution of the rest. Sec. 11361.3.

The position of each party on each challenge, the supporting arguments and precedents, suggestions for avenues of exploration and names of witnesses should be secured in writing. The party making the challenge should be charged with the responsibility of offering full cooperation and whatever evidence is in its possession. Its failure to produce any evidence may cause the Regional Director to decide the matter based on the evidence already available. Sec. 11362.2.

Witnesses should be interviewed and, if applicable, records should be examined. Interviews should be reduced to affidavit form, if possible, and the results of record examination and other lines of investigation should be recorded for the file.

Requests by a party that counsel or a representative be present during the interview of witnesses whose statements or actions would bind the party should be handled in accordance with the procedures employed in unfair labor practice investigations. Sec. 10056.1. See Sec. 10056.6 for procedures to be used in interviewing current or former agents or supervisors of a party. Witness requests for counsel or other representative should be treated in accordance with Sec 10056.2.

11364.2 Conclusion of Investigation; Informing Parties

At the conclusion of the investigation, the Regional Director should issue either a report or a supplemental decision. Sec. 11364.4 discusses the circumstances that prescribe which document should issue.

Where objections have also been the subject of investigation, the report or supplemental decision on challenges should normally be combined with that on objections.

Informing Parties: Prior to the issuance of a report or supplemental decision, the parties may be informed of the conclusions reached in order to facilitate voluntary resolution of the challenges either by withdrawal or by stipulation. Sec. 11361.2.

11364.3 Evidence to Support Report or Supplemental Decision

The report or supplemental decision should be supported by affidavits, memoranda or correspondence in the files. The evidence on which the Regional Director has based his/her findings should be fully set forth. Statements of witnesses may be quoted freely, although their names should not be revealed. Except in unusual cases, affidavits of witnesses should not be appended. If an affidavit is appended, it should be redacted to the maximum extent possible to protect the anonymity of the witness.

The report or supplemental decision should be as specific and complete as to facts and conclusions as possible, thereby eliciting a more precise set of exceptions or request for review. The report or supplemental decision should set forth the facts and the rationale; this will also minimize the argument that a party was not given a full opportunity to know and address the issues. Further, a specific, comprehensive report or supplemental decision presents all the facts to the Board and provides a basis for its decision.

The Regional Director should clearly set forth in the report or supplemental decision the objective factors demonstrating that the challenges should be resolved in the manner described. Where the Regional Director, having obtained the facts alleged by the parties, concludes that there are no disputed facts or that as a matter of law the challenges can be determined without the need to resolve disputed facts, a report or supplemental decision should issue and no hearing is required. Also, where the Regional Director determines that challenges can be resolved solely on the basis of organizational charts, job descriptions, etc., or other documents, no hearing is necessary where the finding rests on the face of the documents without regard to any surrounding circumstances.

Credibility resolutions should be made where possible, i.e., if credibility conflicts can be resolved on the basis of objective factors, the Regional Director should do so and a hearing is not required. The basis for the resolution should be set forth. But if there are factual contradictions raising substantial and material issues that could best be resolved by a hearing, the Regional Director should so proceed. Sec. 11365.1.

11364.4 Type of Document Issued

The document issued at the conclusion of the investigation is determined by the type of election that was conducted, i.e., whether the election was after a consent election agreement, after a stipulated election agreement or after a decision and direction of election by the Regional Director or by the Board.

Consent Election Agreement or Full Consent Election Agreement: A report is used where the election was held pursuant to either of these agreements. See Rules and Regulation Sec. 102.62(a) for guidance relating to consent election agreement or Sec. 102.62(c) for guidance relating to a full consent election agreement. The report issued under either option should contain the Regional Director's determination, which is final.

Stipulated Election Agreement: A report is used where the election was held pursuant to a stipulated election agreement. Secs. 102.69(c)(2) and (4), Rules and Regulations. The report should contain the Regional Director's recommendations to the Board.

Directed Election: Either a report or a supplemental decision is used where the election was directed, whether by the Regional Director or the Board. Secs. 102.69(c)(3) and (4), Rules and Regulations. The report may be used where the Regional Director prefers to transfer the case to the Board for decision; if a report is issued, it should contain the Regional Director's recommendations to the Board. If a supplemental decision is issued, it should contain the Regional Director's determination, which is final unless the Board grants a request for review submitted by a party.

11364.5 Contents of Report or Supplemental Decision

Introduction: The opening paragraphs should contain the following:

- (a) basis for the election (consent, stipulated, Regional Director, or Board directed) and description of the unit
- (b) date of the election
- (c) tally of ballots
- (d) recitation of all other post election documents that have issued in the case
- (e) issues (e.g., the eligibility status of named individuals) and the reason for each challenge, including in the case of a determinative Board directed challenge, the reason advanced by the party for requesting review of the ruling that resulted in such Board directed challenge.

Case-Treatment Section: The case-treatment section should give, by individual or category, the positions of the parties and the facts found. Names of employee witnesses should not be included, but the evidence provided should be fully described. Sec. 11364.3.

Summary of Conclusions: The factual and legal conclusions with respect to the status of individuals or categories may be set forth at the close of each “Case-Treatment” section, but they should nevertheless reappear in the “Summary of Conclusions” section. In this section, the Regional Director should set forth the final determinations (consent election agreement), the recommendations (stipulated election agreement or directed election), or the determinations (directed election), which should be as follows:

- (a) that [named] employees are eligible to vote and that the challenges to their ballots are [should be] overruled
- (b) that [named] employees are not eligible to vote and that the challenges to their ballots are [should be] sustained
- (c) (if necessary) that a hearing will [should] be held with respect to [named] challenges
- (d) (if necessary) that the remaining [named] unresolved challenges are not determinative and need not be resolved and that no final determination is being made with respect to these challenges. (If appropriate, a certification should also reflect this lack of determination. Sec. 11474.)

The determinations or recommendations should account for all challenges.

Attachments: Copies of pertinent documents referred to in the report or supplemental decision, such as organizational charts, job descriptions, etc., may be attached to and made a part of the report or supplemental decision.

Right to File Exceptions or Request for Review: A report pursuant to a consent election or full consent election agreement is final; there is no right of appeal. A report pursuant to a stipulated election agreement or a directed election should include a statement of the right to file exceptions. A supplemental decision should include a statement of the right to request review. The time by which such exceptions or request for review must be received by the Board in Washington, D.C. (14 days) should be stated. A statement should be included concerning the composition of the record. Accordingly, use the following patterns:

- (a) Report Pursuant to Stipulated Election Agreement or Directed Election:

Under the provisions of Sec. 102.69 of the Board’s Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, D.C. by [date]. Under the provisions of Sec. 102.69(g) of the Board’s Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

- (b) Supplemental Decision:

Under the provisions of Secs. 102.69 and 102.67 of the Board’s Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. The request for review must be received by the

Board in Washington, D.C. by [date]. Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the request for review or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

11364.6 Service

Copies should be served on all parties by regular mail.

11364.7 Board Review

11364.7(a) Obtaining Review

Where a report pursuant to a stipulated election agreement or a directed election has issued, review is obtained by the filing of exceptions with the Board. In the absence of exceptions, the Board may decide the matter on the record or may make other disposition of the case.

Where a supplemental decision pursuant to a directed election has issued, the Regional Director's determination is final, unless the Board grants a request for review submitted by a party.

11364.7(b) Board Decision on Review

The Board will review a Regional Director's report; if it grants a request for review, it will also review a Regional Director's supplemental decision. In either event, the Board will take such action as the circumstances call for.

11364.8 Treating Exceptions or Request for Review as Motion for Reconsideration

The Regional Director may decide to treat exceptions or a request for review filed with the Board as a motion for reconsideration of the report or supplemental decision. Sec.102.65(e)(1), Rules and Regulations. In such cases, the Regional Director should promptly advise the Executive Secretary that he/she is reconsidering the matter and may issue a second report or supplemental decision. The parties should also be similarly advised as soon as possible.

If the Board has granted the exceptions or review, the Regional Director lacks jurisdiction to vacate the report or supplemental decision. *North Jersey Newspapers Co.*, 322 NLRB 394 (1996).

11364.9 Scheduling Opening of Challenged Ballots

In a consent election agreement situation, the report may conclude with notice that the ballots of those who may have been determined to be eligible will be opened and counted at a given time and place.

In a stipulated election agreement situation, ballots may not be opened until the exceptions period has expired and the Board has issued an order to do so.

In a directed election situation, if a report has issued, ballots may not be opened until the exceptions period has expired and the Board has issued an order to do so. If a supplemental decision has issued, the Regional Director may direct in the supplemental decision that the challenged ballots be opened and counted at a time and place subsequently to be determined “by the undersigned.” The ballots should not thereafter be counted until the request for review period has expired, and if a request for review is filed, until after the Board has ruled on such.

11365-11366 PROCESSING BY HEARING

11365 Generally

As described in Sec. 11361.1, the Regional Director must decide at the outset whether to process challenges by investigation, by hearing, or by a combination of both. Sec. 11364 discusses the administrative investigation route. This Section discusses the hearing route.

11365.1 Circumstances Warranting Hearing

Since there is no statutory requirement for a hearing on challenges, the primary concern of a Regional Director is to afford due process to the parties. A hearing is required with respect to those challenges which the Regional Director concludes raise substantial and material factual issues. Sec. 102.69(d), Rules and Regulations. Under this standard, substantial credibility issues concerning material facts are to be resolved at a hearing and not on the basis of an evaluation of the results of an administrative investigation. Thus, a hearing should be held if a party has established that it could produce at a hearing evidence which, if credited, would put in material dispute some issue necessary to a challenge determination. However, if credibility conflicts can be resolved on the basis of objective factors or challenges can be determined without the need to resolve disputed facts, if any, the Regional Director should do so and a hearing is not required. Sec. 11364.3.

11365.2 Issuance of Notice of Hearing

If a notice of hearing is being issued by the Regional Director, then no further investigation should be conducted and the facts may be set forth in summary form. Alternatively, the Regional Director may conclude that it would be useful for the hearing if he/she set forth any evidence already offered as well as the contentions of the parties, thereby setting the framework for the hearing and putting the other party/parties on notice of the evidence it/they should be prepared to address at the hearing.

11365.3 Date of Hearing

Since postelection matters are to be resolved with the utmost dispatch, the notice of hearing should issue as expeditiously as possible and the hearing should be scheduled at the earliest practical date. Postponements of postelection hearings should not be granted, absent good cause, and such hearings should be held on consecutive days until completed. Postponement requests should be subject to the requirements set forth in Form NLRB-4338 and the notice of hearing sent to the parties should reflect these requirements. Sec. 11427.

11366 Notice of Hearing Procedures

11366.1 Notice of Hearing

11366.1(a) Contents of Notice of Hearing

The contents of the notice of hearing are determined by the type of election that was conducted, i.e., whether the election was after a consent election agreement, after a stipulated election agreement, or after a decision and direction of election by the Regional Director or by the Board.

11366.1(b) Authority to Conduct Hearing

Where the election was held pursuant to a consent election agreement or a direction of election, the Regional Director has the authority to direct a hearing.

Where the election was held pursuant to a stipulated election agreement, Section 102.69(d) of the Rules and Regulations permits the Regional Director to direct a hearing. This discretion is subject to special permission to appeal. Sec. 102.69(i)(1), Rules and Regulations. This preserves the right of any party to object. It is anticipated that special permission to appeal will be requested “promptly,” as stated in the proviso to Sec. 102.65(c) of the Rules and Regulations.

11366.2 Directions to Hearing Officer

Consent Election Agreement and Full Consent Election Agreement: In the notice of hearing, the Regional Director should direct the hearing officer to prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Regional Director; the hearing officer’s report should provide for exceptions to be filed as follows:

Under the provisions of Section 102.69 of the Board’s Rules and Regulations, exceptions to this Report may be filed with the Regional Director either by mail, hand-delivery or electronically. Exceptions must be received by the Regional Director at the Regional Office by (14 calendar days from date the report issued). See the Attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency’s website at www.nlr.gov, for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and

Regional Offices. Guidance can also be found under *E-Gov* on the Board's website. This request may *not* be filed by facsimile.

The Regional Director must thereafter rule in a report upon the hearing officer's report and such exceptions as may be filed. The Regional Director's report is not subject to appeal.

