

2. REGIONAL DIRECTORS' DECISIONMAKING AUTHORITY IN REPRESENTATION CASES

A major milestone in the history of the National Labor Relations Board was the 1959 change in the Act which permitted the Board to delegate its decisionmaking authority in representation cases to the Regional Directors. This delegation, its scope, specific powers, the finality of Regional Directors' decisions, and the procedure for transfer and review to the Board are treated here.

2-100 Statutory and Administrative Delegation

188-2000

188-6067-6050

393-0167-5000

The National Labor Relations Act was amended on September 14, 1959, by the addition of the following language in Section 3(b):

The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

On May 4, 1961, the Board published in the *Federal Register* a statement describing the delegation to the Regional Directors pursuant to the amendment of Section 3(b). This grant of authority became effective with respect to any petition filed under subsection (c) or (e) of Section 9 of the Act on or after May 15, 1961. The principal effect of the delegation was to permit Regional Directors to decide representation cases. This had previously been done only by the Board in Washington.

The grant of authority under the amendment to Section 3(b) of the Act was initially challenged in *Wallace Shops*, 133 NLRB 36 (1961). It was contended in that case that the Board, in delegating its Section 9 powers to its Regional Directors, had exceeded the authority vested in it by Section 3(b) of the Act, and that, in amending its Rules and Regulations and Statements of Procedure, the Board failed to conform to the requirements of the Administrative Procedures Act, 5 U.S.C.A. § 1001. Rejecting both contentions, the Board held:

1. The task of interpreting the Act is a function vested in the Board, with power of review in the courts, and the Board did not exceed the authority granted to it by the amendments to Section 3(b).
2. The delegation which the amendments to the Rules and Regulations and Statements of Procedure were designed to implement involves only the Board's powers over proceedings for the certification of employee representatives. Section 5 of the Administrative Procedure Act, 5 U.S.C.A. § 1004, by its terms expressly exempts such proceedings from the provisions of Sections 5, 7, and 8, which deal with adjudications, hearings, and decisions.
3. Section 4(c) of the Administrative Procedure Act applies only to substantive rules, and, since these amendments were procedural and organizational, Section 4(c) did not apply.

A similar challenge, in the form of contentions that the delegation of decisionmaking authority to the Regional Directors in representation cases was unconstitutional and Section 3(b) as amended in this respect and the Board's Rules and Regulations were in conflict with the Administrative Procedure Act, was rejected by the Board in *Weyerhaeuser Co.*, 142 NLRB 702 (1963), citing *Wallace Shops*, supra.

Acting Regional Directors have the same authority as the Regional Directors in whose stead they are designated to serve. *Korb's Trading Post*, 232 NLRB 67, 68 fn. 3 (1977).

A State court sustained the validity of the Board's delegation of authority. In *Pennsylvania Labor Relations Board v. Butz*, 411 Pa. 360, 192 A.2d 707 (1963), the lower court held that the National Labor Relations Board itself, rather than a Regional Director, must make the decision to decline jurisdiction. The Supreme Court of Pennsylvania reversed the lower court, at 192 A.2d 7115:

The National Board, with statutory authority, properly delegated to the Director its authority to decline jurisdiction and, the Director having made a final determination in accordance with proper procedure, the federal jurisdiction over the instant labor matter was suspended.

2-200 Scope of Authority

378-0140

393-6081-2000 et seq.

393-6034-1400

Since the effective date of the delegation, the Regional Directors have exercised the authority contemplated by the statutory amendment to decide whether a question concerning representation exists, to determine the appropriate bargaining unit, and to direct elections to determine whether employees wish union representation for collective-bargaining purposes. They also rule on petitions to rescind union-security authorizations and on motions to clarify, amend, or rescind a certification resulting from a petition filed after the date the delegation went into effect. Such action by the Regional Director is final and binding on the parties, subject to a review procedure.

