II. PROCEDURAL MATTERS

A. Outline of Hearing

This section of the manual contains instructional information on conducting a hearing and covering the key elements of the hearing, including the opening statement, introduction of Board exhibits, prehearing motions, intervention, jurisdiction, labor organization, question concerning representation, history of collective bargaining, bars to the conduct of an election and the appropriate unit. Incorporated in this manual as Appendix B is a script of the hearing, with the instructional information from this section deleted, which can be used by the hearing officer as an aid in providing continuity while conducting the hearing. Attached to the script is a sample of a chart that can be used by the hearing officer as an aid in tracking exhibits. For the hearing officer's convenience, a copy of the script can be downloaded from this manual, which is available on the Agency internet and intranet, for purposes of adapting the script to a particular case.

During the hearing, the hearing officer may find that parties are prepared to enter into stipulations. When obtaining a stipulation, the hearing officer should ensure that each party to the proceeding enters into the stipulation and that he/she receives the stipulation. Stipulations should be supported by facts and should not be conclusionary. All parties to the proceeding, including a decertification petitioner, must agree to the stipulation. A stipulation of fact is conclusive, precluding withdrawal or further dispute by a party joining in the stipulation after the stipulation is accepted If the hearing officer is unable to obtain a stipulation on a key element of the hearing, as outlined in the script, he/she should refer to this and other sections of the manual for instructions and/or guidance on how to handle that or any other particular issue. The script is only an aid and is not intended to replace the substantive material contained elsewhere in the manual.

Appendix A to this manual is an exhibit that can be used to streamline the hearing by reducing some of the key elements of the hearing to written stipulations that can be introduced into the record. That exhibit (often Board Exhibit 2) can be used to resolve all issues on which there is no dispute, leaving those that are in dispute for litigation.

1. Opening statement

On opening the hearing, the hearing officer should read into the record the following statement:

The hearing will be in order.

This is a formal hearing in the matter of______, Case No._____ before the National Labor Relations Board. The hearing officer appearing for the National Labor Relations Board is______.

All parties have been informed of the procedures at formal hearing before the Board by service of a Statement of Standard Procedures with the notice

of hearing. I have additional copies of this statement for distribution if any party wants more.

Will counsel please state their appearances for the record? . . .
For the Petitioner:_______________
For the Employer:_______________
For the Intervenor:_____________
Are there any other appearances? . . . Let the record show no (further) response.

Fill out any additions to the appearance sheet.

Are there any other persons, parties or labor organizations in the hearing room at this time who claim an interest in this proceeding?
. . . Let the record show no (further) response.

2. Introduction of formal papers

I now propose to receive the formal papers. They have been marked for identification as Board's Exhibit 1(a) through 1 (—), inclusive, Exhibit 1(—) being an index and description of the entire exhibit. The exhibit has already been shown to all parties. Are there any objections to the receipt of these exhibits into the record? Hearing no objections, the formal papers are received in evidence.

Explain if necessary that the papers in question constitute a routine introduction of the documents which set up the issues for hearing; that admission of the document does not irrevocably establish the truth of any allegations therein; that any relevant evidence may be introduced irrespective of such allegations; and that, in any event, the Regional Director (Board) will pass on the validity of this and any other evidence. Whether or not objections are voiced, receive the formal papers in evidence.

Verify correct names of parties. Entertain motion to amend petition if necessary, to conform to the correct names.

If the parties agree to Board Exhibit 2, introduce that exhibit into the record as follows and then proceed to the appropriate section below:

The parties to this proceeding have executed and I have approved a document which is marked as Board Exhibit 2. That Exhibit contains a series of stipulations including, among other items, that the petitioner is a labor organization within the meaning of the Act, there is no contract bar and the Employer meets the jurisdictional standards of the Board. Are there any objections to the receipt of Board Exhibit 2?

Hearing no objection, Board Exhibit 2 is received in evidence.

If Board Exhibit 2 is not agreed upon, proceed with Section 3 below.

3. Prehearing motions

Identify and receive prehearing motions, rulings and referrals. Referrals include motions which the Regional Director has referred to the hearing officer for ruling (e.g., motions to quash subpoenas). If appropriate, rule on the motions at this time. If not, the hearing officer may want to indicate that he/she will withhold ruling on the motion until later in the hearing. Be sure to rule on all motions still remaining at the end of the hearing, except those that cannot be ruled on by the hearing officer, e. g., motions to dismiss the petition. (See Section II, G, Motions at Hearing).

Are there any prehearing motions made by any party that need to be addressed at this time (e.g., motions to quash subpoenas)?

4. Intervention

Appearances for prospective intervenors should have been made during the opening statement, but at this point, if intervention has been indicated, the actual motion to intervene should be solicited. The hearing officer should call attention to any prehearing motions to intervene which have been referred to him/her and ask for any current motions.

Are there any motions to intervene in these proceedings to be submitted to the hearing officer at this time? Are the parties aware of any other employers or labor organizations that have an interest in this proceeding?

The hearing officer hears no (further) response.

After soliciting the positions of the parties on the motion to intervene, the hearing officer must rule, for example:

If there is a motion to intervene:

M. _______________, please state the correct and complete name of the Intervenor.

If there is no objection:

The motion of_____ for intervention herein is granted (denied).

Require motions to intervene to be offered in evidence, orally or in writing, setting forth the grounds for intervention and inquire of the other parties as to their positions. (Be sure to obtain the full and complete name of the intervenor.)