Stipulated Election Agreement: In the notice of hearing, the Regional Director should direct the hearing officer to prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board; the hearing officer's report should provide for exceptions to be filed as follows:

Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. A request for review may also be submitted by electronic filing. See the Attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency's website at www.nlr.gov, for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. Guidance can also be found under *E-Gov* on the Board's website. This request must be received by the Board in Washington D.C. by 5:00 p.m. (ET) on [14 calendars days from date decision issued]. This request may *not* be filed by facsimile.

Directed Election: In the notice of hearing, the Regional Director should direct the hearing officer to prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Regional Director or to the Board, whichever the Regional Director decides is appropriate.

If the Regional Director directs that the hearing officer's recommendations be made to the Regional Director, then exceptions to the hearing officer's report will be filed with him/her. The hearing officer's report should provide for exceptions to be filed as follows:

Under the provisions of Section 102.67 and 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Regional Director either by mail, hand-delivery or electronically. See the Attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency's website at www.nlr.gov, for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. Guidance can also be found under *E-Gov* on the Board's website. This request must be received by the Board in Washington, D.C. by 5:00 p.m. (ET) on [14 calendars days from date decision issued]. This request may *not* be filed by facsimile.

The Regional Director must thereafter rule in a supplemental decision upon the hearing officer's report and such exceptions as may be filed. The Regional Director's supplemental decision is subject to a request for review to the Board.

If the Regional Director directs that the hearing officer's recommendations be made to the Board, the hearing officer's report should provide for exceptions to be filed as follows:

Under the provisions of Sections 102.67 and 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. A request for review may also be submitted by electronic filing. See Attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency's website at www.nlr.gov, for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. Guidance can also be found under *E-Gov* on the Board's website. This request must be received by the Board in Washington by 5:00 p.m. (ET) on [14 calendars days from date decision issued]. This request may *not* be filed by facsimile.

11366.3 Conclusion

The notice of hearing should conclude with notice that a hearing on the named challenges will be held at a given time and place before a duly designated hearing officer.

11366.4 Procedures at Hearing

The procedures to be followed at hearing are set forth at Secs. 11420–11430.

11367 BIFURCATED PROCEEDINGS—CHALLENGES

11367 Generally

When it is determined that some challenges can be resolved by administrative determination (Sec. 11364.3) and others, which continue to be determinative, raise substantial and material factual or legal issues requiring a hearing (Sec. 11365.1), the Regional Director may issue a report or supplemental decision on those challenges which can be administratively determined and issue a notice of hearing on the challenges which raise substantial and material issues. The hearing may be conducted notwithstanding the pendency of exceptions or a request for review with regard to a report or supplemental decision. Alternatively, the Regional Director may issue a notice of hearing on those challenges which raise substantial and material issues and note therein that the challenges which are not being noticed for hearing are being retained for further appropriate processing, i.e., a forthcoming report or supplemental decision.

There may also be situations in which some challenges can be resolved administratively and others, which warrant hearing, would thereupon appear to no longer be determinative. In these circumstances, the Regional Director may issue a report or

supplemental decision on those challenges which can be administratively resolved and hold in abeyance the hearing on those challenges which raise substantial and material factual or legal issues.

If a report or supplemental decision has issued with respect to some challenges and a notice of hearing with respect to other challenges, the Regional Director should keep the Executive Secretary apprised of the progress of the hearing. In that way, the Executive Secretary can coordinate the Board's processing of any exceptions or requests for review that may be filed with regard to a report, a supplemental decision, or a hearing officer's report. Any notice of hearing, report, supplemental decision, or hearing officer's report should refer to any prior postelection document issued in the case. A report or supplemental decision which deals with challenges that did not require a hearing should issue, at the very latest, by the time the hearing officer's report issues.

11378 COUNT OF OVERRULED CHALLENGED BALLOTS

11378 Count

The counting of ballots, challenges to which have been overruled, should take place as soon as possible at a time and place previously determined or to be determined by the Regional Director.

Ordinarily the count of the ballots of overruled challenges will take place at the Regional Office. In unusual circumstances, the Regional Director may approve the request of one or more of the parties to count the ballots where the original count took place.

At the count, parties may be represented by observers; normally, one per party is adequate, but the count should not be postponed because of the absence of representatives.

The challenged envelope of each voter whose ballot is to be counted should be displayed to the observers. A further challenge of the same voter should not be accepted. The stub should be torn off each envelope (and preserved in the file) and the ballot, still folded, should be dropped from the envelope. After the ballots thus taken from the challenged envelopes are thoroughly mixed with each other, they should be unfolded and counted.

11378.1 Revised Tally of Ballots

A revised tally of ballots (Form NLRB-4168) should be prepared and signed by the Board agent and by a witnessing representative of each party.

A copy of the revised tally should be made available to each party.

11390–11397 RESOLUTION OF OBJECTIONS TO ELECTION

11390-11393 INITIAL CONSIDERATIONS

11390 Objections

11390.1 Context

Conducting an election is the decisive point in the processing of a representation case. By the time employees vote in an election, the issues necessary to scheduling the election have been resolved and the employees, the parties and the Agency have expended significant energy and resources. In some cases, however, certification of the employees' choice in the election is delayed by challenges and/or objections. In this context, the prompt resolution of challenges and/or objections should be given priority attention.

11390.2 Treatment

The postelection portion of the Manual contains Sections first on challenges, 11360 through 11367, and then on objections, 11390 through 11397. Although the different Sections on challenges and objections parallel each other in certain respects, they are treated separately, since either challenges or objections may arise without the other. Notwithstanding this separate treatment, it should be recognized that when both challenges and objections are involved in the same case, they should be regarded as two aspects of one overall matter.

11390.3 Processing of Objections With Challenges

If challenges and objections arise in the same matter, they ordinarily will be processed simultaneously. However, under appropriate circumstances they may be treated separately. For example, the resolution of some or all challenges may make moot the objections of one party. Clearly meritorious cross-objections or objections based on third-party or Board agent conduct may indicate that the election will be set aside regardless of the outcome of determinative challenges, making the challenges moot. Thus, if it appears that the overall more expeditious resolution of the entire matter would result from holding objections in abeyance, while challenges are being processed, or the reverse, that is the course that should be followed.

11391 Methods of Resolution

11391.1 Administrative Investigation or Hearing

Under Section 102.69(d) of the Rules and Regulations, a Regional Director is authorized to process objections through either an administrative investigation or a hearing. Thus, at the outset of the processing of objections, the Regional Director should give consideration to the choice between an administrative investigation (Sec. 11394) and a hearing (Sec. 11395). Also to be considered is whether a portion of the objections may be suitable for processing by administrative investigation and the balance, simultaneously, by hearing.

An important consideration in making these determinations is expeditious processing through all levels of the Agency's deliberations. Although the process of scheduling and holding a hearing and thereafter preparing a hearing officer's report may be time consuming, an administrative investigation may also involve complex scheduling of numerous witnesses and the review of extensive evidence, and a hearing may ultimately be necessary even after the administrative investigation has been conducted. Sec. 11395.1. Accordingly, Regions should avoid administrative investigations where they are likely to be lengthy or where it appears that the administrative investigation is not going to resolve all issues. Further, in light of refusals by circuit courts to enforce certifications when no evidentiary hearing was conducted with regard to the objections, it is preferable to err on the side of proceeding to hearing rather than be told by a circuit court years later that it was inappropriate to resolve the issues administratively (see OM 04-26).

Also see Sec. 11397, Bifurcated Proceedings, for a discussion of related considerations that may arise during processing.

11391.2 Voluntary Resolution

Possibilities of voluntary resolution may arise while objections are being processed.

An objecting party may wish to withdraw its objections. The withdrawal need not be in writing, but may be oral. When objections are withdrawn, the Regional Director may issue the appropriate certification. The certification should include a statement that objections were filed and withdrawn with the Regional Director's approval.

The party/ies other than the objecting party may wish to agree that the election be set aside and a new one be conducted. Written agreement of the other party/ies to set aside the election should be secured. Written agreement of the objecting party is not required. In the agreement, the party/ies other than the objecting party should waive its/their rights under the Board's Rules to a Regional Director's report or supplemental decision, to file exceptions to a Regional Director's report or a request for review of a supplemental decision and to any right to a hearing in the matter or to a Board decision. The agreement should provide that on its approval by the Regional Director, he/she may set the election aside and make arrangements for and conduct a rerun election.

11391.3 Partial Resolution of Objections

In addition to voluntary resolutions, there may be other circumstances in which a determination to set aside an election based upon one or more of the objections may be readily reached, thereby making it unnecessary to resolve the remaining objections. For example, an objection based on a written document that is clearly objectionable on its face would cause the election to be set aside without consideration of the other objections. Undisputed conduct may have occurred. Any objections filed should be carefully examined at the beginning of processing to discover if any such partial resolutions are possible.

11392 Initial Consideration of Objections

11392.1 Generally

By filing objections to the conduct of an election or to conduct affecting the results of an election, a party may question the validity of an election. Objections may have the effect of invalidating an election, a result that has twofold significance: (a) the election may be rerun and (b) the “1-year” rule of Section 9(c)(3) will not run against the invalidated election.

11392.1(a) Objections to Interpretation or Validity of Ballots

If objections are filed that concern the interpretation or the validity of ballots, including voided ballots, then during the investigation of the objections those ballots should be stored in a similar manner as questioned interpretation ballots. Secs. 11340.8(b)(1) and 11344.

11392.2 Objections Period; Timeliness

11392.2(a) Objections to Initial Election

11392.2(a)(1) Period of Alleged Objectionable Conduct

Conduct to be considered in connection with objections to an initial election is that which occurred on or after the date of filing of the petition. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961).

11392.2(a)(2) Timeliness of Filing

To be considered, objections must have been filed by the close of business on the seventh day after the tally of ballots has been prepared and made available to the parties. Sec. 102.69(a), Rules and Regulations.

A holiday which occurs during the 7 days after an election does not affect the filing date for objections, unless the due date falls on a holiday. The due date is then extended until the next day on which the Regional Office is open for business.

The Regional Director is not authorized by the Rules to extend the time for filing objections. *John I. Haas, Inc.*, 301 NLRB 300 (1991). Parties do not have the right to

amend objections or file further objections after the 7-day filing period. *Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984); *Burns Security Services*, 256 NLRB 959 (1981). Also see Sec. 11392.11.

Objections to elections will be accepted as timely filed if delivered to the Regional Director on or before the official closing time of the receiving office on the due date or if postmarked on the day before (or earlier than the day before) the due date; documents which are postmarked on or after the due date are untimely. Secs. 102.69(a) and 102.111(b), the Rules and Regulations. “Postmarking” includes timely depositing the documents with a delivery service that will provide a record showing that the documents were tendered to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date.

Filing by facsimile transmission is permitted. If filing is by facsimile transmission, a failure to timely file will not be excused on the basis of a claim that transmission could not be accomplished. Sec. 102.114(f), Rules and Regulations.

11392.2(a)(3) Impact of Determinative Challenged Ballots

Objections must be timely whether or not challenges are sufficient in number to affect the results of the election.

11392.2(a)(4) Impounded Ballots

If ballots are impounded, the time for filing objections runs from the time the ballots are subsequently counted and the tally of ballots is prepared and made available to the parties.

11392.2(b) Objections to Rerun or Runoff Election

11392.2(b)(1) Rerun Election

Conduct to be considered in connection with objections to a rerun election (Secs. 11450–11456) is that which occurred from the date of the prior election. *Singer Co.*, 161 NLRB 956 fn. 2 (1966). Objections to a rerun election are due within 7 days after the tally of ballots of the rerun election has been made available to the parties. Sec. 102.69(a), Rules and Regulations. If the rerun election is set aside, there can be a second rerun election.

11392.2(b)(2) Runoff Election

Conduct to be considered in connection with objections to a runoff election (Sec. 11350) is that which occurred from the date of the prior election. Objections to a runoff election are due within 7 days after the tally of ballots of the runoff election has been made available to the parties. Sec. 102.69 (a), Rules and Regulations. If the runoff election is set aside, there can be a rerun of the runoff election.

