

X. 10(K) HEARINGS

A. Prehearing Preparation for 10(k) Hearings

The hearing officer should:

1. Bring the following to the hearing:
 - (a) Board's Formal Exhibit - check for completeness and accuracy (see Section D).
 - (b) Appearance sheet and Form NLRB-856.
 - (c) Subpoena (both types).
 - (d) ULP Manual (See Section 10210 for information on 10(k) hearings).
 - (e) Rules and Regulations.
2. If 10(l) relief has been sought, the hearing officer should be familiar with the 10(l) record, including the transcript and exhibits.
3. Review the agenda minute or final investigative report.
4. Appendix A is a stipulation form for use as Board Exhibit 2. It should identify the correct names of the parties, jurisdiction and labor organization status. In addition, the following written stipulations should be secured. They may be added to Board Exhibit 2.
 - (a) Work in dispute and competing claims
 - (b) Prior Board orders
 - (c) To whom the work was assigned
 - (d) Voluntary adjustment mechanisms
 - (e) 10(l) court proceedings
5. Read recent Board 10(k) determinations, particularly those involving the same unions, the same kind of work that is disputed and the same kind of issues.
6. Prepare a list of questions to ask should the parties neglect to cover them. (See Section H, Relevant Areas of Inquiry, *infra*).
7. Call each of the parties' attorneys/representatives several days before the hearing opens to remind them of the hearing time, place and date. Explain what is needed in the record. Encourage the parties to resolve the dispute prior to the hearing, emphasizing that the Board's Decision will likely apply only to the job in question and oftentimes will issue only after the job is completed. This is not an *ex parte* communication prohibited by Section 102.128(d), Rules and Regulations (also see Section 102.131) because the hearing officer is not the decision-maker in the case.

B. The Hearing

The hearing officer should:

1. Before the hearing opens, show the parties the formal papers.

2. Have parties sign and fill out the appearance sheets.
3. Solicit as many stipulations as possible. (Make sure to get stipulation that employer is not failing to conform to an order or certification of the Board determining the bargaining representative for the employees performing the disputed work.)
4. Open the record using opening statement below.
5. Get the appearances stated on the record.
6. Ask for intervenors.
7. Get the correct names of all parties—amendments if necessary.
8. Ask the parties for their positions (after clearly defining the nature of the work in dispute).
9. Decide on the order of presentation of evidence, i.e., who will put on evidence first.
10. To the extent the matters below are not covered by the written stipulations of the parties in Board Exhibit 2, receive evidence, preferably in the following order:
 - (a) Jurisdictional facts (see Section IV, A, Jurisdiction).
 - (b) Evidence or stipulation establishing labor organization(s) status.
 - (c) Evidence on issue of “reasonable cause to believe” that Section 8(b)(4)(D) has been violated.
 - (d) Competing claims.
 - (e) Evidence in support of the various positions regarding the merits.
11. Give all parties opportunity to argue orally on the record.
12. Read closing statement.
13. Set the due date for briefs. Section 102.90, Rules and Regulations provides that briefs shall be filed within 7 days after the close of the hearing. Because Section 10(k) hearing transcripts have a 10-day delivery, parties will probably not have them by the due date. Thus, advise them that extensions of time must be filed with the Executive Secretary's Office. Also note that the Hearing Officer's Report is due within 48 hours after the close of the hearing. It is imperative that the report is timely in order to enable the Executive Secretary's Office to rule on the requested extensions of time.
14. Ask reporter for estimate of number of pages of transcript.

C. Opening Statement

At the commencement of the hearing, the hearing officer shall make the following opening statement:

“The hearing will come to order. This is a formal hearing pursuant to Section 10(k) of the National Labor Relations Act in the matter of (names of parties)

The case number is _____.

The hearing officer appearing for the Board is _____.

Will counsel please state their appearances for the record?

For the Charging Party?

For Employer?

For other unions involved?

For _____?

Are there any other persons in the hearing room at this time who claim an interest in this proceeding?

I wish to inform all the parties that the official reporter makes the only official transcript of these proceedings and all citations and briefs and arguments must refer to the official record. After the close of the hearing, one or more of the parties may wish to have corrections made in the record. All such proposed corrections, either by way of stipulation or motion, should be forwarded to the Board in Washington instead of to the hearing officer. The hearing officer has no authority to make any rulings in connection with the case after the hearing is closed. In the event that any of the parties wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. Statements of reasons in support of motions or objections should be as concise as possible. An original and two copies of all pleadings submitted during the hearing are to be filed with the hearing officer, with copies immediately served on the other parties. The role of the hearing officer is to ensure that the record contains as full a statement of the facts as may be necessary for a determination of the issues by the Board. All parties will be afforded a full opportunity to present their respective positions and to produce evidence in support of their contentions. It may become necessary for me to ask questions, call witnesses and explore avenues with respect to matters not raised or only partially raised by the parties.

