3. INITIAL REPRESENTATION CASE PROCEDURES

Having considered the general authority of the Regional Directors of the Board under Section 3(b), pursuant to the 1959 amendments to the Act, we follow with a capsule summary of representation case procedures as distinguished from substantive law, beginning with the filing of the petition through the decision by the Regional Director or the Board.

Sections 102.60 through 102.82 of the Board's Rules and Regulations, and Sections 101.17 through 101.21 of the Statements of Procedure describe these procedural steps. They may also be found, in greater detail, in the NLRB Casehandling Manual (CHM) (Part Two), Representation, sections 11000 through 11284.

3-100 Filing of Petition and Notification

316-6700 et seq.

393-1000 et seq.

393-6007-1700 to 8700

When a petition is filed with the Regional Office, the petitioner receives a written acknowledgement of the filing, and the employer and all other interested parties are given written notification, including a description of the bargaining unit alleged to be appropriate and the name of the Board agent to whom the case has been assigned. The types of petitions are discussed, infra, at chapter 4.

The following are regarded as interested parties:

a. The petitioner;
b. The employer;
c. The owner of a leased department in a store;
d. Any individual or labor organization named in the petition as having an interest or as being a party to a collective-bargaining contract, current or recently expired, covering any of the employees involved;
e. Any labor organization which has notified the Regional Office by letter within the prior 6 months that it represents the employees involved or is actively campaigning among them; and
f. Any labor organization whose name appears as an interested party in any prior case involving the same employees which was closed within recent years.

An intervenor was held to have had notice of the petition prior to the date it executed a Stipulated Election Agreement. *Seven-Up/Royal Crown Bottling Cos.*, 323 NLRB 579 (1997).

See section 9-550 for discussion of the period for filing a petition.

3-200 Submission of Showing of Interest

324-0100 et seq.

578-8075-6056

If the petitioner has not already done so, proof of interest should be submitted within 48 hours after filing, but in no event later than the last day on which the petition may be timely filed. Note that when a petition is filed involving the same employer who is a party in a pending 8(b)(7) unfair labor practice charge, the petitioner is not required to allege that a claim has been made on the employer or that the union represents a substantial number of employees. See CHM sections 11020–11035 and chapter 5, infra, for more complete information.

3-300 Information Requested of Parties

R/R 102.61(a) and (b)

378-2878

Employers are requested to submit commerce data, a list of employees in the proposed unit, and, when appropriate, information concerning striking employees eligible to vote under Section 9(c)(3). Employers are also advised that, should an election be agreed to or directed, a list of names and addresses of the eligible voters must be filed with the Regional Director by the employer within 7 days after the agreement or direction. This list (*Excelsior list*) is in addition to the proposed unit list (see specific discussion at secs. 23-510 and 24-324, infra).

All parties are requested to submit copies of any presently existing or recently expired contracts covering any of the employees as well as pertinent correspondence, and to notify the Board agent of any other interested parties entitled to be advised of the proceeding. (See CHM sec.11009, for the contents of the initial letter to the employer in an RC case.)

3-400 Preliminary Investigation

393-6014

The Board agent assigned to the case examines the petition for sufficiency, determines the adequacy of the showing of interest, and then contacts the parties and requests the submission of all other pertinent data. (See CHM secs. 11010.1 and 11010.2, for the steps taken by the Board agent in RC, RD, and RM cases, respectively.)

3-500 Dismissal or Withdrawal of Petition

393-6027 et seq.

393-6034 et seq.

393-6081

When it is readily apparent that no question concerning representation exists, the showing of interest is inadequate, the unit sought is inappropriate, the petition is not timely filed, or the petition does not meet the test of sufficiency for any other reason, the petitioner is requested to withdraw the petition. If this is not done within a reasonable time, the petition is dismissed. (For appeals from such dismissals, see CHM secs. 11100–11104.) See also section 8–200, infra.

3-600 Amendments to Petition

393-6021 et seq.