Before intervention is permitted, the prospective intervenor must produce a showing of interest. This may be any of the following:

(a) Valid authorization card(s): Merely note the fact that a showing of interest has been made; under no circumstances introduce the cards into evidence. Indicate the level of intervention. However, if no showing is made, this fact may and should be announced on the record.
(b) Current or recently expired contract; if the showing is a contract, a copy of it should be procured and placed in the record.
(c) Any other evidence of a showing of interest that would be accepted from a petitioner.

The rights of an intervenor depend on the level of intervention based on its showing of interest. CHM Section 11194.5.

If an intervenor indicates an interest in groups apart or unrelated to that sought by the petition, it should be advised to file a separate petition, in which event the normal 30-percent showing of interest will be required.

If the hearing officer has any substantial doubt as to the propriety of permitting intervention by any person or labor organization, he/she should recess the hearing for a time sufficient to enable him/her to resolve the doubt. If such questions are not susceptible of prompt determination, the hearing officer should permit intervention for the time being, making it clear, however, that a final decision is being reserved.

If the hearing officer permits intervention and the Intervenor raises an issue with respect to the lack of receipt of the NOH at least 5 working days prior to the hearing, the hearing officer should consult the Regional Office. See discussion of *Croft Metals, Inc.*, 337 NLRB No. 106 (2002), supra, in Section I, B, Hearing Preparation.

5. Commerce/Jurisdiction

Possibilities of a stipulation of commerce facts should be explored off the record. If attained, the stipulation should be put on record; if not, testimony with respect to commerce and other aspects relevant to the Board's exercise of jurisdiction must be taken. Even when there is a stipulation that the Board's discretionary gross volume standards are met, there must be included sufficient data on actual inflow and outflow to establish de minimis statutory jurisdiction.

Will the employer please state its full and correct name for the record? (Is ''Company'' spelled out? Is ''Incorporated'' spelled out?)

If necessary: **Are there any objections to having the petition and other formal papers amended so that the name of the employer will correctly appear in the captions thereon as _______?**

Hearing no objection, the amendment is allowed.

After reading the stipulation prepared in advance or worked out off the record as to the business of the Employer:

Can it be stipulated that the Employer is engaged in commerce within the meaning of the National Labor Relations Act and is subject to the jurisdiction of the National Labor Relations Board and that the commerce facts are as follows:

____
____
____
____

M. ____________, do you so stipulate for the Employer?
M. ____________, do you so stipulate for the Petitioner?
M. ____________, do you so stipulate for the Intervenor? (*if necessary*)

The stipulation is received.

For questions to develop the record concerning commerce/jurisdiction, joint or single employer or successor employer issues, see Section IV.

6. Labor organization

The possibility of a stipulation that the unions involved are labor organizations within the meaning of Section 2(5) of the Act should be discussed off the record. If attained, the stipulation should be put on the record.

M._______, is the correct and complete name of the (Petitioner) that which appears on the petition filed in this case, _________?
If necessary: Are there any objections to having the petition and other formal papers amended so that the name of the (Petitioner) will correctly appear in the captions thereon as__________?
Hearing no objection, the amendment is allowed.

Can it be stipulated that the Petitioner herein, ___________________, is a labor organization within the meaning of the National Labor Relations Act, as amended?

M. ____________, do you so stipulate for the Employer?
M. ____________, do you so stipulate for the Petitioner?
M. ____________, do you so stipulate for the Intervenor? *(if necessary)*

The stipulation is received.
Obtain the same stipulation for any Intervenor.

If no stipulation is obtained, the testimony of someone, such as a union representative, is required to establish that the organization is one in which employees participate and which ''exists in whole or in part'' for the purpose of representing employees with respect to their wages, hours and working conditions. For questions to develop the record concerning labor organization status, see Section IV, D, Status as a Labor Organization, infra.

7. Issues and burdens of proof

Will the parties please identify the issues for hearing and their positions on each issue?

Employer?
Petitioner?
Intervenor?

If the issue involves a presumption under Board law, advise the party with the burden that the burden lies with it and say the following:

> **Please be aware that (e.g., single facility unit) involves a presumption under Board law and the burden lies with the party seeking to rebut the presumption. You must present specific, detailed evidence in support of your position; general conclusionary statements by witnesses will not be sufficient.**

If the issue involves 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, advise the party with the burden that the burden lies with it and say the following:

> **Please be aware that (e.g., supervisory status) involves a statutory exclusion and the party seeking to exclude employees on this basis bears the burden of proof. You must present specific, detailed evidence in support of your position; general conclusionary statements by witnesses will not be sufficient.**

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.

8. Disclaimers

If a labor organization at the hearing seeks to disclaim interest in representing the employees, the disclaimer should be in writing or on the record. The hearing officer should ask the parties whether they possess any evidence that the disclaiming labor organization has or is engaged in any conduct inconsistent with its disclaimer.

9. History of collective bargaining

Explore off-the-record the possibilities of a stipulation regarding any history of collective bargaining involving the unit in question, other organizational attempts that resulted in petitions being filed with the Agency and the identity of any union involved. If there is a collective bargaining history, obtain details about the nature and origin of that relationship and include those facts in any stipulation, e.g. voluntary recognition, Board-certified unit, prior Board proceedings involving the employer, 8(f) versus 9(a) recognition, multiemployer units or preexisting non-conforming health care units. If attained, the stipulation should be put on record. If there has been no history of bargaining, the record should reflect that fact. If a stipulation is not received, the history should be developed through witnesses or, if none are available, through statements of counsel. Existing and prior contracts that relate to all or part of the petitioned-for unit should be introduced into the record.

For questions to develop the record on bargaining history see Section IV, E, History of Collective Bargaining.

10. Cases pending in other Regions

The following question should be asked in all cases concerning petitions pending in other Regions, unless the facts adduced thus far in the hearing indicate that the question is unnecessary.