11392.2(c) Objections to Revised Tally of Ballots

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. Objections to a revised tally of ballots are due within 7 days after the revised tally of ballots has been made available to the parties. Sec. 102.69 (h), Rules and Regulations.

11392.3 Objections Not Timely Filed

When the Regional Director rules that objections are not timely, he/she need not issue a report or supplemental decision on objections. The Regional Director may return the objections to the party with a letter of rejection as untimely and issue the appropriate certification.

The certification need not note the filing of untimely objections.

11392.4 Who May File Objections

Objections may be filed only by a party to the election, i.e., the following: the employer involved, the petitioner (which may be an individual), and any labor organization or individual whose name appeared on the ballot as a choice. Sec. 102.69(a), Rules and Regulations.

11392.5 Reasons for Objections

The objections must contain a short statement of the reasons therefor. Sec. 102.69(a), Rules and Regulations. The statement should be specific, not conclusionary, and constitutes an essential part of the objections. Objections which are nonspecific, for example, which allege “by these and other acts, etc.,” are insufficient, should not be treated and should be dismissed on their face.

NOTE: Postelection challenges to voters’ eligibility filed in the guise of objections should not be considered. Sec. 11362.1.

11392.6 Duty to Timely Furnish Evidence

It is incumbent on the party which has filed objections to furnish evidence sufficient to provide a prima facie case in support thereof within 7 days of the day the objections are required to be filed or within such additional time as may have, upon a timely request, been allowed by the Regional Director. The evidence must be submitted before the Regional Director is required to investigate the objections. *Craftmatic Comfort Mfg. Corp.*, 299 NLRB 514 (1990); Secs. 102.69(a) and 102.112, Rules and Regulations.

In addition to identifying the nature of the misconduct on which the objections are based, this submission 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 its objections. Absent the timely receipt of sufficient evidence, the Regional Director should overrule the objections without any further processing. *Star Video Entertainment L.P.*, 290 NLRB 1010 (1988). However, when an objecting party has specifically identified witnesses who it claims would provide direct rather than hearsay evidence to support its objections, the Regional Director should proceed with processing

of the objections rather than dismiss the objections for lack of direct evidence in support thereof. *Holladay Corp.*, 266 NLRB 621 (1983). Also see Secs. 11392.10 and 11392.11.

11392.7 Prefiling Assistance

Prefiling assistance in filing objections may be offered to the extent allowable in connection with unfair labor practice charges.

11392.8 Filing Requirements

If objections are filed with the Regional Office, an original and five copies should be submitted. If objections are filed by facsimile transmission, extra copies need not be submitted. Sec. 102.69(a), Rules and Regulations.

11392.9 Service on Parties

The Regional Director will immediately serve a copy of the objections on each of the other parties to the proceeding.

11392.10 Nature and Scope of Processing

The investigation of objections is nonadversarial, insofar as the Agency is concerned, since it is part of the investigation of a representation question. This means that the role of the Board agent is completely nonpartisan; the Board agent is responsible for bringing to the Regional Director all the available facts. However, unlike the resolution of challenges, where the Regional Director must be independently satisfied that all the available facts have been obtained, the burden for supporting objections rests solely on the party making them.

11392.11 Unalleged Objectionable Conduct

It is within the Regional Director's discretion to determine initially the scope of the investigation. In the exercise of this discretion, the Regional Director may confine the investigation to matters specifically alleged in the objections or intimately connected to them. On the other hand, the Regional Director may view the objections as having cast suspicion on the entire election process, thereby justifying the independent investigation of matters not specifically contained in the objections.

“The Regional Director is not required to, nor can he/[she] properly, ignore evidence relevant to the conduct of the election . . . simply because [a party] may not have specifically mentioned such conduct in its objections.”

American Safety Equipment Corp., 234 NLRB 501 (1978). If the Regional Director receives or discovers evidence during the investigation that shows that the election has been tainted, he/she should not ignore such conduct even if it was not specifically alleged. *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988). However, parties do not have the right to amend objections or file further objections after the 7-day filing period, unless the objecting party demonstrates by clear and convincing proof that the evidence is not only newly discovered, but also previously unavailable. *Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984); *Burns Security Services*, 256 NLRB 959 (1981). Further, if evidence of misconduct unrelated to the timely filed objections comes to the Regional

Director's attention during the investigation at the initiative of the objecting party after the time for filing objections has expired, the new evidence should not be considered as a basis for setting aside the election unless the objecting party has provided clear and convincing proof that the evidence was not only newly discovered, but also previously unavailable. *John W. Galbreath & Co.*, 288 NLRB 876 (1988).

NOTE: In the event the Regional Director issues a notice of hearing (Sec. 11395.1), the hearing officer, by contrast with the Regional Director, has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director. Sec. 11424.3(b).

11393 Procedures Applicable to Objections

Initial procedures are the same, whether for a consent, stipulated, or directed election.

Within a few days of receipt of the evidence submitted in support of objections and any statements of position, a determination should be made as to whether a hearing or an administrative investigation is appropriate. Sec. 11391.1. Determinative challenges, if any, and evidence submitted regarding such should also be considered during this determination. Potential ways in which the issues could be resolved should be discussed. For example, the resolution of certain challenges, if any, by agreement or otherwise may eliminate the need to resolve others (Sec. 11361.3) and/or render objections moot (Sec. 11390.3). Some objections may involve clearly objectionable documents or conduct on the basis of which alone the election may be set aside. Sec. 11391.3. All such avenues should be thoroughly explored.

Where these initial efforts to resolve the issues are not successful and the parties' submissions appear on their face to raise substantial and material factual or legal issues requiring a hearing (Sec. 11395.1), no further investigation should be conducted and a notice of hearing should issue as expeditiously as possible setting the objections for hearing. Sec. 11395.2.

11394 ADMINISTRATIVE INVESTIGATION

11394 Generally

As described in Sec. 11391.1, the Regional Director must decide at the outset whether to resolve objections by administrative investigation, by hearing, or by a combination of both. Sec. 11395 discusses the hearing route. This Section discusses the administrative investigation route.

Where objections were untimely filed, an investigation should not be initiated. Sec. 11392.3.

Nonspecific objections should not be considered during the administrative investigation. Sec. 11392.5.

Evidence of unalleged objectionable conduct which the Regional Director receives or discovers during the investigation should be considered pursuant to the guidelines discussed in Sec. 11392.11.

11394.1 Investigation Methods

All objections ordinarily should be investigated. However, under appropriate circumstances some may be left unresolved if it appears that the resolution of some will render unnecessary the resolution of the rest. Sec. 11391.3. The position of each party on each objection, the supporting arguments and precedents, suggestions for avenues of exploration and names of witnesses should be secured in writing. The objecting party should be charged with the responsibility of offering full cooperation and whatever evidence is in its possession. Its failure to produce any evidence may obviate further investigation. Secs. 11392.6 and 11392.10.

Witnesses should be interviewed and, if applicable, records should be examined. Interviews should be reduced to affidavit form, if possible, and the results of record examination and other lines of investigation should be recorded in the file.

Requests by a party that counsel or a representative be present during the interview of the witnesses whose statements or actions would bind the party should be handled in accordance with the procedures employed in unfair labor practice investigations. Sec. 10056.1. See Sec. 10056.6 for procedures to be used in interviewing current or former agents or supervisors of a party. Witness requests for counsel or other representative should be treated in accordance with Sec. 10056.2.

11394.2 Conclusion of Investigation; Informing Parties

At the conclusion of the investigation, the Regional Director should issue either a report or a supplemental decision. Sec. 11394.4 discusses the circumstances that prescribe which document should issue.

Where challenges have also been the subject of investigation, the report or supplemental decision on objections should normally be combined with that on challenges.

Informing Parties: Prior to the issuance of a report or supplemental decision, the parties may be informed of the conclusions reached in order to facilitate voluntary resolution of the objections either by withdrawal or by stipulation. Sec. 11391.2. Oral requests to withdraw objections may be approved.

11394.3 Evidence to Support Report or Supplemental Decision

The report or supplemental decision should be supported by affidavits, memoranda or correspondence in the files. The evidence on which the Regional Director has based his/her findings should be fully set forth. Statements of witnesses may be quoted freely, although their names should not be revealed. Except in unusual cases, affidavits

of witnesses should not be appended. If an affidavit is appended, it should be redacted to the maximum extent possible to protect the anonymity of the witness.

The report or supplemental decision should be as specific and complete as to facts and conclusions as possible, thereby eliciting a more specific set of exceptions or request for review. The report or supplemental decision should set forth the facts and the rationale; this will also minimize the argument that a party was not given a full opportunity to know and address the issues. Further, a specific, comprehensive report or supplemental decision presents all the facts to the Board and provides a basis for its decision.

The Regional Director should clearly set forth in the report or supplemental decision the objective factors demonstrating that the election should or should not be vacated. Where the Regional Director, having obtained the facts alleged by the parties, concludes that there are no disputed facts or that objections can be resolved without the need to resolve disputed facts; or where the Regional Director in effect assumes the facts alleged in the objections but concludes as a matter of law that the facts do not present substantial grounds for setting aside the election, a report or supplemental decision should issue and no hearing is required. *NLRB v. Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245 (5th Cir. 1964); *Whitney Museum of American Art*, 636 F.2d 19 (2d Cir. 1980). Also, where the Regional Director recommends that an election be set aside solely on the basis of letters, handbills, or other writing, no hearing is necessary where the finding rests on the face of the documents without regard to any surrounding circumstances. Credibility resolutions should be made where possible, i.e., if credibility conflicts can be resolved on the basis of objective factors, the Regional Director should do so and a hearing is not required. The basis for the resolution should be set forth. But if there are factual contradictions raising substantial and material issues that could best be resolved by a hearing, the Regional Director should so proceed. Sec. 11395.1.

11394.4 Type of Document Issued

The document issued at the conclusion of the investigation is determined by the type of election that was conducted, i.e., whether the election was after a consent election agreement, after a stipulated election agreement, or after a decision and direction of election by the Regional Director or by the Board.

Consent Election Agreement: A report is used where the election was held pursuant to a consent election agreement. Sec. 102.62(a), Rules and Regulations. The report should contain the Regional Director's determination, which is final.

Stipulated Election Agreement: The report is used where the election was held pursuant to a stipulated election agreement. Secs. 102.69(c)(2) and (4), Rules and Regulations. The report should contain the Regional Director's recommendations to the Board.

Directed Election: Either a report or a supplemental decision is used where the election was directed, whether by the Regional Director or the Board. Sec. 102.69(c)(3), Rules and Regulations. The report may be used where the Regional Director prefers to transfer the case to the Board for decision; if a report is issued, it should contain the Regional Director's recommendations to the Board. If a supplemental decision is issued,

it should contain the Regional Director's determination, which is final unless the Board grants a request for review submitted by a party.

11394.5 Contents of Report or Supplemental Decision

Introduction: The opening paragraphs should contain the following:

- (a) basis for the election (consent, stipulated, Regional Director, or Board directed) and description of the unit
- (b) date of the election
- (c) tally of ballots
- (d) objections filed, the date filed, and by whom
- (e) recitation of all other post election documents that have issued in the case
- (f) summary of the objections by "counts." Alternatively, a copy of the objections may be attached.
- (g) unalleged conduct concerning which evidence has been received or discovered, if any (Sec. 11392.11)

Count-Treatment Section: The count-treatment section should give the positions of the parties and the facts found for each objection. Names of employee witnesses should not be included, but the evidence provided should be fully described. Sec. 11394.3. Nonspecific objections (Sec. 11392.5) should be noted as insufficient on their face in this section.

Summary of Conclusions: The factual and legal conclusions with respect to the objections may be set forth at the close of each "Count-Treatment" section, but they should nevertheless appear in the "Summary of Conclusions" section. In this section, the Regional Director should set forth the final determinations (consent election agreement), the recommendations (stipulated election agreement or directed election) or the determinations (directed election), which should be as follows:

- (a) that [numbered or unalleged] counts of the objections are without merit, and are [should be] overruled (nonspecific objections (Sec. 11392.5) should be recited as insufficient in this section)
- (b) that [numbered or unalleged] counts of the objections have merit, on the basis of which the election is [should be] set aside, and a new [rerun] election scheduled
- (c) (if necessary) that a hearing will [should] be held with respect to [named] issues.