The petitioner may add to or delete from the original or amended petition and, when this occurs, all interested parties are notified of the changes. See section 9-520, infra, for additional discussion of amending the petition.

3-700 Consent-Election Agreements

393-6054 et seq.

Consent-election agreements obviate the necessity for a hearing. There are two types of consent-election agreements: (1) Agreement for Consent Election (Form NLRB-651), (2) Stipulated-Election Agreement, and (3) Full Consent Agreement (Form NLRB-652). Under either, the parties agree that an election be conducted by the Regional Director. The basic difference between the two is that under a consent agreement, questions which arise in connection with the election at the postelection stage are determined by the Regional Director, but under a stipulated agreement these questions are determined by the Board.

3-800 Notice of Hearing and Hearings

393-6068-2000

If the Regional Director has reason to believe that a question concerning representation exists, and if an election agreement is not obtained, a notice of hearing is issued (Form NLRB-852). In such circumstances a hearing is mandatory. *Angelica Healthcare Services*, 315 NLRB 1320 (1995). Compare *Mueller Energy Services*, 323 NLRB 785 (1997), where the Regional Director did not have reasonable cause and *Premier Living Center,* 331 NLRB 123 fn. 9 (2000) (no hearing required in a UC case).

All parties must receive at least 5 days' notice of hearing. *Croft Metals, Inc.*, 337 NLRB 688 (2002).

A Regional Director may use a Notice to Show Cause procedure to assist in expediting a representation case but that procedure cannot be a substitute for a hearing. *Amerihealth Inc./Amerihealth HMO*, 326 NLRB 509 (1998).

Ordinarily a hearing will be conducted even if the issue is one that the Board is reconsidering. But see *Pratt Institute,* 339 NLRB 971 (2003).

3-810 Nature and Objective

393-6068-0100

The hearing in a representation proceeding is a formal proceeding designed to elicit information on the basis of which the Board or its agents can make a determination under Section 9 of the Act. The hearing is investigatory, not adversary. Parties have a right to present relevant evidence on the issues presented by the petition and the Board has ruled that it was an error to refuse the introduction of evidence in those circumstances. *Barre National, Inc*., 316 NLRB 877 (1995). In *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999), the Board held that it was improper for a hearing officer to exclude testimony about a group of contested employees because of the small size of the group. See section 3-840 on the obligation of parties to take positions on issues. See section 22–118 (a) for a discussion of subpoenas in representation cases.

3-820 Hearing Officer's Responsibilities

393-6068 et seq.

The hearing officer is an agent of the Board who has an affirmative obligation to develop a full and complete record and may, if necessary to achieve this purpose, call and question witnesses, cross-examine, and require the introduction of all relevant documents. See *Mariah, Inc*., 322 NLRB 586 fn. 1 (1996). Once on notice of a substantial issue, the hearing officer is obliged to conduct inquiry. *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999). The hearing officer is, of course, required to be impartial in rulings and in conduct. For a discussion of hearing officer discretion to seek enforcement of subpoenas see section 3–840. For discussion of burdens of proof in representation cases see NLRB Hearing Officers Guide.

3-830 Intervention

393-2001-2083

The hearing officer considers all motions to intervene. Motions for intervention are denied if filed by "employees'' or "employees' committees'' not purporting to be labor organizations, or by an organization which had been directed to be disestablished by a final Board order. Those filed by labor organizations within the meaning of the Act, which show an interest in the employees concerned, are granted. A party permitted intervention may thereafter participate fully in the hearing, although the extent to which an intervenor may block stipulations depends on its showing of interest. See also *Peco, Inc.*, 204 NLRB 1036 (1973), in which employees opposed to amendment were permitted to intervene in AC hearing. (For additional discussion on intervention, see sec. 5–640, infra.)