> **Are there any petitions pending in other Regional offices involving other facilities of the Employer?**
>
> **M._______, on behalf of the Petitioner?**
> **M._______, on behalf of the Company?**
> **M._______, on behalf of the Intervenor?**

If an affirmative response is received, the hearing officer should inquire further in order to determine the impact, if any, on the present proceeding.

11. Bars to conduct of an election

On the basis of the information obtained concerning the bargaining history of the employees sought by the petition, inquiry can be directed to circumstances which might constitute a bar to the petition. Information concerning prior elections or recognition will be disclosed. The positions of the parties on possible contract bars to the petition should be obtained:

Do any of the parties contend that there is a contract bar to an election in this case?

M._______, what is the position of the Employer?
M._______, what is the position of the Petitioner?
M._______, what is the position of the Intervenor?

If the parties agree that there is no bar, obtain the following stipulation:

Can it be stipulated that there is no contract or other bar in existence that would preclude the processing of this petition?

M. ____________, do you so stipulate for the Employer?
M. ____________, do you so stipulate for the Petitioner?
M. ____________, do you so stipulate for the Intervenor? (*if necessary*)

The stipulation is received.

If not already in the record, a copy of the contract should be placed in evidence. Develop record by way of testimony. For questions to develop the record on issues of contract or recognition bar, other types of agreements raised as bars, labor organization schism or defunctness and merger, see Section IV.

12. Appropriate unit

Read into the record the unit as described in the (amended) petition. Obtain a clear statement on the record reflecting the exact positions of the parties with respect to the appropriate unit. The petitioner may request and should be allowed to amend the petition to reflect changes in its unit contention. If necessary, recheck the showing of interest, off the record, if the Petitioner enlarges its requested unit.

Off the record, determine the disputed and agreed-on inclusions and exclusions. Explore the possibilities of a stipulation covering the scope of the unit, as well as any agreement on the composition. If attained, stipulations should be put on the record. If a stipulation is obtained with respect to the full unit, propose the following:

Can it be stipulated that a bargaining unit that includes _______ and excludes ________ is appropriate for the purposes of collective bargaining?

Read from the Petition or the off-the-record discussion notes of the unit.

M. ____________, do you so stipulate for the Employer?
M. ____________, do you so stipulate for the Petitioner?
M. ____________, do you so stipulate for the Intervenor? (if necessary)

The stipulation is received.

If a stipulation is obtained only with respect to part of the unit, with the remainder of the unit being in issue, propose the following stipulation:

Can it be stipulated that any unit found appropriate by the Regional Director should include _____ and exclude _____?

M. ____________, do you so stipulate for the Employer?
M. ____________, do you so stipulate for the Petitioner?
M. ____________, do you so stipulate for the Intervenor? (if necessary)

The stipulation is received.

Sample supervisor stipulation language:

Can it be stipulated that _______________ is a supervisor within the meaning of Section 2(11) of the Act and as such possesses and exercises one or more of the following authorities: to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action; utilizes independent judgment in exercising such authority; and, therefore, should be excluded from the bargaining unit?

M. _______________, can you so stipulate for the Employer?
M. _______________, can you so stipulate for the Petitioner?
M. _______________, can you so stipulate for the Intervenor?

The stipulation is received.

Ascertain the following on the record:

(a) How many employees are employed at the facility?
(b) Which classifications do the parties seek to include; how many employees are in each classification?
(c) Which classifications do the parties seek to exclude; how many employees are in each excluded classification?

When possible, secure the number of employees in each classification at

the facility.
When stipulations are not received, take testimony and evidence with respect to unit scope and composition. Introduce a list, usually from the employer, of classifications and the number of employees in each unit, or alternatively, obtain oral testimony about these matters.

(d) Call an official of the employer familiar with the employer's operations, swear him/her in, then develop testimony to show, where relevant:

(1) Products of the employer.
(2) Supervisory or management hierarchy, including specific titles.
(3) Departmental or divisional groupings of operations and the supervisors of each.
(4) Physical arrangements of operations. If possible, a blueprint or schematic drawing of the facility should be introduced as an exhibit.
(5) Operations and flow of product from department to department or job to job.
(6) Number of buildings and distance between them.

For questions on developing the record for various types of units and employees' status and category issues, see Sections IV through VIII.

13. Framing issues

Frame the remaining issue(s) on the record. Have the parties agree on the issues for litigation.

It is my understanding that the issue(s) to be litigated today are ____________ _________________________(e.g., the supervisory status of Mr. John Wayne, whether the quality control employees have a community of interest with the plant employees, single versus multi-location unit, etc.)

Are there any other issues of which I am not aware?

If no response, proceed to 14, Presentation of Evidence. If there is a response, let the parties state their positions on that issue, then proceed to 14, Presentation of Evidence.

14. Presentation of evidence

Generally the employer should begin, but the hearing officer can use his/her own judgment and have the parties present their evidence in whatever order makes the most sense. Ordinarily, a witness should be presented to testify about the overall structure of the Employer's operations and organization.

Employer, please present your first witness.
(*Employer calls first witness*.)

Stand and Swear in each witness: **Please raise your right hand. Do you**

solemnly swear that the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

If the witness objects to swearing in the indicated fashion, ask the witness:
Do you solemnly affirm that you will testify truthfully at this hearing?

Swearing in an Interpreter: **Please raise your right hand. Do you solemnly swear that you are fluent in both English and_______ (foreign language) and that you will faithfully and truly, to the best of your skill, knowledge and ability, translate from English to______ (foreign language) and from ___ (foreign language) to English when called upon to do so during the hearing, so help you God?**

If the Interpreter objects to swearing in the indicated fashion, ask:
Do you solemnly affirm that you will translate truthfully at this hearing?