The determinations or recommendations should account for all objections by count.

Attachments: Copies of pertinent documents referred to in the report or supplemental decision, such as contracts, defaced sample ballots, etc., may be attached to and made a part of the report or supplemental decision.

Right to File Exceptions or Request for Review: A report pursuant to a consent election agreement is final; there is no right of appeal. A report pursuant to a stipulated election agreement or a directed election should include a statement of the right to file exceptions. A supplemental decision should include a statement of the right to request review. The time by which such exceptions or request for review must be received by the

Board in Washington, D.C. (14 days) should be stated. A statement should be included concerning the composition of the record. Accordingly, use the following patterns:

(a) Report Pursuant to Stipulated Election Agreement or Directed Election:

Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, D.C. by [date]. Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

(b) Supplemental Decision:

Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. The request for review must be received by the Board in Washington, D.C. by [date]. Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the request for review or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

11394.6 Service

Copies should be served on all parties by regular mail.

11394.7 Board Review

11394.7(a) Obtaining Review

Where a report pursuant to a stipulated election agreement or directed election has issued, review is obtained by the filing of exceptions with the Board. In the absence of exceptions, the Board may decide the matter on the record or may make other disposition of the case.

Where a supplemental decision pursuant to a directed election has issued, the Regional Director's determination is final, unless the Board grants a request for review submitted by a party.

11394.7(b) Board Decision on Review

The Board will review a Regional Director's report; if it grants a request for review, it will review a Regional Director's supplemental decision. In either event, the Board will take such action as the circumstances call for.

11394.8 Treating Exceptions or Request for Review as Motion for Reconsideration

The Regional Director may decide to treat exceptions or a request for review filed with the Board as a motion for reconsideration of the report or supplemental decision. Sec. 102.65 (e)(1), Rules and Regulations. In such cases, the Regional Director should promptly advise the Executive Secretary that he/she is reconsidering the matter and may issue a second report or supplemental decision. The parties should also be similarly advised as soon as possible.

If the Board has granted the exceptions or review, the Regional Director lacks jurisdiction to vacate the report or supplemental decision. *North Jersey Newspapers*, 322 NLRB 394 (1996).

11395-11396 PROCESSING BY HEARING**11395 Generally**

As described in Sec. 11391.1, the Regional Director must decide at the outset whether to process objections by investigation, by hearing, or by a combination of both. Sec. 11394 discusses the administrative investigation route. This Section discusses the hearing route.

11395.1 Circumstances Warranting Hearing

Since there is no statutory requirement for a hearing on objections, the primary concern of a Regional Director is to afford due process to the parties. A hearing is required with respect to those objections or challenges which the Regional Director concludes raise substantial and material factual issues. Sec. 102.69(d), Rules and Regulations. Under this standard, substantial credibility issues concerning material facts are to be resolved at a hearing and not on the basis of an evaluation of the results of an administrative investigation. Thus, a hearing should be held if the objecting party has established that it could produce at a hearing evidence which, if credited, would warrant setting aside the election. However, if credibility conflicts can be resolved on the basis of objective factors or objections can be determined without the need to resolve disputed facts, if any, the Regional Director should do so and a hearing is not required. Sec. 11394.3.

11395.2 Issuance of Notice of Hearing

If a notice of hearing is being issued by the Regional Director, then no further investigation should be conducted and the facts may be set forth in summary form. Alternatively, the Regional Director may conclude that it would be useful for the hearing if he/she described in more detail the evidence submitted in support of and in response to

the objections, thereby setting the framework for the hearing and putting the other party/parties on notice of the evidence it/they should be prepared to address at the hearing.

11395.3 Nonspecific and Unalleged Objections

The notice of hearing should describe any nonspecific objections (Sec. 11392.5) as insufficient. They should not be included among the issues to be considered at the hearing and should be dismissed on their face in the notice of hearing.

If the Regional Director has received or discovered evidence of unalleged objectionable conduct (Sec. 11392.11) that is being included among the issues to be considered at the hearing, such should be described in the notice of hearing with sufficient specificity pursuant to Sec. 102.69(a) of the Rules and Regulations.

NOTE: The hearing officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director. Sec. 11424.3(b).

11395.4 Date of Hearing

Since postelection matters are to be resolved with the utmost dispatch, the notice of hearing should issue as expeditiously as possible and the hearing should be scheduled at the earliest practical date. Postponements of postelection hearings should not be granted, absent good cause, and such hearings should be held on consecutive days until completed. Postponement requests should be subject to the requirements set forth in Form NLRB-4338 and the notice of hearing sent to the parties should reflect these requirements. Sec. 11427.

11396 Notice of Hearing Procedures

11396.1 Notice of Hearing

11396.1(a) Contents of Notice of Hearing

The contents of the notice of hearing issued by the Regional Director are determined by the type of election that was conducted, i.e., whether the election was after a consent election agreement, after a stipulated election agreement, or after a decision and direction of election by the Regional Director or by the Board.

11396.1(b) Authority to Conduct Hearing

Where the election was held pursuant to a consent election agreement or a direction of election, the Regional Director has the authority to direct a hearing.

Where the election was held pursuant to a stipulated election agreement, Sec. 102.69(d) of the Rules and Regulations permits the Regional Director to direct a hearing. This direction is subject to special permission to appeal. Sec. 102.69(i)(1), Rules and Regulations. This preserves the right of any party to object. It is anticipated that special

permission to appeal will be requested “promptly,” as stated in the proviso to Sec. 102.65(c) of the Rules and Regulations.

11396.2 Directions to Hearing Officer

Consent Election Agreement: In the notice of hearing, the Regional Director should direct the hearing officer to prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Regional Director; the hearing officer’s report should provide for exceptions to be filed as follows:

Under the provisions of Sec. 102.69 of the Board’s Rules and Regulations, exceptions to this Report may be filed with the Regional Director. Exceptions must be received by the Regional Director at the Regional Office by [date].

The Regional Director must thereafter rule in a report upon the hearing officer’s report and such exceptions as may be filed. The Regional Director’s report is not subject to appeal.

Stipulated Election Agreement: In the notice of hearing, the Regional Director should direct the hearing officer to prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board; the hearing officer’s report should provide for exceptions to be filed as follows:

Under the provisions of Sec. 102.69 of the Board’s Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, D.C. by [date].

Directed Election: In the notice of hearing, the Regional Director should direct the hearing officer to prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Regional Director or to the Board, whichever the Regional Director decides is appropriate.

If the Regional Director directs the hearing officer’s recommendations be made to the Regional Director, then exceptions to the hearing officer’s report will be filed with him/her. The hearing officer’s report should provide for exceptions to be filed as follows:

Under the provisions of Secs. 102.69 and 102.67 of the Board’s Rules and Regulations, exceptions to this Report may be filed with the Regional Director. Exceptions must be received by the Regional Director at the Regional Office by [date].

The Regional Director must thereafter rule in a supplemental decision upon the hearing officer’s report and such exceptions as may be filed. The Regional Director’s supplemental decision is subject to a request for review to the Board.

If the Regional Director directs that the hearing officer’s recommendations be made to the Board, the hearing officer’s report should provide for exceptions to be filed as follows:

Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, D.C. by [date].

11396.3 Conclusion

The notice of hearing should conclude with notice that a hearing on the named objections will be held at a given time and place before a duly designated hearing officer.

11396.4 Hearing Procedures

The procedures to be followed at hearing are set forth at Secs. 11420–11430.

11397 BIFURCATED PROCEEDINGS—OBJECTIONS

11397 Generally

When it is determined that some objections can be overruled by administrative investigation (Sec. 11394.3) and others raise substantial and material issues requiring a hearing (Sec. 11395.1), the Regional Director may issue a report or supplemental decision on those objections which can be administratively determined and issue a notice of hearing on the objections which raise substantial and material factual or legal issues. The hearing may be conducted notwithstanding the pendency of exceptions or a request for review with regard to a report or supplemental decision. Alternatively, the Regional Director may issue a notice of hearing on those objections which raise substantial and material issues and note therein that the objections which are not being noticed for hearing are being retained for further appropriate processing, i.e., a forthcoming report or supplemental decision.

There may also be situations in which an administrative investigation reveals that some objections clearly warrant setting aside the election, whereas other objections warrant a hearing. In these circumstances, the Regional Director may issue a report or supplemental decision on those objections which can be administratively determined and hold in abeyance the hearing on those objections which raise substantial and material issues.

If a report or supplemental decision has issued with respect to some objections and a notice of hearing with respect to other objections, the Regional Director should keep the Executive Secretary apprised of the progress of the hearing. In that way, the Executive Secretary can coordinate the Board's processing of any exceptions or requests for review that may be filed with regard to a report or supplemental decision. Any notice of hearing, report, supplemental decision, or hearing officer's report should refer to any prior postelection document issued in the case. A report or supplemental decision which deals with the objections that did not require a hearing should issue, at the very latest, by the time the hearing officer's report issues.

11407 CHALLENGES/OBJECTIONS INVESTIGATION WHEN UNFAIR LABOR PRACTICE CHARGE ALSO INVOLVED

11407 Generally

In the event there are determinative challenged voters who are also involved in a related unfair labor practice charge, or who are also alleged discriminatees in an unfair labor practice charge, or there are objections to an election and an unfair labor practice charge, both of which encompass in whole or in part the same conduct, then the investigation of the challenges and/or objections and the charge should be coordinated.

NOTE: If determinative challenged voters are also alleged discriminatees in an unfair labor practice charge and if the tally of ballots reveals that, if some or all of the challenged ballots have been cast for the union, the union will receive a majority regardless of how the challenges are ultimately determined, see Sec. 11361.4.

A variety of circumstances may be presented by a combination of challenges/objections and unfair labor practice charge cases. Thus, unfair labor practice allegations filed before the election may already be under investigation. Alternatively, the unfair labor practice allegations may be filed around the time of the election's determinative challenges and/or with objections, with which they may be partially or totally coextensive, and an initial investigation of each must be commenced. The Regional Director should review each set of circumstances carefully, from the perspective of the most expeditious overall processing thereof, and select among the options available.

Options:

(a) Objecting Party Withdraws Charge to Expedite Processing of Objections

A notice of hearing on challenges or objections requires merely a finding that there are substantial and material factual or legal issues, whereas a determination as to the merit of an unfair labor practice charge requires a complete administrative investigation. Under appropriate circumstances, a charging party may prefer to withdraw its unfair labor practice charge in order to permit the processing of the challenges and/or objections to proceed more quickly, including if warranted directly to a hearing.

(b) Objecting Party Does Not Withdraw Charge

If the charging party chooses not to withdraw the unfair labor practice charge, the Regional Director nonetheless may decide it is appropriate and more expeditious to hold the charge in abeyance and process the challenges and/or objections. Agreement of the parties is not required. This alternative procedure could be used where the unfair labor practice allegations and the challenges and/or objections are coextensive or related, and the resolution of the challenges and/or objections in the representation case, after Board review, is likely to provide an appropriate basis for resolving the unfair labor practice case.

For example, if objections were overruled after a hearing, the record in the objections proceeding may provide a basis for dismissal of the charge which was held in abeyance. If the objections were sustained and the election was set aside after a hearing

and the sole remedy for the unfair labor practices in the charge consists of the posting of a notice, such as is the case with 8(a)(1) or 8(b)(1)(A) statements or other conduct, the Regional Director may conclude that the coextensive charge should be dismissed consistent with prosecutorial discretion. A dismissal, for example, might be appropriate where provision has been made for a *Lufkin* notice prior to the rerun election. Sec. 11452.1. The *Lufkin* notice, coupled with the rerun election, may in essence provide an effective remedy for the unfair labor practice allegations. On the other hand, after reviewing the record evidence from the challenges/objections hearing, the Regional Director may conclude that dismissal of the charge would be inappropriate and the charge should be processed further. Whether a rerun election should be conducted notwithstanding a pending charge is governed by the considerations set forth in Secs. 11730–11734.

The situations described herein are not exhaustive. There may be other circumstances in which the procedures discussed in this Section may be appropriate.

