

I. INTRODUCTION

This manual is intended to give guidance to hearing officers and to serve as a reference source for them when conducting preelection, postelection and Section 10(k) hearings. Included in the manual are procedural guidelines to follow in preparing for and conducting the hearing, substantive issues to be covered at the hearing and suggested questions and/or areas of inquiry to be explored on various issues. This manual should supplement the prehearing preparation of hearing officers, not take the place of that preparation.

The R case hearing is a formal proceeding, the purpose of which is to adduce record evidence on the basis of which the Board may discharge its duties under Section 9 of the Act. As such, it is investigatory, intended to make a full record, and nonadversarial.

As a formal proceeding, an R case hearing should be conducted at a place conducive to the maintenance of a judicial atmosphere. If it cannot be held in a Regional Office hearing room, it should be held, if possible, in a courtroom. If the space secured proves inadequate or accommodations are poor, the Board agent should take remedial action, if possible. At the hearing, the conduct of the parties should be dignified, both on and off the record. Smoking is prohibited.

The R case hearing is conducted by a hearing officer who is normally a Board agent from the Region in which the hearing is held. The hearing officer is not an advocate of any position and must be impartial in his/her rulings and in conduct both on and off the record. The hearing officer's role is to guide, direct and control the presentation of evidence at the hearing. NLRB Casehandling Manual, Part Two, Representation Proceedings (CHM) Sections 11187–11188. The hearing officer ensures that a full and complete record is obtained, upon which the Regional Director can make a decision regarding the issues. While the record must be complete, it is also the duty of the hearing officer to keep the record as short as is commensurate with its being complete. This also minimizes the significant costs associated with a hearing.

In a preelection hearing, the hearing officer does not make any recommendations or participate in any phase of the decisional process. He/she may or may not be the same agent who handled earlier or who may handle later phases of the same case.

In a postelection hearing, the hearing officer makes credibility resolutions, findings of fact, conclusions of law and recommendations to either the Regional Director or the Board. Since those determinations must be based solely on the record made in the hearing, he/she may not be the same agent who handled any phase of postelection processing of the case.

A. Prehearing Preparation

The hearing officer must fully prepare for the hearing. In advance of the hearing, the hearing officer should be aware of all issues in the case and of the types of information generally bearing on such issues, in order to prepare properly to conduct the hearing. In the context of a preelection hearing, the hearing officer should have a meeting with the appropriate Regional management and/or supervisory personnel in advance of the hearing to discuss the issues that may be raised and develop a plan for the conduct of the hearing.

Prior to a scheduled hearing, the basic facts with respect to each potential issue should be secured and the relevant issues should be researched. The hearing officer should discuss with the parties the critical issues, the law and the likelihood of the parties' positions prevailing. Attempts should also be made to arrive at a firm commitment regarding an election agreement. In this regard, it is the Agency's policy to make every effort to secure an election agreement whenever possible to avoid the delay and expense of a hearing.

Where an employer has refused to cooperate in providing commerce information prior to the hearing or has indicated that it will not voluntarily do so at the hearing, the Regional Director will have issued a subpoena as part of the prehearing preparations. *Tropicana Products*, 122 NLRB 121 (1958). See sample *Tropicana* subpoena language in Appendix D. The Regional Director's issuance of a subpoena of commerce information prior to the hearing is a proper basis for utilization of the *Tropicana* rule, i.e., if an employer refuses to comply with a *Tropicana* subpoena, the hearing officer may secure secondary evidence to establish that the employer is engaged in more than de minimis interstate commerce, rather than seek enforcement of the *Tropicana* subpoena. See Section IV, A, Jurisdiction, for examples of appropriate secondary evidence. See also Section II, B, 5, *Tropicana* Subpoenas.

B. Hearing Preparation

1. Review CHM Sections 11010 (Initial Investigation) through 11124.4.
2. Make sure that all known or potential parties, intervenors or parties in interest have been contacted and/or served with a notice of hearing (NOH). Check for other labor organizations or other employers involved. *Croft Metals, Inc.*, 337 NLRB No. 106 (2002) (all parties must receive the NOH at least 5 working days prior to the hearing, absent unusual circumstances or waiver).
3. Research prior cases involving the same employer and other cases involving similar issues.
4. Contact parties and attempt to work out all details for a consent/stipulated election agreement.

INTRODUCTION

- (a) If agreement is reached, notify supervisor immediately.
 - (b) When contacting parties, obtain correct names and addresses of parties.
5. If agreement cannot be reached, question parties regarding the following hearing data:
- (a) Stipulations concerning: jurisdictional facts and concessions of jurisdiction, labor organization, questions concerning representation (QCR), history of bargaining, unit scope and unit composition. (Explore written stipulations. See Section D, below.)
 - (b) Availability of list of employee classifications, inclusions and exclusions.
 - (c) Issues that will be raised at hearing.
 - (d) Availability of documents, evidence and witnesses to support positions.
 - (e) Evidence and witnesses to support case should a party refuse to cooperate.
 - (f) Subpoenas. (See Section II, B, Subpoenas.)
 - (g) Need for an interpreter.
 - (h) If a party is unrepresented, see I, G, Unrepresented Parties.
6. Check date, time, and place of hearing. Verify arrangements for hearing room and court reporter. Secure court reporter's telephone number.
7. Examine formal papers for completeness and accuracy of documents.
8. Review case file thoroughly, noting issues and legal and procedural problems.
9. Discuss with his/her supervisor the issuance of subpoenas to obtain, for example, jurisdictional information in *Tropicana* situations (122 NLRB 121 (1958)) or position descriptions, in situations when supervisory status is in issue.
10. Prepare hearing outline.