Ask the witness: **Please state your name and spell it for the record.**

(After Employer has rested, proceed to the next party)

Petitioner, you may call your first witness.

(After Petitioner has rested, proceed to the next party, if any)

Intervenor, you may call your first witness. (If necessary)

15. Completing the record

(a) Summarize on the record those issues that the parties resolved during the course of the hearing.
(b) Obtain on the record the exact final position of the parties regarding unit contentions, inclusions or exclusions or remaining issues raised during the hearing.
(c) Recap on the record (1) the total number of employees in the unit sought, as well as any alternate unit, and (2) the total number of employees in each disputed category.
(d) If you have not done so already, evaluate the showing of interest with respect to changes in the unit contentions and revise the Report on Investigation of Interest (Form NLRB–4069) accordingly.
(e) Inquire if the labor organizations wish to proceed to an election in any alternate unit if the unit sought is found to be inappropriate by the Regional Director or the Board.
(f) Inquire of the parties whether there are any further witnesses or evidence which they wish to present.
(g) Rule on outstanding motions and receive or reject outstanding stipulations.
(h) Inquire of court reporter as to estimated length of transcript.
(i) Review notes to ensure that all issues, evidence and positions are covered.

(j) When appropriate, seek on the record a waiver of briefs. Provide parties the opportunity for oral argument in lieu of briefs. CHM Section 11242. If a waiver cannot be obtained, set time for briefs on the record. Except where good cause is shown, briefs are due within 7 days after the close of the hearing. See Section 102.67(a), Rules and Regulations and CHM Section 11244.2.

Make the following statement regarding ordering the transcript:

The parties are reminded that they should request an expedited copy of the transcript from the court reporter. If you fail to do so, late receipt of the transcript will not be grounds for an extension of time to file briefs.

16. Adjournment and closing

Adjournment:

If the hearing has not been completed but is being adjourned, the hearing officer should state:

If there is nothing further, the hearing will be adjourned to ——————— (indefinitely).

Closing:

Before closing, review the **Closing Checklist:**

(a) Be certain reporter has all exhibits.
(b) Obtain estimate of number of pages of transcript from reporter, complete obligation document and provide it to the Regional Office.
(c) Ensure appearance sheet (Form NLRB–1801) is correct and legible.
(d) Complete Close of R Case Hearing Form NLRB–856.

When the hearing has been completed, the hearing officer should state:

If there is nothing further, the hearing will be closed.

Absent response:

The hearing is now closed.

When the hearing is being closed except for the subsequent receipt of an exhibit, the ‘‘closing’’ statement should be appropriately revised. CHM Section 11224.6.

Section 8(b)(7)(C) cases:

When the hearing has been completed, the hearing officer should state:

> **This is a proceeding pursuant to Section 8(b)(7)(C) of the Act: Therefore, the parties shall not file briefs without special permission of the Regional Director but may state their respective positions fully on the record prior to the closing of this hearing. Will each party state his/her position at this time?**
> **Employer . . . Petitioner . . . Intervenor.**
> **The hearing is now closed.**

After the hearing has closed, the hearing officer should complete a Hearing Officer's Report. CHM Sections 11250–11252.

B. Subpoenas

The hearing officer should provide subpoenas to any party making a written request after the opening of the hearing. The parties may have been provided with some subpoenas by the Regional Office prior to the hearing. Pursuant to Section 11(1) of the Act, such issuance is automatic, upon request. The case name and number should be filled in before the subpoena is issued. Subpoenas are available to the parties subject to the standards set out in Section 102.66(c), Rules and Regulations.

If a party requests a large number of subpoenas, the hearing officer should ensure that the requestor's intention to subpoena a large number of witnesses does not conflict with the need for a concise as well as complete record and that the scheduling of necessary witnesses reasonably accommodates the need of the employer to avoid disruption of its operations. If a party appears to be engaging in en masse subpoenaing of witnesses as a harassment device, the hearing officer should inform the affected party to bring this concern to the attention of the Regional Director and request appropriate relief. *Rolligon Corp*., 254 NLRB 22 (1981).

Subpoenaed information should be produced if it relates to any matter in question or if it can provide background information or lead to other evidence potentially relevant to the inquiry. *Perdue Farms*, 323 NLRB 345, 348 (1997) (the information need only be 'reasonably relevant').

Service of subpoenas may be made by personal service, by registered or certified mail, by telegraph or by leaving a copy at the principal office or place of business of the person required to be served. See Section 102.113(c) and (e), Rules and Regulations. *Best Western City View Motor Inn*, 327 NLRB 468 (1999) (the attorney's affirmation of service is sufficient, without the postal return receipt card). The date of service is the day that the subpoena is deposited in the mail or with a private delivery service that will provide a record showing the date it was tendered to the delivery service or is delivered in person. See Section 102.112, Rules and Regulations.

1. Petitions to Revoke

Pursuant to Section 102.66(c), Rules and Regulations, parties may seek to revoke

subpoenas either in whole or in part. Petitions to revoke should be in writing and filed within 5 days after the date of service of the subpoena (also called the "5 day rule"). The date of service for the purposes of computing the time for filing a petition to revoke is the date the subpoena is ***received.*** See Section 102.112, Rules and Regulations. However, there are times when petitions to revoke are submitted orally to the hearing officer or the petition to revoke may not be timely filed. Even if the petition to revoke does not explicitly comply with the Rules and Regulations, the hearing officer should rule on the substance of the petition to revoke.