11407.1 Circumstances Affecting Choice of Procedures

These procedures should not be used where the likelihood of duplicative proceedings is high and the representation case will not provide a suitable remedy for the unfair labor practice allegations, e.g., where restoration of the status quo ante is required. It also cannot be utilized where a finding of an unfair labor practice is required in order to resolve the objections or challenges, such as is the case with an allegation of an 8(a)(3) discharge. *Texas Meat Packers*, 130 NLRB 279 (1961). Also see 11361.4.

11420–11430 HEARING ON CHALLENGES/OBJECTIONS

11420-11427 ISSUES PRELIMINARY TO HEARING

11420 Generally

To the extent they are adaptable, the procedures discussed herein apply to hearings on challenges as well as to hearings on objections. Where, in the same case, there are challenges and objections, see Secs. 11360.2–11360.3 and 11390.2–11390.3.

11420.1 Procedures: Unfair Labor Practice Charge Also Involved

In some cases, there are determinative challenged voters who are also involved in related unfair labor practice allegations, or who are also the subject of 8(a)(3) unfair labor practice allegations (Sec. 11361.4), or there are objections to an election and an unfair labor practice charge, both of which encompass, in whole or in part, the same conduct. If after investigation merit determinations have been made on the unfair labor practice charge and complaint has been authorized, then the complaint and the related challenges and/or objections normally should be consolidated for hearing before an administrative law judge. Sec. 11407 discusses alternative procedures that may be applicable.

If a consolidated hearing has been directed, the procedures applicable to the hearing are mixed. To the extent that alleged unfair labor practices are involved, the

procedures set forth in Sections 10380–10412 should be followed; to the extent that challenges and/or objections, the substance of which does not coincide with the substance of the alleged unfair labor practices, are involved, the procedures set forth in Sections 11420–11438 should be followed; to the extent that there is overlapping, ambiguity, or conflict, the procedures set forth in Sections 10380–10412 should be followed. The administrative law judge will thereafter make appropriate recommendations in a decision; except where the election was held pursuant to a consent election agreement, the cases will be transferred to the Board. Where the election was held pursuant to a consent election agreement, the administrative law judge will sever the cases and transfer the R case to the Regional Director for further processing.

Unless the election had been held pursuant to a consent election agreement, the order directing a hearing on objections in a representation case, which is to be consolidated with a hearing on unfair labor practice charges, should include the following language:

IT IS HEREBY ORDERED, pursuant to Section 102.33 of the National Labor Relations Board Rules and Regulations, that these cases be, and they hereby are, consolidated for the purposes of hearing, ruling, and decision by an administrative law judge and that thereafter [here designate the R case] be transferred to and continued before the Board in Washington, D.C., and that the provisions of Sections 102.46 and 102.69(e) of the above-mentioned Rules shall govern the filing of exceptions.

Where the election had been held pursuant to a consent election agreement, the order should include the following language:

IT IS HEREBY ORDERED, pursuant to Section 102.33 of the National Labor Relations Board Rules and Regulations, that these cases be, and they hereby are, consolidated for the purposes of hearing, ruling, and decision by an administrative law judge and that thereafter [here designate the R case] shall be severed and transferred to the undersigned Regional Director for further processing.

In a consent election agreement case, the administrative law judge should issue an appropriate order as a part of the decision severing and transferring the R case to the Regional Director for appropriate action.

11422 Nature and Objective

A hearing on challenges/objections is a formal proceeding designed to elicit information on the basis of which the Regional Director or the Board may discharge their duties under Section 9 of the Act. As such, insofar as the Agency is concerned, it is investigatory and nonadversarial.

The hearing on challenges/objections should be conducted with the same formality as is accorded a preelection hearing. Sec. 11182.

11424 Participating Agency Personnel

The hearing on objections/challenges is ordinarily conducted by an administrative law judge (Sec. 11424.1) or by a hearing officer (Secs. 11424.2–11424.3). When no unfair labor practices are involved, the Regional Director may also assign a Board agent designated as representative of the Regional Director (Sec. 11424.4) to appear at the hearing to see that evidence adduced during the Region’s investigation becomes part of the record. However, as the parties are expected to carry the burden of ensuring that a full record is made (Secs. 11362.2 and 11392.10), a representative of the Regional Director will ordinarily not be necessary.

11424.1 Administrative Law Judge

If the Board’s order directing that a hearing be held specifies that it be before an administrative law judge, or when a Regional Director determines objections and/or challenges are appropriate for hearing by an administrative law judge (those cases where the hearing officer’s report would be submitted directly to the Board), the Region should contact the Chief or Associate Chief Administrative Law Judge to inquire whether an administrative law judge is available for a date and at the location for hearing. OM 03-84. The Region should provide the Chief or Associate Chief Administrative Law Judge all available information concerning the nature of the objections and/or challenges and an estimate of the number of days the hearing is expected to last. The Region would then issue a notice of hearing and the administrative law judge would conduct the hearing as the hearing officer. The matter would not be transferred to the Division of Judges but instead remain in the Region.

11424.2 Selection of Hearing Officer

The hearing officer ordinarily 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. (Sec. 11429.1 discusses requests for testimony by a Board agent.)
- (b) If a hearing is directed by the Board concerning credibility findings previously made by the Regional Director. Secs. 11364.3, 11365.1, 11394.3, and 11395.1.

There may be unusual circumstances that, in the Regional Director’s judgment, warrant further exceptions to this procedure. In any event, all requests and arrangements for obtaining a hearing officer from outside the Region should be made through the Division of Operations Management.

11424.3 Functions and Duties of Hearing Officer

11424.3(a) Prehearing

The hearing officer should be given all formal papers. These include a copy of the notice of hearing, any order directing hearing, amendments thereto, Regional Director’s report or supplemental decision on objections and/or challenges, exceptions, request for review, Board order and any motions or requests on which prehearing rulings

have been made that bear on the issues to be resolved by the hearing. Working from this material alone, the hearing officer should become familiar with the factual and legal issues presented and the general Board precedents relevant to the indicated issues.

11424.3(b) Hearing

The role of the hearing officer in a postelection challenges and/or objections hearing differs from the role of the preelection hearing officer in two significant respects: in a postelection hearing, the hearing officer makes (1) credibility resolutions and (2) findings, conclusions, and recommendations, whereas the preelection hearing officer does neither (Sec. 11250). In other respects, however, the roles are similar. Secs. 11180–11248. Thus, the postelection hearing officer conducts the hearing, opens, adjourns and closes the hearing, and maintains order while the hearing is in session. The hearing officer listens to and passes on the admissibility of oral testimony and arguments concerning documentary evidence offered.

The hearing officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director. Allegations based on a new legal theory or different factual circumstances are insufficiently related to the objections set by the Regional Director for hearing. *Precision Products Group, Inc.*, 319 NLRB 640 (1995); *Iowa Lamb Corp.*, 275 NLRB 185 (1985).

The hearing officer is not an advocate of any position but must be impartial in his/her rulings and in conduct both on and off the record. The hearing officer should not have access to the Region's case file, nor direct or indirect knowledge of its contents, except to the extent that he/she has been furnished the pleadings in advance (Sec. 11424.3(a)) and to the extent developed by the evidence presented at the hearing. Therefore, although the hearing officer should take pains to see that the record contains all relevant and competent evidence, his/her efforts in this direction will be without the benefit of the material elicited in any prehearing investigation.

The hearing officer should actively participate. As necessary, he/she should cross-examine, call and question witnesses, and call for and introduce appropriate documents. It should be recognized, however, that, under some circumstances, the hearing officer's pursuit of his/her responsibility for the development of a full record may lead to an appearance of undue assistance to one party or another. The hearing officer should exercise self-restraint, should give the parties prior opportunity to develop points, and should refrain from needlessly "taking over." The hearing officer must keep constantly in mind that the parties will expect his/her objective and considerate regard. Nonetheless, the hearing officer, while exercising self-restraint, should also be cognizant that his/her primary responsibility is, as noted above, to see that the record is full and contains all relevant and competent evidence, within the confines of the issues set for hearing by the Regional Director.

The hearing officer should keep the record as short as is commensurate with its being complete, in the same manner as at a preelection hearing. Sec. 11188.1. By requiring the parties to state succinctly their positions on the record (Sec. 11217), by receiving stipulations (Sec. 11222), and by excluding irrelevant and cumulative material,

including by utilizing offers of proof (Sec. 11226), the hearing officer should achieve an uncluttered record.

Finally, it is the duty of the hearing officer, on consideration of the record, to make credibility resolutions when necessary, as well as to make findings, conclusions, and recommendations that are fully explained and supported by the facts and analysis contained in his/her report.

11424.4 Functions and Duties of Representative of Regional Director

11424.4(a) Prehearing

The representative of the Regional Director, if one is utilized (Sec. 11424), should be thoroughly familiar with the contents of the Regional Office case file. Whether or not the representative was the Board agent assigned to the original investigation of objections, he/she should not reinterview witnesses.

11424.4(b) Hearing

As indicated in Sec. 11424, the primary function of a representative of the Regional Director is to see that the relevant evidence adduced during the Region's investigation becomes part of the record. During the hearing, the file should be in his/her possession. The representative may voice objections; cross-examine, call and question witnesses; and call for and introduce appropriate documents. If the information in the representative's possession warrants it, he/she should seek to impeach the testimony of witnesses called by others or contradict evidence that has been presented. However, the representative of the Regional Director should not offer new material unless he/she is certain it will not be offered by one of the parties.

If the representative finds it necessary to impeach the testimony of witnesses or contradict evidence that has been presented, the representative must exercise self-restraint and display impartiality as well as the appearance of impartiality.

11424.4(c) Hearing After Remand

In the event there is a remand by the Board in which the Board orders that a hearing be held, the role of the representative of the Regional Director, if any, does not change. The representative does not have the duty of sustaining at the hearing the Regional Director's report or supplemental decision.

11426 Prehearing Procedures

11426.1 Regional Office Preparation

11426.1(a) Formal Papers

In advance of the hearing, the formal papers should be prepared. They consist of the notice of hearing, any order directing hearing, amendments thereto, Regional Director's report or supplemental decision on challenges and/or objections, exceptions,

request for review, Board order and any motions or requests on which prehearing rulings have been made that bear on the issues to be resolved by the hearing. They should be placed in one legal backing, in chronological order from the bottom upward, marked as Board's Exhibit 1(a)-().

11426.1(b) Statements of Witnesses

Some statements obtained during the prehearing investigation that are in the possession of the Regional Office may be producible at the hearing under Sec. 102.118(c) of the Rules and Regulations. Sec. 11429.2. In preparation for the hearing, it may be suitable to prepare copies of relevant portions of these statements. If there is to be a representative of the Regional Director at the hearing (Sec. 11424.4(b)), these copies would enable him/her to provide copies as appropriate as the hearing progresses. In the event there is to be no representative, these copies may be provided to the hearing officer, prior to the hearing, in sealed envelopes labeled with the names of the affiants, to enable him/her to provide copies as appropriate as the hearing progresses. Such copies of statements are not part of the record and should not be opened or examined by the hearing officer except in connection with their production under Sec. 102.118(c) of the Rules and Regulations.

11426.1(c) Foreign Language Witnesses

In the event foreign language witnesses are required, the Regional Office should ensure that the appropriate arrangements are made in order to avoid unnecessary expense or delay. Sec. 11429.4.

11427 Postponement Requests

Postponements should be granted only in unusual circumstances. As indicated in Secs. 11365.3 and 11395.4, Form NLRB-4338 should have been sent to each party with the notice of hearing. The parties should be required to adhere to its requirements.

11428-11430 CONDUCT OF HEARING

11428 Hearing Procedures

11428.1 Generally

The frame of reference for the hearing on objections/challenges is the notice of hearing and order directing the hearing; the hearing officer must limit the hearing to the matters that the Regional Director has set for hearing. Sec. 11424.3(b). Material not bearing on the issues posed therein should not be offered; if offered, it should not be received.

The procedures used in a hearing on objections/challenges are similar to those used in a preelection representation case or an unfair labor practice case. Sec. 11420.

The functions and duties of the hearing officer and a representative of the Regional Director, if one is utilized, are set forth in Secs. 11424.3 and 11424.4.

11428.2 Opening Statement

At the beginning of the hearing, the hearing officer/administrative law judge should make the following statement:

The hearing will be in order.

This is a hearing before the National Labor Relations Board in the matter of _____ Case _____ pursuant to the order of the Regional Director/Board dated _____.