The powers granted to Regional Directors include the issuance of such decisions, orders, rulings, directions, and certifications as are necessary to process any petition. Thus, they may dispose of petitions by administrative action, by formal hearing and decision, or by stipulated election agreements; pass on rulings made at hearings, including motions to dismiss petitions, and on requests for extensions for filing of briefs beyond the time granted by the Hearing Officer; rule with respect to showing of interest, waivers, disclaimers, withdrawals, or current charges; and entertain motions for reconsideration and oral argument. See *Pentagon Plaza*, 143 NLRB 1280 (1963), which makes clear that, under the delegation of decisionmaking authority in representation cases, Regional Directors have the same authority as the Board, in cases which they decide, to reconsider their decisions. See also *Air Lacarte, Florida, Inc.*, 212 NLRB 764 (1974), in which the Board affirmed the Regional Director's reconsideration of a representation case based on new evidence.

A Regional Director may also consider alternative units when a petitioner expresses a willingness to proceed to an election in any unit found appropriate. *Acme Markets*, 328 NLRB 1208 (1999).

Election arrangements, e.g., dates and places of elections, mail ballots etc., are within the discretion of the Regional Director. *Manchester Knitted Fashions*, 108 NLRB 1366 (1954); *Halliburton Services*, 265 NLRB 1154 (1982), and *Odibrecht Contractor of Florida*, 326 NLRB 33 (1998).

In *T & L Leasing*, 318 NLRB 324 (1995), the Board held that Regional Directors must, absent special circumstances, honor the terms of a Stipulated Election Agreement.

The Board's Rules and Regulations were amended to effectuate the terms of the 1961 grant of authority to the Regional Directors. Subpart C, Sections 102.60 through 102.72, inclusive, details the "procedure under Section 9(c) of the Act for the determination of questions concerning representation of employees and for clarification of bargaining units and for amendment of certifications under Section 9(b) of the Act." See also Rules and Regulations, Sections 102.77(b); 102.80(a); 102.85; and 102.88. The Board's Statements of Procedure, Sections 101.2101.21; 101.23; 101.28; and 101.30 were similarly revised.

2-300 Other Specific Powers Under the Delegation

188-8067

393-6081-2000 et seq.

393-7077-2000 et seq.

393-7022-1700

In the course of the normal decisional process, the Board has from time to time spelled out other specific forms of authority which may be exercised by the Regional Directors under the delegation. Some of these are:

1. The question of whether a continuance is to be granted and its extent is a matter within the sound discretion of the Regional Director. See *Power Equipment Co.*, 135 NLRB 945 fn. 1 (1962), for a full discussion.

2. The jurisdiction of the Regional Director in making postelection investigations is not limited to the specific issues raised by the parties. *Carter-Lee Lumber Co.*, 119 NLRB 1374, 1376 (1958).

3. The Regional Director's staff is merely carrying out its duties when, in connection with having a petitioner withdraw its single-employer petition, it tells the petitioner of the existence of a multiemployer bargaining history involving the named employers. This is not improper assistance to the petitioning union. *Dittler Bros., Inc.*, 132 NLRB 444 (1961); see Statements of Procedure, Section 101.18.

4. When the Regional Director has consolidated a complaint case and an objections-to-election case and the consolidated proceeding comes to the Board for review, the Board may rule on the complaint, but sever the representation case and remand it to the Regional Director. See, for example, *Collins & Aikman Corp.*, 143 NLRB 15 (1963).

5. A Regional Director has delegated authority to deny a request for enforcement of a subpoena. Such a request was therefore properly referred by the hearing officer to the Regional Director rather than the Board. *Northern States Beef*, 311 NLRB 1056 (1993).

6. A Regional Director does not have authority to vary the terms of a Stipulated Election Agreement, absent special circumstances. *T & L Leasing*, supra.

2-400 Finality of Decisions

393-6081-4067

596-0175-5025 et seq.

After the delegation of decisional authority in representation cases to the Regional Directors became effective, the question was raised whether to continue the policy in existence at that time that, in the absence of new or previously unavailable evidence, the Board will decline to reconsider matters determined in a prior representation case in a subsequent refusal-to-bargain unfair labor practice proceeding. The Board held that the policy will continue to govern under the delegation. Thus, where a representation petition had been processed by the Regional Director under Section 3(b) and the Board had denied a request for review of the decision and direction of election, relitigation of the issues raised in the request for review was not permitted in a later unfair labor practice proceeding involving an alleged violation of Section 8(a)(5). *Mountain States Telephone Co.*, 136 NLRB 1612, 1613 (1962). In *Hafadai Beach Hotel*, 321 NLRB 116 (1996), the Board noted that this was not limited to refusal to bargain cases. In *Hafadai*, supra, the Board precluded the relitigation of jurisdiction. See also *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921 (1997), where the issue was supervisory status. Accord: *Premier Living Center*, 331 NLRB 123 fn 5 (2000).