To avoid unnecessary delay, a party seeking to revoke a subpoena may be required to respond in less than 5 days. *Packaging Techniques Inc.*, 317 NLRB 1252, 1253 (1995). This rule applies to both subpoenas ad testificandum and duces tecum.

The hearing officer must rule on petitions to revoke that are filed after the hearing opens. If the petition to revoke is submitted to the Regional Director prior to the opening of the hearing, the Regional Director may rule on the petition or refer it to the hearing officer for ruling. At the commencement of the hearing, the hearing officer may immediately be faced with a petition to revoke and may be asked for a ruling without the benefit of testimony. The hearing officer may defer ruling until later in the proceeding when it becomes more apparent whether the subpoenaed information is necessary.

Some of the most common reasons for revocation of subpoenas are:

(1) relevancy and materiality: the hearing officer must determine if and how the evidence sought will aid in completing the record. The hearing officer should require that the parties discuss the relevancy of the subpoenaed documents. The hearing officer should secure the parties' positions to see if there is room for compromise and an alternate source of information that may be satisfactory.

(2) burdensome and oppressive: a party may assert that accumulating documents is too difficult or the number of documents is too voluminous. However, it may be possible to narrow the request and eliminate the basis for the objection. This should be explored by the hearing officer.

(3) confidentiality: the subpoenaed party may contend that the documents to be produced are confidential because, for example, they contain confidential employee information, such as social security numbers, or because the subpoena seeks proprietary information. Where confidentiality is asserted, the hearing officer may wish to consider the motion to quash only after an in camera inspection. Such an inspection allows the hearing officer to inspect the documents privately, apart from the involved parties, to determine whether the material is relevant, privileged or not producible for other reasons and whether portions of the documents may be redacted to satisfy confidentiality concerns.

(4) failure to tender the appropriate witness fees: if a witness fee was not served with the subpoena, the subpoena is invalid and must be re-served with the

appropriate witness fee.

(5) proprietary information, such as production figures and profit and loss statements: the hearing officer may be faced with a claim that wage-related information is proprietary and confidential and not producible.

In sum, as noted above, if a party served with a subpoena contends that the items encompassed by the subpoena are irrelevant, privileged or otherwise exempt from production, the hearing officer should consider conducting an in camera inspection. The hearing officer should also look for areas of compromise, e.g., redaction of certain information or narrowing the scope of the subpoena, in order to satisfy the subpoenaing party and allow the hearing to proceed.

Whenever the hearing officer rules on a petition to revoke, his/her rulings and the basis therefor should be clear and on the record, i.e., refer to each item in the subpoena and explain the decision to require production in whole or in part. If a hearing officer rules that some portions of the subpoenaed documents are not producible because, for example, they are irrelevant or because they seek confidential information, he/she should grant the petition to revoke with respect to those portions of the subpoena and explain the basis for the ruling. The hearing officer may also choose to reserve ruling on all or part of the petition to revoke the subpoena until after hearing some testimony, in order to determine whether the subpoenaed information is necessary for a determination of the issues. On occasion, continuation of the hearing, even with an outstanding petition to revoke, may resolve the issue because sufficient testimony is secured and the subpoenaing party is satisfied that production of the documents is no longer necessary. Where there continues to be a dispute about the subpoenaed documents, the subpoena, petition to revoke, the parties' positions and the hearing officer's ruling should be placed on a separate subpoena record. See Section 2, Subpoena Record, below.

2. Subpoena Record

When there is an ongoing dispute regarding the production of subpoenaed documents, a separate subpoena record should be established. To make a subpoena record, the hearing officer should inform the court reporter to stop the proceeding and begin a new transcript for the subpoena record. The subpoena record should include:

(1) a separate copy of the formal papers;
(2) a copy of the subpoena at issue;
(3) proof of service; and
(4) any written petitions to revoke the subpoena. If there are any written rulings on the petition to revoke, those documents should be included in a Board exhibit. On the record, the hearing officer should indicate the purpose of the proceeding, that a subpoena has been properly served and that the subpoenaed party is refusing to comply with the subpoena. All parties should state their respective positions regarding the subpoenaed documents and the hearing officer's ruling should be made on the record.

The purpose of a subpoena record is to have a concise record of the dispute for the Regional Director and the Board.

3. Subpoena Enforcement

Section 102.31(d), Rules and Regulations, requires the Regional Director to institute enforcement proceedings "unless in the judgment of the [Regional Director] the enforcement of such subpoena would be inconsistent with law and with the policies of the Act." Thus, upon the failure of any person to comply with a subpoena issued and upon the request of the subpoenaing party for enforcement proceedings, the hearing officer should advise Regional management of the enforcement request. After consultation with the hearing officer, the Regional Director will decide whether the subpoenaed documents are necessary for a determination of the issues. If the Regional Director determines that the subpoenaed documents are necessary, then, upon the request of a party, the General Counsel, "shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for enforcement of the subpoena." The Region should prepare the enforcement papers, but is not a party to the proceeding and does not assume responsibility for prosecution of the enforcement proceedings. See Section 102.31(d), Rules and Regulations. *Best Western City View Motor Inn,* 325 NLRB 1186 (1998).

4. Contempt of Enforced Subpoena

If a district court orders compliance with the subpoena and the subpoenaed party continues to refuse to produce documents or to appear for testimony, then, upon request of the party on whose behalf the subpoena was issued, the Regional Director must institute contempt proceedings in U.S. District Court. However, contempt proceedings need not be instituted by the Regional Director, absent a request by the party on whose behalf the subpoena was issued. The Regional Director is under no obligation to institute contempt proceedings sua sponte and need only do so upon request of the subpoenaing party. *Best Western City View Motor Inn,* 325 NLRB 1186 (1998). Conversely, the party refusing to comply with the subpoena may be precluded from introducing secondary evidence on the matters covered by the dishonored subpoena. In such cases, the hearing officer should permit a brief offer of proof.