The Hearing Officer/Administrative Law Judge conducting this hearing is _____.

The official reporter makes the only official transcript of these proceedings and all citations in briefs and arguments must refer to the official record. In the event that any of the parties wishes to make off-the-record remarks, requests to make such remarks should be directed to the Hearing Officer/Administrative Law Judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. Exceptions automatically follow all adverse rulings. Objections and exceptions may, on appropriate request, be permitted to an entire line of questioning.

It appears from the Regional Director's/Board's order dated _____ that this hearing is held for the (limited) purpose of taking evidence concerning _____.

In due course the Hearing Officer/Administrative Law Judge will prepare and file with the Regional Director/Board his/her report and recommendations in this proceeding and will cause a copy thereof to be served on each of the parties. The procedure to be followed from that point forward is set forth in the Board's Rules and Regulations, more particularly Section 102.69 thereof.

Will counsel and other representatives for the parties please state their appearances for the record? For the Regional Director? Are there any other appearances? Let the record show no (further) response.

During these introductory remarks, the hearing officer should indicate that in the event briefs are permitted (Sec. 11430), a party which plans to order a transcript for purposes of preparing a brief should make arrangements with the reporting service contractor to obtain it on an expedited basis, by pick up, delivery or overnight mail. The hearing officer should also advise the parties that a party's request for an extension of time to file briefs based upon a delay in receipt or the nonreceipt of a transcript will normally be denied, in the event such arrangements for expedited delivery were not made by the party. The hearing officer should then continue:

You may proceed Mr./Ms. _____ (Representative of the Regional Director).

The representative, if any, should say:

I am here as Representative of the Regional Director to see that the evidence adduced during the investigation is made available to the hearing officer. 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 and all parties.

11428.3 Introduction of Formal Papers

The representative of the Regional Director, if one is utilized, should introduce the formal papers (Sec. 11426.1(a)); otherwise, they will be offered by the hearing officer or administrative law judge.

11428.4 Order of Presentation

Following the receipt of the formal papers and the explanatory statement of the representative of the Regional Director, the party that filed the objections or the party that made the challenges in question should be asked to proceed. After he/she has put in his/her case, the other parties should put in their cases.

The representative of the Regional Director normally should refrain from introducing evidence until other parties have completed their cases — and then only if the evidence involved is essential to the completeness of the record. If the information in the representative's possession warrants it, he/she should seek to impeach the testimony of witnesses called by others or contradict evidence that has been presented. Sec. 11424.4(b).

11429 Witnesses

11429.1 Board Agent Testimony

Pursuant to Sec. 102.118(a)(1) of the Rules and Regulations, Board agent testimony, if requested by a party, is prohibited without the General Counsel's written authorization. The General Counsel has delegated the authority to permit such testimony to Regional Directors, who should rule on any such requests. In ruling on such requests, the Regional Director should apply the Board's strong and longstanding policy against Agency employees appearing as witnesses in Agency proceedings. This policy is intended to avoid the appearance of partiality; unusual circumstances must be present to justify overriding the prohibition. Unusual circumstances are not present where other witnesses are available and the issues can be resolved through credibility resolutions. *Laidlaw Transit, Inc.*, 327 NLRB 315 (1999).

11429.2 Production of Statements of Witnesses

The production of statements of witnesses at a postelection hearing is governed by Sec. 102.118(c) of the Rules and Regulations. That Section provides essentially that, after a witness called by any party has testified, any statement of the witness in the possession of the Board or the General Counsel that, under Sec. 102.118(b) would be producible at an unfair labor practice hearing, should on motion of any other party be produced, in accordance with the procedures applicable in unfair labor practice hearings. The hearing officer exercises the authority that the administrative law judge would exercise at an unfair labor practice hearing. It should be noted, however, that since the statement is to be used solely for the purpose of cross-examining the witness, the party calling the witness is not entitled to production of the statement unless the circumstances would permit it to cross-examine.

11429.3 Copies of Statements of Witnesses

The representative of the Regional Director or, if there is none, the hearing officer, may be in possession of witnesses' affidavits and copies thereof (Sec. 11426.1(b)) for the purpose of their production as described in Sec. 11429.2. If such is not the case, the representative or the hearing officer should contact the Regional Office to obtain these statements as required, ensuring that the hearing is not unduly delayed by the need to have them provided from the Regional Office file.

11429.4 Foreign Language Witnesses

In the event foreign language witnesses are required, the Regional Office will secure and pay for interpreter services. Unnecessary expense and delay regarding such should be avoided. *Solar International Shipping Agency*, 327 NLRB 369 (1999); Sec. 11221.

11430 Briefs

In a hearing on challenges/objections the parties have no right to file briefs. The filing of briefs is generally to be discouraged to the extent they are unnecessary and interfere with the promptness with which postelection matters should be resolved. However, where allowed, the hearing officer has the authority to set time limits for filing. It is assumed, however, that in the interests of expeditiously resolving a representation question, no more time than is necessary will be allowed, usually 7 days.

Parties should be advised that requests for extensions of time to file briefs will not be granted by the hearing officer except under the most unusual circumstances. As is the case in preelection hearings, the hearing officer should advise the parties, at the opening of the hearing, that requests for extensions of time to file briefs based upon the unavailability or delayed receipt of transcripts will not be entertained unless arrangements were previously made with the reporting service for the expedited delivery of transcripts. Sec. 11428.2.

The representative of the Regional Director should not file a brief in a hearing on challenges/objections.

11432-11438 POSTHEARING**11432-11434 HEARING OFFICER REPORT ON CHALLENGES/OBJECTIONS****11432 Hearing Officer Report**

The order directing that a hearing on challenges/objections be held should specify that the hearing officer/administrative law judge prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations as to the disposition of each issue. The order directing hearing will specify whether the report should be served on the Regional Director or the Board. Secs. 11366.2 and 11396.2. If the hearing is conducted by an administrative law judge, the report is always submitted directly to the Board. Sec. 11424.1.

The form and content of the report will vary according to the case. Normally, it should note the occasion for the hearing (the order) and any other postelection documents that have preceded the report, narrate the background material and then recite factual findings.

Questions of credibility should be resolved, with the basis for resolution being cited. Finally, appropriate recommendations should be made to the Board or the Regional Director, whichever is appropriate. A copy of such report shall be served on all parties. Parties' exceptions to the report are discussed in Sec. 11434. If the report is filed with the Board, a copy should also be served on the Regional Director.

The hearing officer should file his/her report with the Board or Regional Director as quickly as possible after the close of hearing. Immediately upon the filing of exceptions to the report, the transcript and exhibits, bearing the case name and number, should be forwarded to the Associate Executive Secretary. OM 02-28.

11434 Exceptions to Hearing Officer Report

The order directing hearing should specify that, within 14 days of the issuance of the report, any party may file exceptions thereto with the Board (eight copies) or with the Regional Director (an original and one copy) immediately serving copies on all other parties. Secs. 11366.2 and 11396.2. If filed with the Board, a copy should be served on the Regional Director. In the absence of exceptions, recommendations in the hearing officer's report may be adopted.

11436-11438 BOARD OR REGIONAL DIRECTOR DECISION**11436 Decision**

The Board or Regional Director, as the case may be, having considered the hearing officer's report on challenges/objections and the exceptions thereto, will issue a decision.

If the decision sustains the objections in any part, an order will set aside the original election and direct a rerun election "at such time as the Regional Director deems appropriate." Sec. 11450.

Thereafter, the Regional Director should issue a notice of the rerun election that the Board or he/she has directed. Normally, the eligibility date will be the latest completed payroll period preceding the date of issuance of the notice of rerun election.

11438 Withdrawal After Election Invalidated

Between the setting aside of an election by the Regional Director or the Board and the conduct of a rerun, there may be an attempted withdrawal of the petition or a withdrawal from the election agreement or the ballot. Such an attempt is considered a postagreement/posthearing request, and the principles relevant thereto (Secs. 11098 through 11116) should be applied.

11450–11456 RERUN ELECTIONS

11450 Occasion

A rerun election is conducted when the original election is a nullity by virtue of its tallied results (Secs. 11350.1–11350.2) or because it is set aside, either by the Board or the Regional Director (Sec. 11436) or by agreement of the parties (Sec. 11391.2).

11452 Timing and Conditions

11452.1 Date of Rerun Election

The rerun election should be held when appropriate after the original election is set aside, within the terms of the enabling determination or direction. When selecting the date for the rerun election, the passage of a significant period of time between the original election and the determination or direction of the rerun may be taken into consideration. Sec. 11284.

When an election has been set aside on the basis of objections which were consolidated with unfair labor practices, the arrangements for the rerun election may be affected by the status of the unfair labor practice allegations. Sec. 11452.4.

11452.2 Terms of Rerun Election

The voting unit(s) or group(s) in a rerun election will be the same as in the original election. The payroll period determining eligibility, however, will be the latest completed payroll period preceding the date of issuance of the notice of rerun election, as set forth in Sec. 11436. The preparation and preelection check of the voting eligibility list should follow the principles applying to an original election, as set forth in Sec. 11312.1(i).

Intervention for the first time in a rerun election should not be permitted. *Waste Management of New York*, 326 NLRB 1126 (1999); *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987); *General Motors Corp.*, 17 NLRB 467 (1939).

The date, hours and place, and general conditions should be set in accord with the principles applying to an original election.

11452.3 Notice of Election

In accordance with the Board decision in *Lufkin Rule Co.*, 147 NLRB 341 (1964), the standard notice of election may be modified to include a paragraph explaining why the original election was set aside.

Where there has been a finding of objectionable conduct by the Board or Regional Director, the following language should be included upon request or where no request is made, if in the judgment of the Regional Director the situation warrants it. Also see Sec. 11407.

The language adapted from the *Lufkin* decision is as follows:

NOTICE TO ALL VOTERS

The election conducted on _____ was set aside because the National Labor Relations Board found that certain conduct of the (Employer) (Union) interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

While the Board looks favorably on granting requests to use this language in all cases where an election has been set aside and a new election directed, this should not be viewed as mandatory. Where the Regional Director determines that the use of *Lufkin* language is appropriate based upon a stipulation of the parties to void and set aside the election and to conduct a rerun election, and absent an actual finding of merit to the objections, the following language should be used:

The election conducted on _____ was set aside by mutual agreement of the parties based upon alleged objectionable conduct of the (Employer) (Union) that interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, from interference by any of the parties.

If, in the discretion of the Regional Director, *Lufkin* language is not used, the notice of election should be modified to the extent that it should explain that the election to be conducted is a "rerun of the election held on [date of original election]."

In accordance with the Board's decision in *Builders Insulation, Inc.*, 338 NLRB 793 (2003), when the originally scheduled election has been set aside through no fault of any party to the election (i.e., Board agent misconduct, weather, etc.), the standard notice of election shall be modified to include a statement that the election is being rerun for administrative reasons beyond the control of the parties to the election. Pattern language that may be utilized to accomplish this notification is:

NOTICE TO ALL VOTERS

The election conducted on _____ (date) has been set aside for administrative reasons beyond the control of any party to the election. Therefore a rerun election will be held in accordance with the terms of this notice of rerun election.

11452.4 Consolidated Representation and Unfair Labor Practice Cases

As discussed in Sec. 11420.1, objections may have been consolidated for hearing with an unfair labor practice case. If the Board sets aside the election on the basis of the

objections, while also finding merit to the unfair labor practice charge, the Regional Director should consider the impact of the meritorious charge upon a rerun election, i.e., whether a rerun election should be conducted notwithstanding a pending charge. Secs. 11730–11734. In the event the charged party petitions in the Court of Appeals for review of the Board order in the unfair labor practice case, the Regional Director should nonetheless proceed with the rerun election, if otherwise appropriate. *Graham Architectural Products v. NLRB*, 697 F.2d 534 (3d Cir. 1983).

11454 Voting Procedures

The voting procedures of a rerun election are the same as those of an original election.

11456 Count; Tally

The count and the preparation and service of the tally of ballots are the same as for an original election, except that the tally of ballots should indicate that the election is a rerun.

11456.1 Challenges

As in the case of an original or a runoff election, the number of challenges may be sufficient in number to affect the results of a rerun election. If so, the machinery to resolve challenges (Secs. 11360–11378) should be put into operation.