C. Materials for Hearing

The hearing officer should have a kit that contains all of the materials set forth below:

1. Specific

- (a) Case file.
- (b) Formal papers, ready for introduction as exhibits, including:
 - (1) Petition and/or amended petition(s).
 - (2) Notice of representation hearing and affidavit of service.
 - (3) Notice of postponement (if any) and affidavit of service.
 - (4) Any other prehearing motions, orders or documents properly included in the formal papers.
- (c) Original and copy of appearance sheet (Form NLRB-1801).
- (d) Close of R Case Hearing (Form NLRB-856)—two copies.
- (e) Board Exhibit 2—Pre hearing stipulation form (See Appendix A)

2. General

- (a) Board's Rules and Regulations.
- (b) NLRB Casehandling Manual, Part Two, Representation Proceedings.
- (c) Guide for Hearing Officers in NLRB Representation Proceedings.
- (d) An Outline of Law and Procedure in Representation Cases.
- (e) Extra copies of Statement of Standard Procedures in Formal Hearing Held Before the National Labor Relations Board Pursuant to Petition Filed Under Section 9 of the National Labor Relations Act, as Amended (Form NLRB-4669).
- (f) Copies of blank subpoenas, ad testificandum and duces tecum.
- (g) Copies of blank appearance sheets (Form NLRB-1801).
- (h) Copies of blank consent election forms - Agreement for Consent Election (Forms NLRB-651 and 4931) and Stipulated Election Agreement (Forms NLRB-652 and 4932). (The basic difference between the consent agreement and the stipulated election agreement is that questions that arise after the election are decided by the Regional Director in a consent election and by the Board in a stipulated election.)
- (i) Withdrawal Request (Form NLRB-601).
- (j) Request to Proceed (Form NLRB-4551).
- (k) Copies of blank Report on Investigation of Interest (Form NLRB-4069).
- (l) Copies of blank R Case Petition (Form NLRB-502).
- (m) Copies of blank Report of Obligated Cost of Hearing Held or Hearing Canceled (Form NLRB-4237).
- (n) Telephone numbers of appropriate Regional personnel and Court Reporter.
- (o) Envelopes of various sizes addressed to the Regional Office.
- (p) Pencils and writing pad.

D. Prehearing Conference

Prior to the hearing, the hearing officer should prepare a *written* stipulation, for signature by the parties at the hearing, that covers all of the generally uncontested issues for hearings, i.e., the correct names of the parties, labor organization status, commerce information, etc., as well as any other issues that are known not to be in dispute, such as contract bar, bargaining history, demand for and refusal of recognition, etc. A sample stipulation appears as Appendix A. Preparation of such a stipulation prior to the hearing can save reporting costs and provide accurate information, while avoiding typographical and other errors that the transcript may contain as to details. Such a stipulation, once signed by the parties, should become a Board exhibit, usually Board Exhibit 2, and should be entered into evidence after the introduction of the formal papers (Board Exhibit 1; CHM Section 11192).

Prior to opening the hearing, the hearing officer should conduct a prehearing conference to determine the positions of the parties and discuss procedural matters. During the conference, the parties and the hearing officer can fully explore all potential areas of agreement in order to eliminate or limit, to the extent possible, litigation of unnecessary issues and the significant costs associated with a formal hearing. The parties should be encouraged to share information and documents at the conference. The

INTRODUCTION

likelihood of parties' positions prevailing should be candidly discussed. If agreement is not reached, every effort should be made to narrow the issues that remain for the hearing. The hearing officer should also discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited.

During the prehearing conference, the hearing officer should inform the parties that where issues are raised involving a presumption under Board law, the party seeking to rebut that presumption has the burden of proof. If a party raises statutory exclusions, such as Section 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, the hearing officer should inform the parties that the party seeking to exclude employees on these bases bears the burden of proof.

The hearing officer will typically discuss the following topics at the prehearing conference:

1. The issues and each party's position on each issue.
2. All stipulations reached should be drafted in longhand preparatory to reading them into the record at the appropriate time, e.g., commerce, supervisors who are not in dispute, unit description, etc. A sample stipulation which could be used to deal with the preliminary matters at the hearing, including statement of standard procedures, the formal papers, labor organization status, question concerning representation, contract bar and jurisdiction, if they are not in issue, is contained in Appendix A of this manual (Board Exhibit 2).
3. The hearing officer should determine the size and structure of the Employer's work force and the size of the agreed upon unit, as well as the number of individuals in disputed categories. The hearing officer should determine the managerial hierarchy and a description of the organization of the plant, including departments and numbers of employees in departments and job classifications.
4. Explore with the parties the need for amendments to the petition, including amendments to correct the name of the company, labor organization and unit description wherever appropriate.
5. Related R or C cases in the Region or another Region.
6. Show the formal papers to the parties and explain what they are to parties unfamiliar with the Agency's processes.
7. The hearing officer should make one last effort to secure an election agreement. **If successful, do not release the court reporter until the consent/stipulated election agreement is concluded.**

If an agreement is executed, the hearing should not be opened; the subsequent approval of the agreement serves as a withdrawal of the notice of hearing.