5. *Tropicana* Subpoenas

Where an employer has refused to cooperate in obtaining commerce information, the Regional Director should issue a subpoena. *Tropicana Products*, 122 NLRB 121 (1958). In order to establish a proper basis for utilization of the *Tropicana* rule, the Regional Director should subpoena commerce information prior to the hearing whenever the employer has refused to furnish such information or has indicated that it will not voluntarily do so at the hearing. (See sample *Tropicana* subpoena language in Appendix D)

If an employer fails or 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.

C. Witnesses

1. Oath

Prior to testifying, each person called as a witness should be sworn in by the hearing officer. On recall, a witness need not be sworn again but should be asked to signify that he/she understands that he/she is still under oath.

2. Witness' Refusal to Answer Questions

If a witness refuses to answer a question that the hearing officer deems to be proper, the hearing officer can exercise his/her discretion to strike all testimony previously given by the witness on related matters. However, if a motion to strike a witness' testimony is made for a reason other than a refusal to answer, it should not be granted. Section II, G, 5, Motions to Strike.

If a witness appears under subpoena but refuses to answer questions, it is as if the witness did not appear at all. Accordingly, subpoena enforcement proceedings may be appropriate, where requested by the subpoenaing party. Section II, B, 3, Subpoena Enforcement. Under those circumstances, the district court judge should be notified that the subpoenaing party seeks an order compelling the witness to testify.

One way to avoid subpoena enforcement proceedings is to ask the subpoenaing party to wait until the end of the hearing to evaluate whether the subpoenaed witness remains necessary. The subpoenaing party may find, at the close of the hearing, that there is sufficient record testimony in support of its position and there is no longer a need for the subpoenaed witness to testify. Thus, when faced with a request by a party to institute enforcement proceedings, the hearing officer should recommend to that party to await the completion of testimony and evaluate the need for the subpoenaed witness at that time. Note and advise the parties that a request for subpoena enforcement must be made before the record closes.

3. Failure to Appear

If a subpoenaed witness fails to appear at the hearing and the Regional Director or the hearing officer believes that a decision cannot be made in the absence of that witness' testimony, the Regional Director may consider subpoena enforcement upon the request of the subpoenaing party. However, that process can be lengthy and the Regional Director may decide that, in order to avoid a protracted proceeding, he/she should decide the case without the subpoenaed witness, if at all possible. The hearing officer or the Regional Director may also decide to call other witnesses instead of instituting subpoena enforcement proceedings.

4. Sequestration of Witnesses

A motion for sequestration arises when a party seeks to exclude potential witnesses from the hearing room. The purpose is to ensure that their testimony will not be influenced by the testimony of other witnesses. Sequestration is a matter of right only in C cases, not in R cases. *Hamilton Nursing Home*, 270 NLRB 1357 (1984); *Fall River Savings Bank*, 246 NLRB 831 fn.4 (1979) (R cases hearings are not adversarial). In preelection R cases, sequestration of witnesses is not appropriate because the proceeding is non-adversarial in character and credibility questions are not resolved by the hearing officer. A hearing officer should not grant a motion to sequester witnesses in a preelection hearing. For sequestration in a postelection hearing, see Section IX F 6.

5. Hostile or Adverse Witnesses - Section 611(c) Witnesses

A witness who is either hostile or has interests adverse to the calling party may be asked leading questions and is subject to cross-examination by the party that called the witness. Under FRE 611(c), a witness is considered a hostile or adverse witness when that witness' relationship to the opposing party is such that his or her testimony may be adverse to that party. On rare occasions, FRE 611(c) may arise in a pre or postelection case. A foundation should be laid to establish that the witness falls within the parameters for invoking FRE 611(c). If a dispute arises regarding use of FRE 611(c) examination, seek guidance from Regional Office management.

D. Foreign Language Witnesses

Although non-English speaking witnesses have always appeared in the processing of representation cases, they now appear with greater frequency. Therefore, during the initial investigation of a representation case, the assigned agent should be alert to any potential foreign language issue and should inform the parties to apprise the Regional Office promptly of a need for interpreter services. The hearing officer should also be aware of the potential need for foreign language witnesses and should ensure that appropriate arrangements are made in order to avoid unnecessary expense or delay. In the event foreign language witnesses are required, the Regional Office must secure and pay for certified interpreter services. *Solar International Shipping Agency,* 327 NLRB 369 (1998).

The Agency's limited budget is always a concern in regard to the expenses related to processing representation cases, particularly at hearings. Board agents should take all reasonable steps to reduce costs, including interpreter costs. With respect to interpreter costs, the hearing officer should exclude irrelevant and repetitious material from the record. Also, in those circumstances where it is unclear whether a witness' testimony would be relevant or necessary and the witness would require a translator if called to testify, it may be appropriate for the hearing officer to request that the party which intends to call the non-English speaking witness identify, either through a formal offer of proof or any other method satisfactory to the hearing officer, the nature of the testimony

to be given by the witness. The hearing officer would then be able to determine in advance (i.e., prior to retaining an interpreter) whether that testimony will be probative of the issues and assist the hearing officer with his/her decision regarding the need for the witness and an interpreter.