11456.2 Results

The results of a rerun election may call for a runoff election, but not if the original election that is being rerun was itself a severance or runoff election. There can be no runoff of a severance or runoff election.

11456.3 Objections

Objections to a rerun election are due within 7 days after the tally of ballots of the rerun election has been made available to the parties. Sec. 102.69(a), Rules and Regulations.

Conduct to be considered in connection with objections to a rerun election is that which occurred from the date of the prior election. *Singer Co.*, 161 NLRB 956 fn. 2 (1966). If the rerun election is set aside, there can be a second rerun election.

11470–11478 CERTIFICATIONS

11470 Generally

The ultimate product of a representation election is a certification. If a union has received a majority of the valid votes, a certification of representative should be issued.

EXCEPTION: Sec. 11091, Self-Determination Elections.

If a union has not received a majority of the valid votes cast, a certification of results should be issued. (Unless the contrary is indicated, the term certification will be used herein to denote either.)

Certification is not issued on the basis of any results calling for a runoff. Nor is it issued with respect to an invalid election or one in which the number of challenged votes is sufficient to affect the results. Thus, if objections are timely filed or if the number of challenged votes is sufficient to affect the results, such issue(s) must be resolved before certification can issue.

A certification issued by the Regional Director has the same force and effect as one issued by the Board.

11472 Issuance

11472.1 Election Pursuant to Consent Election Agreement

In all cases, the certification will be issued by the Regional Director.

11472.2 Election Pursuant to Stipulated Election Agreement

- (a) The certification will be issued by the Regional Director where no objections are filed (or, if filed, are withdrawn); and where challenges are not determinative of the results (or, if determinative, are withdrawn or resolved by agreement).
- (b) The certification will be issued by the Board where objections are filed or challenges are determinative of results, *except* that the Regional Director will issue a certification (if one is called for by the results) after the opening and counting of challenged ballots pursuant to an agreement of the parties or a direction of the Board, at the expiration of the 7-day period for filing objections to the revised tally only. Sec. 102.69(h), Rules and Regulations.

11472.3 Election Directed by Regional Director or Board

- (a) The certification will be issued by the Regional Director where no objections are filed (or, if filed, are withdrawn); and where challenges are not determinative of the results (or, if determinative, are withdrawn or resolved by agreement).
- (b) Objections filed or challenges determinative of results:

(1) Certification may be issued by the Regional Director in a supplemental decision based on an administrative investigation, a hearing or both. The Regional Director's supplemental decision should include the certification; issuance of the certification should not be delayed until after the expiration of the time for filing a request for review.

(2) Certification may be issued by the Board after consideration of a Regional Director's report or after consideration of a hearing officer/administrative law judge report or both.

(c) The Regional Director will issue a certification (if one is called for by the results) after the opening and counting of challenged ballots pursuant to a direction of the Regional Director or the Board, after the expiration of the 7-day objections period (if no objections have been filed to the revised tally).

11474 Form

The form of a certification will vary with the circumstances. A certification may be a separate document or may appear at the end of a report or supplemental decision on challenges and/or objections.

When the Board or a Regional Director does not rule on eligibility or unit placement prior to an election, and directs that the disputed classification be permitted to vote subject to challenge and those challenges are not determinative of the results, appropriate language should be used to indicate that the challenged classifications are neither included in nor excluded from the bargaining unit, inasmuch as no determination has been made regarding the disputed placements. Such information should be conveyed in a footnote in a certification, such as:

Note, however, that (*unit category*) are neither included in nor excluded from the bargaining unit covered by this certification, inasmuch as the Board, in denying the (employer/union)'s request for review of the Regional Director's decision in this matter, excepted the unit placement of (*unit category*) and ordered them voted subject to challenge.

In a self-determination election held among professional employees (Sec. 11091.1), appropriate language should be used. For example, whatever the majority answer may be to the first question ("Do you wish to be included with nonprofessional employees in a unit for the purposes of collective bargaining?"), a footnote on the certification of representative or certification of results (whichever applies) should convey this information.

11476 File

Regions and Subregions should maintain a permanent file of certifications issued in their cases. The file should be arranged alphabetically or by case number and should contain all certifications of representative and certifications of results issued by the Regional Director or by the Board, including certifications contained in the Regional Director's supplemental decision or in the Board's decision on challenges or objections.

In all cases, the certification should contain a unit description.

11478 Authority of Regional Director to Correct, Amend, or Revoke

11478.1 Correction

A Regional Director has authority to correct inadvertent errors in a certification, whether issued by the Board or by the Regional Director. Matters of substance must be disposed of by amendment.

11478.2 Amendment

On appropriate petition, the Regional Director may amend any certification by a decision issued with or without a hearing. Secs. 11490–11498.

Where the certification involved arose out of a consent election agreement, the Regional Director's decision on amendment shall be final.

Where the certification involved arose out of a directed election or a stipulated election agreement, the Regional Director's decision on amendment shall be final, provided that any party may file a request for review with the Board, as provided in Sec. 102.67 of the Rules and Regulations.

11478.3 Revocation

A Regional Director has authority to revoke a certification on a motion by one of the parties or on his/her own initiative, if he/she feels that revocation is appropriate in a given situation.

Where the certification involved arose out of a consent election agreement, the Regional Director's action on revocation shall be final.

Where the certification involved arose out of a directed election or a stipulated election agreement, the Regional Director's action shall be final, subject to the right of the parties to request review by the Board. A statement of the right to request review should be included in the action on revocation.

11490–11540 UC, AC, UD AND OTHER CASES

11490-11498 UC AND AC CASE PROCEDURES

11490 Generally

11490.1 UC (Unit Clarification) Petition

A UC petition is usually filed by an employer or a labor organization to clarify whether particular employees should be included in or excluded from an existing unit. The collective-bargaining representative named therein need not have been certified.

UC petitions are sometimes filed when there have been changes in the employer's operations or among the employer's employees and the parties are unable to agree whether or not the affected employees should be included in or excluded from the recognized unit. A UC petition may also be used to decide the status of individuals whose status was not determined by the Regional Director or the Board (Sec. 11474) or who voted subject to challenge in an election but whose ballots were not determinative.

11490.2 AC (Amendment of Certification) Petition

An AC petition is usually used to confirm a change in the name of the employer or labor organization involved or to reflect a change in the affiliation of the labor organization.

11490.3 Concurrent Unfair Labor Practice Charge

When a UC or AC petition and an 8(a)(2) or (5) charge raise the same issue, the UC or AC petition may be the more effective way of resolving the issue. Ordinarily, the UC or AC case should be processed while the 8(a)(2) or (5) charge is held in abeyance, unless the potential for excessively lengthy or duplicative proceedings warrants a determination to process the issue through the unfair labor practice case. Secs. 11730.5 and 11731.3.

11491 Processing UC and AC Petitions

11491.1 Initial Communications

When a petition for clarification of a bargaining unit or for amendment of a certification is filed, it must contain a description of the proposed clarification or amendment and a statement of the reasons therefor. Secs. 102.61(d)(5) and (9) and 102.61(e)(5), Rules and Regulations. If the description and the reasons are not attached to the petition when received, steps to obtain them should immediately be taken. An acknowledgment is sent to the petitioner and notification, along with a copy of the petition, is sent to all interested parties, with the name of the Board agent to whom the case has been assigned.

11491.2 Interested Parties

Interested parties consist of the employer(s) involved; the recognized or certified bargaining agent; all labor organizations and individuals who claim or are believed to claim to represent any employee within the unit involved or who would be affected by the proposed clarification, as the case may be; any labor organization that, by letter within the past 6 months, has notified the Regional Office that it represents employees of the employer involved, or is presently actively campaigning among employees of the employer; and any labor organization whose name appears as an interested party in any prior case involving the same employees that has been closed within the last 2 years.

If the interest of a party is not apparent at the outset, that party is notified of the proceeding, in the form and manner indicated above, as soon as that party's interest becomes apparent. For purposes of initial communication, it is preferable to err on the side of considering a party to be interested rather than on the side of ignoring the party. Blanket requests for notice of "all" petitions filed should not be honored.

11491.3 Information Requested

A certified labor organization should be requested to submit a copy of the certification. All parties should be requested to submit copies of any presently existing or recently expired contracts covering any of the employees. They should also be requested to notify the Board agent at once of any other interested parties, including any potential joint employers, who should be apprised of the proceedings.

11492 Investigation

11492.1 Generally

On receipt of the case, the Board agent should review the petition and any accompanying papers and check any prior related cases. With respect to any issue that may be anticipated on the basis of such examination, the Board agent should become familiar with the existing precedents. The agent should ensure that there are no fatal defects on the face of the petition and that the requested changes and the reasons therefor are described. Sec. 11491.1.

In many UC cases, the information needed to determine the matter can be obtained through a telephone investigation and the submission of documents, although occasionally it may be necessary to take one or more affidavits from individuals with information about the facts involved. A notice to show cause may also be utilized. The Board agent should advise the parties that the determination as to the future course of the case may be made on the basis of the investigation, without the need for a hearing. Sec. 102.63(b), Rules and Regulations. He/she should prepare the parties for issuance of the Regional Director's decision without hearing or, if necessary, for issuance of notice of hearing. Explaining, if necessary, the need for promptness, the Board agent should inform the parties that if a hearing is to be held the notice will issue promptly.

11492.2 Lack of Cooperation

In the event of lack of cooperation in investigating the petition, a factual dispute should be resolved against the noncooperating party. Thus, failure of petitioner to make facts available should result in issuance of a decision and order dismissing the petition. Sec. 11494.

Failure of other parties to furnish information on a given point should lead to acceptance of credible information that is available on that point.

11492.3 Withdrawal

If it appears that a question concerning representation exists, or if for any other reason it appears that the case would ultimately be dismissed, the petitioner should be made aware of such and a withdrawal request should be solicited. If a withdrawal is not received, a decision and order dismissing the petition should issue. Sec. 11494.

11493 Amendment

The petitioner on its own initiative and irrespective of developments in the pending investigation may add to or delete from its original or last amended petition. Assistance to the extent permitted in connection with the original petition may be rendered in connection with the filing of such amendments.

A petition is amended by typing "Amended" (or "Second Amended," "Third Amended," etc.) before the word "Petition" on the regular petition form and by rewriting the contents of the petition to include the desired changes. An amendment merely referring to the existing petition and stating what is being added to or dropped from the petition should not be used. Whenever amended petitions are filed, all interested parties should be notified of the effected change.

An amendment filed after the dismissal of a petition should be docketed as a new petition, no matter how titled, and assigned a new number.

11494 Regional Determination

At the earliest point possible, the Regional Director should determine the case. The Regional Director's determination should be set forth in a decision or a decision and order. A decision may amend a certification or clarify a bargaining unit; a decision and order may dismiss a petition. These actions may be taken after issuing a notice to show cause, after an administrative investigation without a hearing or after a hearing. If the unit involved was certified pursuant to a consent election agreement, the decision is final. Otherwise, the decision should include a footnote advising the parties of their right to file a request for review with the Board. Sec. 102.63(b), Rules and Regulations. Copies of the decision should be sent to the petitioner and all other parties or their representatives. Sec. 11006.

11495 Hearing

If hearing is indicated, all hearing and posthearing procedures, insofar as applicable, shall be in conformance with instructions governing representation case proceedings (Secs. 11140–11274), except that where the certification of the unit involved arose out of a consent election agreement, the Regional Director’s decision shall be final with no right of the parties to request review (Sec. 11494).

11496 Patterns

11496.1 Pattern Dismissal of UC Petition

DECISION AND ORDER

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer’s rulings made at the hearing are free from prejudicial error and are affirmed.

[OR, if no hearing conducted: Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, careful investigation and consideration took place.]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the Regional Director finds:

- (1) The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- (2) The Petitioner proposes to clarify the bargaining unit as follows:
- (3) Clarification of the bargaining unit is not warranted inasmuch as

ORDER

The petition filed in this matter is dismissed.

Dated _____ At _____

Regional Director, Region ____

11496.2 Pattern Dismissal of AC Petition**DECISION AND ORDER**

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

[OR, if no hearing conducted: Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, careful investigation and consideration took place.]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the Regional Director finds:

- (1) The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- (2) The Petitioner proposes to amend the certification as follows:
- (3) Amendment of the certification is not warranted inasmuch as

ORDER

The petition filed in this matter is dismissed.