Compare *Union Square Theatre Management*, 326 NLRB 70 (1998), relitigation permitted of employee status of technical directors in a subsequent 8(a)(1) and (3) case. Later affirmed at 327 NLRB 618 (1999).

Section 102.67(f) of the Rules and Regulations, provides in part: "Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

The Board's practice was affirmed by the Supreme Court in *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971). The Court concluded that the 3(b) amendment was enacted for the purpose of expediting the final disposition of the Board's caseload, and this delegation of authority reflects the considered judgment of Congress that the Regional Directors "have an expertise concerning unit determination" sufficiently comparable to the Board's expertise and that such determinations may be left primarily to the Regional Directors, subject to the Board's discretionary review.

A Regional Director's finding in an "R" case can have "persuasive relevance" in an unfair labor practice case subject however to reconsideration and additional evidence. *Dole Fresh Vegetables*, 339 NLRB 785 (2003).

When an agreement for a consent election provides that the determinations of the Board's Regional Director shall be final and binding, the courts have consistently held that "such a determination is conclusive and cannot thereafter be questioned unless the Regional Director acts arbitrarily or capriciously or not in line with Board policy or the requirements of the Act." *NLRB v. United Dairies*, 337 F.2d 283, 286 (10th Cir. 1964). In the absence of fraud, misconduct, or gross mistake, the Regional Director's decision is final, even though the Board might have reached a different conclusion in the first instance. *General Tube Co.*, 141 NLRB 441, 445 (1963). These cases, it should be noted, were decided after the effective date of the delegation.

The Board accords finality to a Regional Director's decision where the Board Members are equally divided and there is no majority to grant review. *United Health Care Services*, 326 NLRB 1379 (1998), and *Rapera, Inc.*, 333 NLRB 1287 (2001).

In a representation proceeding, the Regional Director's consent to the withdrawal of a representation petition, on the ground that the exercise of jurisdiction by the National Labor Relations Board would not effectuate the policies of the National Labor Relations Act, constitutes a sufficient declination of jurisdiction to permit a State board to assume jurisdiction. *Pennsylvania Labor Relations Board v. Butz*, supra, 192 A.2d 707, 714.

2-500 Transfer and Review

393-6048

393-6081-4000 et seq.

The Regional Director may transfer a case to the Board for initial decision at any time before decision. This may occur prior to the hearing, during the hearing, or after the hearing. Whether a particular case should be transferred is a matter to be determined by the Regional Director, although Board policy is to discourage these transfers. It is also within the discretion of the Regional Director to inform the parties of the reason for transferral.

Parties to a representation case may request the Board to review any action of the Regional Director taken pursuant to the authority under Section 3(b). Neither the filing of a request for review, nor the granting of review, will stay the Regional Director's decision, unless otherwise ordered by the Board. Absent an order from the Board, the ballots in question will be impounded. See Section 102.67(b) of the Board's Rules.

Review of actions of Regional Directors may be sought only in any of the following situations:

1. Where a substantial question of law or policy is raised because of the absence of, or departure from, officially reported precedent.
2. Where a Regional Director's decision on a substantial factual issue is clearly erroneous, and such error prejudicially affects the rights of a party.
3. Where the conduct of a hearing in an election case or any ruling made in connection with the proceeding has resulted in prejudicial error.
4. Where there are compelling reasons for reconsideration of an important Board rule or policy.

With respect to the second ground, and other grounds where appropriate, the request must contain a summary of all evidence or rulings bearing on the issues, together with page citations from the transcript and

a summary of the argument. But such request may not raise any issue or allege any facts not timely presented to the Regional Director.

Failure to request review precludes the relitigation, in any related subsequent unfair labor practice proceeding, of any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review constitutes an affirmance of the Regional Director's action; this also precludes relitigation of any such issues in any related subsequent unfair labor practice proceeding.

See the Board's Rules and Regulations, Section 102.67.

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The reader can find more complete information on related representation matters as follows:

- Election Procedures—Chapter 22
- Conduct of Elections—Section 24-400.
- Objection Procedures—Section 24-100