When swearing an interpreter, use the following oath:

> **Please raise your right hand. Do you solemnly swear that you are fluent in both English and________ (foreign language) and that you will faithfully and truly, to the best of your skill, knowledge and ability, translate from English to________ (foreign language) and from _ (foreign language) to English when called upon to do so during the hearing, so help you God?**

At the hearing, the hearing officer should provide the interpreter with a copy of the Guidelines for Interpreters (See Memorandum OM 06-49) if that has not been done previously. The hearing officer should also be familiar with the Guidelines. When a party objects to a translation, the objection and the basis for the objection should be preserved on the record. Moreover, interpreters should be provided an opportunity to correct themselves after they hear the objection. The hearing officer should also be alert for a translation that clearly does not include the witness's complete answer. When this occurs, the hearing officer should request that the interpreter translate <u>everything</u> that is said by the witness. If it appears that the witness disagrees with a translation, the Hearing Officer has the responsibility to ensure the accuracy of the translation. In addition, due to the complexity of presenting testimony through an interpreter, the hearing officer should not allow complex or compound questions directed to non-English speaking witnesses. Finally, to ensure an accurate record, the hearing officer should make sure that the witness does not answer the question before completion of the translation.

E. Nonlitigable Issues

1. Matters which would constitute unfair labor practices, except for the legality of a clause in a contract urged as a bar, such as a union security clause. No extrinsic evidence should be introduced.

2. Showing of interest: if evidence of fraud is sought to be introduced at the hearing, the party desiring to present such evidence should be advised on the record to bring it administratively to the attention of the Regional Director within 5 working days; hearing should not be interrupted. CHM 11028.3

If there is an allegation of supervisory solicitation of the cards or the Petitioner is alleged to be a supervisor, it may be necessary to litigate supervisory status. With respect to the solicitation of cards, litigation is only necessary if the number of cards solicited by the alleged supervisor is sufficient to affect the adequacy of the showing of interest. The actions or activities of the card solicitor are not litigable at a preelection hearing.

3. Matters concerning internal union affairs, except in relation to schism, merger or defunctness issues.

4. Compliance with reporting provisions of the Labor-Management Reporting and Disclosure Act of 1959 or alleged violations of statutes other than the National Labor Relations Act.

5. The Region's investigation of a petition.

6. Enforcement of a subpoena (as opposed to ruling on the relevancy of materials sought by the subpoena and/or a petition to revoke a subpoena).

7. Evidence sought to be introduced to bar the issuance of a certification concerning a labor organization's discrimination in admission to membership because of race, immigration status, age, sex or national origin.

8. Requests to proceed.

9. Evidence with respect to the appropriateness of any *substantially different bargaining unit sought by a union* if that union has not submitted a petitioner's 30-percent showing of interest in that unit. *General Dynamics Corp.*, 175 NLRB 1035 (1969). Evidence as to a somewhat different unit may be taken.

10. Failure to comply with notice requirements of Section 8(d) of the Act.

11. Employer's objective considerations in RM cases.

12. Voting eligibility of strikers and strike replacements are not generally litigated at a preelection hearing. They are more commonly disposed of through challenged ballot procedures.

13. Mechanics of the election, including date, time, place of the election, or whether the election should be conducted by mail or manually.

14. Immigration status: pursuant to GC Memorandum 02–06, any party raising an employee's immigration status at a representation case hearing, either pre- or post-election, should not be permitted to adduce any evidence on this issue. The Board has held that an employee's immigration status has no impact on that employee's right to vote. *Intersweet, Inc*., 321 NLRB 1, 17, fn. 68 (1996); *County Window Cleaning*, 328 NLRB 190 (1999) (challenge to a ballot overruled based on immigration status). Accordingly, hearing officers should not permit any testimony on this issue.

Although the issues listed above are not litigable, the hearing officer may permit brief offers of proof on the record, indicating the evidence a party would present. The offer of proof may also be in writing and can be placed in the record as an exhibit. The hearing officer should receive the offer of proof, but state that "the evidence proffered is

rejected." The matter is then in the record for the reviewing authority to decide if the hearing officer's ruling was proper.

F. Conduct of Representatives

The Board expects that the parties will conduct themselves in a professional manner at hearings. If a party at a hearing engages in misconduct, the hearing officer should request that the party conduct him or her self in an acceptable manner. If the party persists in misconduct, the hearing officer should remind him or her of the potential consequences, including sanctions, which could result from such behavior.

The Board's rules provide for two sanctions that can be applied to parties who engage in misconduct at hearings. Those sanctions are exclusion from the hearing and suspension or disbarment from further practice before the Board. The conduct of the party must be of an aggravated nature to justify the latter sanction. In addition to those two sanctions, the Board has sometimes issued a note of censure or condemnation for less serious misconduct. Section 102.177, Rules and Regulations and OM 94–6, OM 97–2 and OM 01–80; *In re: Stuart Bochner*, 322 NLRB 1096 (1997); *In re: Joel I. Keiler*, 316 NLRB 763 (1995).

For the hearing officer, the sanction of exclusion from the hearing is one that may be invoked, due to a party's misconduct. Misconduct which could cause a hearing officer to invoke this sanction would include violence or threats of violence; subornation of perjury; or using rude, vulgar and/or profane language, if egregious. Before invoking the exclusion sanction, the hearing officer should discuss the matter with Regional Office management, as serious due process concerns are raised in this circumstance.