3-840 Conduct of Hearing

393-6068-6067-1700 through 8300

393-6075

Evidence is received either in the form of sworn oral testimony or stipulations. Examination and cross-examination of witnesses are permitted and parties are expected to take positions on the matters raised at the hearing. See *Seattle Opera Assn.*, 323 NLRB 641 (1997); and *Mariah, Inc.*, 322 NLRB 586 fn. 1 (1996). Failure to do so may limit the party's right to present evidence or to utilize the challenge procedure on the disputed classification if there is a presumption in the law with respect to that classification. *Bennett Industries*, 313 NLRB 1363 (1994). But in *Allen Health Care Services*, 332 NLRB 1308 (2000), the Board distinguished *Bennett Industries* on a unit issue where there was no presumption with respect to that unit. In those circumstances, the Board directed that the hearing officer take testimony necessary for the Board to make a unit determination. In doing so, the Board noted its obligation under Section 9(b) to "decide in each case . . . the unit appropriate."

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

Where foreign language witnesses are required for the hearing, the Board secures the interpreter and pays the costs. *Solar International Shipping Agency*, 327 NLRB 369 (1998). Compare *George Joseph Orchard Siding, Inc.*, 325 NLRB 252 (1998), for unfair labor practice hearing policy.

Sequestration does not apply in pre-election representation cases. *Fall River Savings Bank*, 246 NLRB 831 fn. 4 (1979).

A petitioner is permitted to amend the petition during the hearing to reflect any changes in position after hearing the testimony. The other parties are likewise permitted to reflect changes in position. Withdrawal requests are also considered. Opportunity for oral argument is given to any party requesting it. The hearing officer refers to the Regional Director or to the Board for ruling all motions to dismiss, to transfer the case to the Board, or for oral argument before the Regional Director or the Board.

3-850 Hearing Officer's Report

393-7055

The hearing officer, after the close of the hearing, submits a brief report to the Regional Director, or to the Board in cases in which an order transferring the case to the Board has been issued prior to the preparation of the report.

3-860 Briefs

393-7066-2000 through 9000

Section 102.67(a) of the Board's Rules and Regulations provides that any party desiring to submit a brief to the Regional Director shall file an original and one copy thereof within 7 days after the close of the hearing, with the proviso that, before the close of the hearing and for good cause, the hearing officer may grant an extension of time not to exceed an additional 14 days. Requests for additional time, not made to the hearing officer, must be made to the Regional Director in writing. CHM section 11244.2, notes that "Authority to grant extensions of time to file briefs is discretionary with the hearing officer," and not automatic.

3-870 Posthearing Matters Prior to Decision

393-6068-7000

393-6068-6067-(3300)

393-6054-0100 through 8200

The transcript of the hearing may be corrected, if necessary. If the matter is pending before the Board and an unfair labor practice charge is filed, the Board is notified of the filing. All motions, or answers to motions, filed after the close of the hearing are filed directly with the Regional Director, or if before the Board with the latter. A consent-election agreement may be entered even after hearing. (For withdrawal of petitions or disclaimer of interest, see chapter 8, infra.)

3-880 Regional Director's or Board Decision and Request for Review

393-6081-2000 et seq.

393-6081-6000 et seq.

The Regional Director or, if the case is transferred to the Board in Washington, the Board may dismiss a petition, remand it for further hearing, or direct an election.

393-7077-4000 et seq.

Sections 102.67(b) and (c) provides for requests for review of Regional Director's decisions. Where a party is challenging a Regional Director's factual findings, its request for review should be accompanied by documentary evidence. *Aramark Sports & Entertainment Services*, 327 NLRB 47 (1998). The filing of such a request or the grant of review does not, "unless otherwise ordered by the Board," operate as a stay of any action taken or directed by the Regional Director and the Regional Director may schedule and conduct the election. In that event, the voters whose eligibility is being questioned in the request for review will be challenged and their ballots impounded.