If the possibility of an election agreement arises during the hearing, the hearing should be recessed for its consideration. If agreement is reached, the hearing should be adjourned indefinitely. It is unnecessary to insert the agreement in the record. The subsequent approval of the agreement serves as a withdrawal of the notice of hearing.

E. Before Opening the Record

At the hearing, the hearing officer should discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited. The hearing officer should take an active role in exploring all potential areas of agreement and narrowing the issues that remain to be litigated.

F. Opening the Hearing

After the preliminary matters set forth in the hearing officer outline and script are resolved, the hearing officer should open the record by specifying the issues that have been identified by the parties to be covered at the hearing. In order to help make the record clear, the hearing officer should have the parties state their positions on the issues at the beginning of the hearing.

1. Notification of Burdens

The hearing officer should specify on the record whether the issues involve a presumption under Board law and identify which party has the burden of rebutting that presumption. For instance, if the Union has petitioned for a presumptively appropriate unit, such as the employees at a single facility of the Employer, and the Employer contends that the smallest appropriate unit must include the employees at all of its facilities, the hearing officer should inform the Employer that it has the burden of rebutting the single facility presumption.

If a party raises statutory exclusions, such as Section 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, the hearing officer should indicate, on the record, that the party seeking to exclude employees on these bases bears the burden of proof.

The hearing officer should also state on the record that a party seeking to rebut a presumption under Board law or meet a burden of proof must present specific, detailed evidence in support of its position; general conclusionary statements by witnesses will not be sufficient.

2. Hearing Officer's Role

The hearing officer should guide, direct and control the hearing, excluding irrelevant and cumulative material and not allowing the record to be cluttered with evidence submitted "for what it's worth." Cf. CHM Section 11217. In addition, the hearing officer should solicit stipulations and utilize offers of proof in order to achieve an uncluttered record. CHM Sections 11187.2, 11189(f) and 11226. Although difficult to accomplish, the hearing officer should make every attempt to organize the record so that each issue, and the evidence in support of the issue, is presented separately and

INTRODUCTION

completely. In this way, the transcript will be organized according to the issues, to assist the decision writer in analyzing the issues and writing the decision.

The hearing officer may cross-examine and call and examine witnesses. The questions contained in the substantive sections of this manual should be used as a guide in examining witnesses. However, not every question on a particular issue set forth in this manual need be asked. The hearing officer may call for and introduce all appropriate documentary evidence, being limited only by the relevance of the evidence to the issues. It is the obligation of the hearing officer to ask follow up questions and to obtain specific examples when the parties elicit generalized testimony regarding matters in issue, including issues on which the parties have a burden. If parties cannot supply specific examples in support of their generalized testimony, they should be required to state that on the record. Where the testimony is confusing, unclear or incomplete, the hearing officer should ask questions that will clear up the confusion or make the record complete.

At the end of the hearing, if there are changes in the parties' positions, the hearing officer should make them clear on the record and should summarize the issues that have been resolved. Whenever the hearing officer's technical assistance is required by any party, e.g., how to amend a petition, it should be given.

When necessary to ensure the development of a record that is complete, concise and cogent, it may become necessary for the hearing officer to interrupt the presentation of a party and conduct some or all of the questioning of a witness or witnesses. However, it should be recognized that the hearing officer's responsibility for the development of a complete yet concise record may on occasion lead to an appearance of undue assistance to a party that does not itself introduce evidence in support of its positions or of undue interference with a party seeking to introduce immaterial, irrelevant or cumulative evidence. The hearing officer should explain his/her role in developing a full yet concise record. The hearing officer must also keep constantly in mind that, to the parties, he/she is the Board's representative and they expect him/her to be objective and considerate in the conduct of the hearing. Thus, the hearing officer, while meeting his/her primary responsibility to develop a full yet concise record, should also exercise self-restraint, give the parties prior opportunity to develop points and refrain from needlessly taking over.

G. Unrepresented Parties

Unrepresented parties (pro se) may not be familiar with our processes, the pertinent law or their burden of proof. The hearing officer should take the time to explain the process involved and the extent of their obligations, if any, and should be particularly sensitive to any language difficulty problems. The hearing officer should also explain the nature of the hearing and burdens of proof and that he/she has the right to seek subpoenas to compel the testimony of witnesses, call witnesses and question witnesses on cross-examination. However, the hearing officer is not obligated to advocate on behalf of a pro se party and is not required to develop extensive lines of testimony.

HEARING OFFICER'S GUIDE