G. Motions at Hearing

1. Adjournments or postponements

It is the General Counsel's policy that hearings be conducted on consecutive days, wherever possible. If a party requests a postponement at some point during the hearing, authority to grant such a request rests with the hearing officer. The hearing officer should insist upon an adequate basis for any adjournment request prior to ruling on the request. However, since the parties were advised prior to the hearing that it would continue on consecutive days until completion (CHM Sections 11008, 11009.2(g), 11082.3, and 11143), such a request should rarely be granted and only under the most compelling circumstances. Therefore, when faced with a postponement request, the hearing officer should grant the request only on a showing of exceptional need. The hearing officer should reconcile two important policies—the prompt processing of R cases under the Act (CHM Sections 11000 and 11740) and the need for a complete and concise record (CHM Section 11188.1). Unwarranted delay should be avoided and, when possible, the hearing should proceed on those issues where progress is possible. Adjournments or postponements should be with the provision that the hearing will continue on consecutive

days thereafter until completed. In some cases, a request for a postponement may be withdrawn after the hearing has proceeded in those aspects on which progress is possible.

However, if the hearing officer grants an adjournment at his/her discretion, he/she may adjourn to a specific later date or a different place. In so doing, he/she should make an appropriate announcement on the record and notify the court reporting service of the date, time and place of the resumption.

The hearing officer should check with the Regional Office prior to granting any postponement, or any adjournment, unless it is routine (e.g., to continue the hearing on another day). If a party is requesting a postponement based on the failure to receive the NOH at least 5 working days prior to the hearing, the hearing officer should check with the Regional Office prior to ruling on the motion. *Croft Metals, Inc.*, 337 NLRB No. 106 (2002).

If during the hearing the hearing officer concludes that a question concerning representation does not exist, he/she should recess the hearing and present the facts to the Regional Director.

2. Consent/stipulated election agreement

When a consent/stipulated election agreement is entered into after the hearing commences, the hearing officer should adjourn indefinitely. Approval of the agreement by the Regional Director constitutes withdrawal of the notice of hearing.

3. Amendment or filing of petition

(a) Motion to amend petition.

A petitioner may amend its unit at any time before the close of the hearing in the form of an alternative request. The petition will not be dismissed in the absence of prejudice to any party and if there is an adequate showing of interest in the new unit. Obtain the parties' positions concerning the amendment and, if possible, obtain consent to the motion. If a party is opposed, obtain the reasons for its opposition. In ruling on a motion to amend and whether an adjournment is appropriate, consider the following:

(1) Completeness of record and timing of the amendment request.
(2) Adequacy of notice and opportunity to prepare for hearing, including the availability of necessary witnesses and/or evidence.
(3) Adequacy of showing of interest. All discussions of adequacy of showing of interest must take place off the record. If the Petitioner does not have an adequate showing in the amended unit, so advise the Petitioner off the record.

If the amendment sought is substantial, e.g., a material enlargement or a change in the scope of the unit, exercise the greatest care to see that the granting of the amendment and proceeding with the hearing will cause no prejudice to any interested persons or organizations. If an amendment to the petition and an adjournment request are granted,

the adjournment should be to a specific date with the provision that the hearing will continue on consecutive days thereafter until completed.

(b) Filing of petition at hearing.

The hearing officer may accept a petition at the hearing for overlapping units if he/she believes it should be heard simultaneously with the pending petition. Should the hearing officer accept the petition, he/she should:

(1) Adjourn for a short time.
(2) Communicate with the Regional Office and inform it of the new filing.
(3) Get a new docket number.
(4) Advise the Regional Office of the parties' positions on consolidation and continuance.

On resumption of the hearing, the hearing officer should, if the Regional Director has decided on consolidation:

(1) Introduce the new petition into the record.
(2) State on the record the Regional Director's rulings, introducing the amended notice of hearing and order of consolidation, when possible, but when not, reserving exhibit numbers for later introduction of these documents.
(3) Order a continuance when necessary.

4. Withdrawal or dismissal of petition

(a) Motion to withdraw before hearing.

(1) Do not open hearing.
(2) Reduce request to writing.
(3) Contact Regional Director for approval.

(b) Motion to withdraw during hearing.

(1) Require that motion be made on record or in writing and introduce in evidence.
(2) Continue hearing indefinitely.
(3) Contact Regional Director for approval.

(c) Motions to withdraw during adjournment of hearing.

(1) Get approval of Regional Director.
(2) Hearing need not be reopened.

(d) Motion to dismiss made at hearing: all such motions must be referred on the record to the Regional Director or the Board for ruling at such time as the record is considered by them. See Section 102.65(a), Rules and Regulations.

5. Motions to Strike

A party may submit a motion to strike testimony during a hearing. Section 611(a) of the Rules of Evidence provides authority for striking direct-examination testimony where the witness was nonresponsive on cross-examination. Motions to strike also may be based on incompetent testimony or answers to questions that are opinions rather than facts. In a preelection hearing, except under the limited circumstances described in Section II, C, 2, Witness' Failure to Answer Questions, the hearing officer should deny a motion to strike and advise the objecting party that the Regional Director and the Board will give the testimony the appropriate weight.

H. Appeals From Rulings

A request for special permission to appeal to the Regional Director or the Board a ruling by the hearing officer on motions, objections and orders should be made promptly and in writing. A copy must be served on the Regional Director and the other parties. Section 102.65(c), Rules and Regulations. The other parties should be given an opportunity to respond to the special appeal.

The request should set forth the ruling, the reasons special permission should be granted and the grounds relied on for the appeal, including the prejudice that resulted from the ruling.

The hearing officer should recess the hearing long enough for the preparation of the request. The hearing officer is not required to recess the hearing immediately; the special appeal may be prepared at an appropriate breaktime. After the request has been prepared and submitted, the hearing should be resumed, even though the Regional Director or the Board has not passed on the request. Once all evidence is received (other than the issues raised by the special appeal), the hearing should be closed whether or not the Regional Director or the Board has ruled on the special appeal. After ruling on the special appeal, the Regional Director or the Board will take further action as is appropriate.