The Second Circuit has held that in some circumstances a substantial change in the bargaining unit by the Board on review may affect the validity of the election. See *Hamilton Test Systems v. NLRB*, 743 F.2d 136 (2d Cir. 1984); *NLRB v. Lorimar Productions*, 771 F.2d 1294 (9th Cir. 1985); and *NLRB v. Parson School of Design*, 793 F.2d 503 (2d Cir. 1986). All three cases are discussed by the Board in *Toledo Hospital*, 315 NLRB 594 (1994); and *Morgan Manor Nursing & Rehabilitation Center*, 319 NLRB 552 (1995). The Board has held that its *Sonotone* procedures (infra at sec. 21-400) for professional and nonprofessional elections are not implicated by these court rulings. *Pratt & Whitney*, 327 NLRB 1213 (1999). See also *Northeast Iowa Telephone Co.*, 341 NLRB 670 (2004), in which a divided Board distinguished these cases from the "vote and impound procedures of the Board."

The Board will sometimes permit a disputed classification or an individual to vote under challenge rather than seeking to resolve the question on review. Usually, the number of such challenges will not exceed more than 10–12 percent of the unit. See *Silver Cross Hospital*, 350 NLRB No. 11 fn. 10 (2007).

In those situations in which the Board, on review, decides to vote the contested classification or person under challenge, any ensuing certification will note that the position is neither included nor excluded. *Orson E. Pontiac-GMC Trucks, Inc.*, 328 NLRB 688 (1999).

In a variation of this issue, the Board ordered a new election when it determined on review of the Regional Director's decision that the Director had incorrectly found that two healthcare institutions were a single employer. Because an election had already been held on the premise that the companies were a single employer, the Board found that the ballot misidentified the employer and the unit and therefore a second election was warranted. *Mercy General Partners*, 331 NLRB 783 (2000).

A Board decision will ordinarily apply "to all pending cases in whatever stage." *Aramark School Services*, 337 NLRB 1063 (2002).

For discussion of the finality of Regional Directors decisions and the effect of the absence of a Board majority to reverse a Regional Director's decision see section 2–400.

* * * *

This section of the procedures summarizes the initial stages of a representation proceeding. The precise language of the Board's Rules and Regulations and Statements of Procedure should be consulted at all times in relation to specific procedural provisions and, for greater detail, it is important to follow the steps described in the CHM.

3-900 Review of Representation Decisions

3-910 Judicial Review—Generally

A Board order in a representation case is not a final order and is therefore, not subject to judicial review directly. *AF of L v. NLRB*, 308 U.S. 401 (1940). Indeed, the Board retains jurisdiction over the representation case even where a related unfair labor practice case is pending in the Court. *Freund Baking Co.*, 330 NLRB 17 fn. 3 (1999).

Where, however, the contention is that the Board's decision in the representation case is in excess of its delegated power and is contrary to a specific prohibition of the Act, a party can obtain district court review of the Board's decision. *Leedom v. Kyne*, 358 U.S. 184 (1958). The Court has held that this exception to the general rule of nonreviewability is a "narrow one,'' *Boire* v. *Greyhound Corp*., 376 U.S. 473 (1964). In test of certification proceedings, the Board generally rejects ancillary defenses where it is clear that the employer would not honor the certification in any event. See, e.g., *People Care, Inc.*, 314 NLRB 1188 fn. 2 (1994), rejecting an employer defense that the union was dilatory in seeking bargaining.

For a discussion of Court jurisdiction over the representation case see *Freund Baking Co*., 330 NLRB 17 fn. 3 (1999).

3-911 Review by Employers

An employer who is dissatisfied with an adverse representation decision by the Board can obtain review of the decision only by refusing to bargain if and when the union is certified. The defense to that refusal to bargain would then be that the certification was improperly issued. The Board does not permit relitigation of the representation issue in the refusal to bargain case. Section 102.67(f) of the Board Rules, *Shadow Broadcast Service*, 323 NLRB 1002 (1997); and *FPA Medical Management*, 331 NLRB 936 (2000). In those circumstances, the court will review the representation issue in the court of appeals proceeding to enforce the Board order. Failure to request review will bar a party from raising the issue in a subsequent challenge to the certification. *Nursing Center at Vineland Concrete*, 318 NLRB 337 (1995). Similarily, in the absence of newly discovered evidence, an employer may not challenge a certification on the ground of supervisory status of unit members if it failed to raise the issue in the representation case. See *Premier Living Center*, 331 NLRB 123 (2000), where the Board likened that effort to a post election challenge. See also *International Maintenance Corp*., 337 NLRB 705 (2002), where the Board did not address a contention that the unit had increased by a factor of 10 because it was not raised as an exception.