Dated _____ At _____

Regional Director, Region ____

11496.3 Pattern Decision and Clarification of Bargaining Unit**DECISION AND CLARIFICATION OF BARGAINING UNIT**

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

[OR, if no hearing conducted: Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, careful investigation and consideration took place.]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the Regional Director finds:

(1) The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

(2) The Petitioner proposes to clarify the bargaining unit as follows: [also in this section set forth the applicable facts, discussion, and law]

(3) Accordingly, the [position of/job classification of] is [excluded from/included in] the bargaining unit.

Dated _____ At _____

Regional Director, Region ____

11496.4 Pattern Decision and Amendment of Certification

DECISION AND AMENDMENT OF CERTIFICATION

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[OR, if no hearing conducted: Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, careful investigation and consideration took place.]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the Regional Director finds:

(1) The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

(2) The Petitioner proposes to amend the certification as follows: [also in this section set forth the applicable facts, discussion, and law]

(3) Accordingly, the Certification of Representative issued on [date] in Case [number] should be, and it hereby is, amended as follows: by substituting [name] as [Employer] [certified union].

Dated _____ At _____

Regional Director, Region ____

11498 Transmission of Regional Director Decision to Washington

The decision should be forwarded to Washington by electronic submission pursuant to Memorandum OM 99-7 (January 22, 1999).

11500–11516 UD CASE PROCEDURES

11500 Objective

The objective of a UD (Union Deauthorization) — or 9(e)(1) — case is to determine whether or not a majority of the eligible employees within a voting unit covered by an agreement between their employer and a labor organization, which is the exclusive representative of such employees, desire to rescind the authority of such labor organization to require, under such agreement, that employees make certain lawful payments to that labor organization in order to retain their jobs. The Board modified the language on the UD ballot from the literal language of Section 9(e)(1) after the decision of the Supreme Court in *Communications Workers v. Beck*, 487 U.S. 735 (1988).

11502 Initiation

A UD case is initiated by the filing of a petition alleging that the employees covered by a union-security clause desire to rescind the authority to maintain such a clause. Prefiling assistance is discussed in Sec. 11001, especially Sec. 11001.7.

11504 Initial Notification and Service

Upon docketing of the petition, the employer and union involved should be notified in writing of the filing. The notice should give the name of the Board agent to whom the case has been assigned; define the unit named in the petition; invite the parties' cooperation; request of the employer commerce information and a current list of the names and classifications of eligible voters; and request of both the employer and the union copies of the current or recently expired contract and any relevant correspondence.

11506 Investigation

11506.1 Generally

In almost all UD cases, the information needed to determine the matter can be obtained through a telephone investigation and the submission of documents, although occasionally it may be necessary to take one or more affidavits from individuals with information about the facts involved. A hearing is very rarely required in a UD case. Sec. 11506.8. The Board agent should advise the parties that the determination as to the future course of the case will most likely be made on the basis of an investigation, without the need for a hearing.

11506.2 Question Concerning Representation Precludes Processing

No UD petition will be investigated while a question concerning representation of the employees involved is pending. If a timely representation petition is filed, a concurrent UD petition should not be dismissed until the Regional Director or the Board actually finds that a representation question exists or until the parties so agree by signing an election agreement in the R case. Meanwhile, the investigation should be suspended.

11506.3 Concurrent Unfair Labor Practice Charge

The effect of a concurrent unfair labor practice case is found at Secs. 11730–11734.

11506.4 Jurisdiction

With respect to exercising jurisdiction in UD cases, the principles to be applied are the same as those applied to other types of cases. Subject only to unamended errors on the face of the petition, jurisdiction constitutes the first issue to be disposed of in the investigation.

11506.5 Evidence in Support of Petition

A requirement of Section 9(e)(1) of the Act for the processing of a UD petition is the presentation of a petition by at least 30 percent of the covered employees asking that the union-security authorization be rescinded.

The showing requirement will be satisfied for a petitioner in a UD case if he/she has submitted cards or a signature list in support of the petition. The showing of interest for a UD petition need not be in the precise language of the Act; it is sufficient if the intent is clear. Sec. 11001.7.

NOTE: The language on a list of signatures to be used as the showing of interest in support of a RD petition may not ordinarily be used as a showing of interest in support of a UD petition, or vice versa.

The evidence should be submitted with the petition. If it is not, a 48-hour notice should be given by the Regional Director; if the proof is not submitted within that period, the petition may be dismissed.

Where applicable, the procedures and principles outlined for establishing a showing of interest in R cases should be followed. Secs. 11020–11034.

The file should contain a memo or Form NLRB-4069 showing the results of the interest investigation.

In seasonal industries, although no election may be held until a representative number of employees are employed, the UD petition will be accepted for filing before the season commences and proof of interest may be based on the total number of permanent employees working at the time the petition is filed or on some other reasonable formula that satisfies the spirit of the showing requirement. Sec. 11027.5.

11506.6 Union-Security Clause

The existence of a union-security clause is a prerequisite in a UD case. It is not necessary, however, that the clause be a lawful one; to hold otherwise would serve to defeat the intent of Congress.

11506.7 Contract as Bar

The existence of a contract with a union-security clause is a prerequisite to proceeding in a UD case. Hence, the Board has consistently held that the normal contract-bar principles are not applicable to UD petitions.

11506.8 Bargaining Unit

The unit covered by a UD petition should be the same as the contractually defined unit. On the other hand, if the former differs from the latter only in the descriptive terms used but not in substance, the petition should not be dismissed; if there is substantial variation between the two, the case should be put before the Regional Director by hearing if it appears that the UD unit is an appropriate one and the contract unit is not.

11508 Regional Determination

11508.1 Basis of Disposition

The Board agent should ascertain, as early as possible, the facts as to the various issues and should recommend dispositive action.

If the precedents for formal proceedings are not met, the petition should be dismissed, absent withdrawal, with opportunity for appeal to the Board. Sec. 11100.

If further processing is appropriate, efforts should be made to obtain an election agreement. However, processing of the petition should not be delayed by such efforts.

11508.2 Direction of Election by Regional Director

If the parties do not promptly enter into an agreement, the Regional Director should, in most situations, have the necessary election arrangements made and issue a letter directing that an election be held.

EXCEPTION: Sec. 11506.8.

There is no provision for filing a request for review of a letter directing a UD election and none should be provided. Sec. 102.85, Rules and Regulations.

Directions of election issued by the Regional Director should carry an *Excelsior* footnote. Secs. 11312–11313.

NOTE: Since a majority of those eligible to vote, rather than a majority of those voting, determines the outcome of a UD election (Sec. 11512), it is especially important that provision be made for checking the list of eligible voters with the parties in advance of the election.

Copies of the notice of election should be prepared and enclosed with the direction of election. Sec. 11314. The requirement that the employer must post the official notice of election for 3 full working days prior to the date of the election should be noted. Sec. 11314.7(a); Sec. 103.20, Rules and Regulations. The correspondence sent to the employer should contain sufficient extra copies for posting at the employer's premises.

11508.3 Pattern Direction of Election

Petitioner

Date _____

Employer

Union

Re: [Case Name]

Sir/Madam:

On the basis of the investigation made to date in the above matter, it appears appropriate now to conduct a secret-ballot election to determine whether or not certain of the employees of [employer name] wish to withdraw the authority of [union name] to require, under its agreement with their employer, that employees make certain lawful payments to the union in order to retain their jobs.

Accordingly, pursuant to Section 9(e)(1) of the National Labor Relations Act, as amended, and Section 102.85 of the Board's Rules and Regulations, an election by secret ballot will be conducted as provided in the enclosed notice of election.¹

¹ 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 that may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the full names and addresses of all the eligible voters, must be filed by the Employer with the undersigned within seven days of the date of this Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, 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. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of _____ copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall, or by department, etc.).

Additional copies of the notice of election are herewith furnished the employer for posting in conspicuous places throughout the plant. Your attention is directed to Section 103.20 of the Board's Rules and Regulations, which provides that the Employer must post the Board's official Notice of Election at least three (3) full working days before the date of the election, excluding Saturdays, Sundays and holidays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

If you have any questions, please contact (Board agent).

Your cooperation will be appreciated.

Very truly yours,

Regional Director

11510 Prehearing and Hearing Procedures

Only in rare cases will issuance of a notice of hearing be warranted, since the voters are all those covered by the union-security clause and substantial issues rarely exist. Sec. 11506.8. Where a notice of hearing issues, the prehearing and hearing procedures are the same as those for R cases. Secs. 11140–11275.

11512 Election

Whether agreed or directed, election procedures are the same. Except to the extent indicated below, they are the same as those applicable to R case elections. Secs. 11300–11456.

Since in UD elections, a *majority of those eligible to vote* must vote for rescission of authority before a certification rescinding such authority will be issued, it is important that the eligibility list be checked in advance with the parties. Sec. 11508.1.

NOTE: Persons who are ill, on vacation, or temporarily laid off, but not employees in the armed services who do not actually appear to vote in person, will be included as “eligible” employees.

The question on the ballot should be, “Do you wish to withdraw the authority of your bargaining representative to require under its agreement with the employer that employees make certain lawful payments to the union in order to retain their jobs?”

11514 Postelection Procedures

Postelection procedures in UD cases, including investigation and disposition of challenges and objections (Secs. 11360–11407), follow the same general course as those applicable to elections in R cases.

11516 Certification of Results

At the conclusion of the case, a certification of results of union deauthorization election issues.

11516.1 Certification of Results of Election

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

[Type of Election]

(name of party)

Employer

and

Case

(name of party)

Petitioner

and

(name of party)

Union

CERTIFICATION OF RESULTS OF ELECTION

Following the filing of a petition, pursuant to Section 9(e) of the National Labor Relations Act, as amended, an election was conducted herein under the supervision of the Regional Director for the National Labor Relations Board. No objections were filed to the conduct of the election or to the tally of ballots.

Pursuant to the authority vested in the undersigned by the National Labor Relations Board.

It is certified that a majority of employees eligible to vote has (not) voted to withdraw the authority of (name of union) to require, under its agreement with the Employer, that employees make certain lawful payments to that labor

organization in order to retain their jobs in conformity with Section 8(a)(3) of the Act, as amended.

Signed at _____, this _____ day of _____.

Regional Director for Region _____

National Labor Relations Board

11520-11540 OTHER CASES

11520 Last-Offer Elections

Preparations for and conduct of elections held under Section 209(b) of the Labor Management Relations Act, 1947 (Title II—National Emergencies) should be undertaken pursuant to advice provided by the Division of Operations Management on a case-by-case basis.

11540 Certification of Representative Under FLSA

Under Section 7(b) of the Fair Labor Standards Act (FLSA), a union (including labor organizations representing Federal, state, or local government employees) may seek certification as a bona fide representative of a given group of employees. The procedure to be followed is set forth below.

- (a) Petition Form NLRB-1026 should be filed in the appropriate Regional Office by the labor organization seeking the certification; and the Regional Office should give the case a W.H. number.
- (b) At the time the petitions are filed for the bona fide certification, the Regional Office should request a copy of the current or most recent contract between the labor organization and the employer.
- (c) The Region should ascertain whether there is a certification as exclusive bargaining agent outstanding.
- (d) The Regional Office should issue a notice to show cause as to why the petitioned for certification should not issue, which should be posted on the employer's premises and sent to all interested parties. Responses to the notice to show cause should be filed with the Regional Director within 14 days or any other time period as set forth in the notice.
- (e) If there is no response to the notice, the Regional Director should send the file to the Board with the Regional Director's recommendation.
- (f) If there is a response to the notice to show cause that raises issues sufficient to go to a hearing, a hearing officer should be assigned who, at the conclusion of such hearing, makes a written report without recommendation. The Regional Director reviews the report and record and makes a recommendation to the Board and the report and record are transmitted to the Board, which will decide whether or not to issue the certification. Procedures in such hearing

will be similar to representation proceedings with the burden on the moving party.

A certificate of bona fides for purposes of the FLSA does not necessarily establish the right of the organization so certified to be recognized as the exclusive bargaining representative of the affected employees under the provisions of the NLRA.