In an unfair labor practice case, the Respondent is required to notify the Board of its intention to preserve the issues that it raised in the underlying unfair labor practice case. Some courts have disagreed with the Board as to how much notification is required. See *Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001).

In *Food & Commercial Workers Local 1996* (*Visiting Nurse Health System*), 336 NLRB 421 (2001), a divided Board found that a certified union could engage in secondary activity against a

neutral that was doing business with the employer who was refusing to honor the certification. See also section 7–120.

3-912 Review by Unions

A union, on the other hand, has to utilize an even more indirect method of obtaining review if it is dissatisfied with an adverse decision of the Board in a representation case. Thus, a union would have to engage in allegedly unlawful 8(b)(7)(B) picketing where it believes the Board has incorrectly certified the results of an election (a union loss) because of the erroneous representation case decision. *Oakland G. R. Kinney Co.,* 136 NLRB 335 (1962); *Kansas Color Press,* 158 NLRB 1332 (1966); and *American Bread Co.,* 170 NLRB 91 (1968).

3-920 Litigation of Unfair Labor Practice Issues in Representation Cases

The Board is occasionally confronted with a contention that it should review an unfair labor practice decision of the General Counsel in a representation case. Stated simply, the general rule has since the earliest days of Section 3(d) of the Act been that the Board will not permit the litigation of unfair labor practices in representation proceedings. *Times Square Stores Corp.,* 79 NLRB 361 (1948). See also *Texas Meat Packers,* 130 NLRB 279 (1961); *Cooper Supply Co*., 120 NLRB 1023 (1958); and *Capitol Records,* 118 NLRB 598 (1957); and *Virginia Concrete Corp*., 338 NLRB 1182 (2003). But in *All County Electric Co.,* 332 NLRB 863 (2000), a divided Board permitted the litigation of alter ego status in a representation case. In doing so the Board majority distinguished *Texas Meat Packers*, which held that issues of motivation for a layoff should not be litigated in representation cases.

In *Cooper Supply,* the issue was one of striker eligibility to vote in an election. The General Counsel had refused to find bad-faith bargaining charge which the union contended resulted in an unfair labor practice strike which in turn, it was argued, made the strikers eligible to vote. The Board refused to consider the union's contention solely because the General Counsel had refused to issue an 8(a)(5) complaint as to the bargaining. However, the fact that an unfair labor practice charge concerning the same conduct has been dismissed does not require pro forma overruling of the objection because they are not tested by the same criteria. *ADIA Personnel Services*, 322 NLRB 994 (1997).

Where, however, a party is charged with an unfair labor practice, the Board will consider that party's contention that the General Counsel incorrectly dismissed an unfair labor practice charge which the party relies on as its defense to the General Counsel's prosecution. See *Warwick Caterers*, 269 NLRB 482 (1984).

A finding in a representation case of supervisory status is not binding in a later unfair labor practice case involving allegations of independent 8(a)(1) conduct, *Bon Harbor Nursing & Rehabilitation Center,* 348 NLRB 1062 (2006).

For a related discussion of the relationship between unfair labor practice decisions of the General Counsel and objections to an election see discussion at section 24-312.

3-930 Effect of Violence on a Board Certification

In "extraordinary" circumstances of union violence, the Board may decline to enforce a certification or to give a normal bargaining order remedy. See *Overnite Transportation Co.,* 333 NLRB 472 (2001). See also *Laura Modes Co*., 144 NLRB 1592 (1963), and section 6-380, infra.