The services of the hearing officer are equally at the disposal of all the parties to the proceeding in developing the material evidence.

D. Formal Exhibits

The formal papers consist of the following:

- (a) Copy of the charge and proof of service.
- (b) Notice of charge filed.
- (c) Notice of 10(k) hearing and affidavits of service.
- (d) Any request by the parties for postponements of the hearing.
- (e) Any 10(l) injunctions entered by the court.
- (f) Appearance sheet.

The hearing officer should state:

The formal exhibit in this matter has been marked as Board's Exhibit 1(a) through 1(___), the latter being the index of the exhibit. This formal exhibit has already been shown to the parties.

Are there any objections to the receipt of the Board's Exhibit 1(a) through 1(___)?

Ask each party and get his/her response clearly for the record.

Board's Exhibit 1 is received in evidence.

E. Intervention

Are there any motions to intervene in this proceeding at this time?

F. Stipulations

As set forth above in Section A, 4, receive into evidence Board Exhibit 2 containing the parties' written stipulations. If the hearing officer has not secured stipulations prior to the opening of the hearing, secure them at this time. If the parties refuse to enter into written stipulations, attempt to secure their verbal stipulations, on the record. Make sure that each party consents to enter into the stipulations you receive. The hearing officer must state on the record the precise stipulation and that it is received or rejected.

If the parties do not enter into written stipulations, the hearing officer must obtain the following oral stipulations:

1. Jurisdictional Information

See Section IV, A, Jurisdiction, for commerce standards.

Can it be stipulated that (here give the jurisdictional information, e.g., XYZ Co. is a Delaware corporation engaged in the business of _____ and annually sells and ships goods valued at in excess of \$ ___ from its facility located at

_____ to customers located outside the State of _____. The parties stipulate that the employer is engaged in commerce within the meaning of the NLRA.

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

2. Labor Organization

Will the parties stipulate that Local _____ is a labor organization within the meaning of Section 2(5) of the Act?

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

3. Work in Dispute

Can it be stipulated that the work described in the Notice of Hearing is the work that is in dispute? [Note: If the parties will not stipulate that the Notice of Hearing is accurate, attempt to obtain a stipulation of the work that is in dispute. If no stipulation can be reached, evidence needs to be presented regarding this issue].

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

4. Board Orders

Can it be stipulated that the employer herein is *not* failing to conform to an order or certification of the Board determining the bargaining representative for the employees performing the work in dispute?

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

5. Work Claims

Can it be stipulated that (Union A) and (Union B) both claim the work in dispute?

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

6. Voluntary Adjustments

Will the parties stipulate that there is no agreed-on method for voluntary adjustment of the work dispute in question here which would bind all parties?

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

7. Reasonable Cause

(Note: A party may object to entering into a stipulation on this issue. If so, evidence must be taken on the matter.)

Will the parties stipulate that on or about (date), the business agent for (union) told (employer), there would be (strike, picketing or other forms of

inducement, coercion) unless the work of (disputed work) was assigned to members of the (charged) union and that since or about (date), the employer assigned the disputed work to (members of other union or unrepresented employees) who are its employees?

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received.

8. Court Proceedings

Can it be stipulated that on or about (date), a petition under Section 10(l) of the Act was filed with the U.S. District Court for the District of _____, seeking an injunction against (Respondent Union), Civil No. _____, and that on (date) the district court granted an injunction prohibiting Respondent Union _____ from _____ (i.e., status of 10(l) petition). The parties have no objection to the receipt in evidence of the petition and order. (If you cannot get this stipulation, official notice can be taken of the court's action.)

Mr./Ms. _____, do you so stipulate on behalf of the Charging Party?

Mr./Ms. _____, do you so stipulate on behalf of the Charged Party?

Mr./Ms. _____, do you so stipulate on behalf of the Intervenor?

The stipulation is received. The Board's injunction petition and court's order will be marked as Board Exhibit (____).

G. Presentation of Evidence

The parties should now state their positions and present their cases. Keep accurate notes and ensure that the record contains all evidence needed for the hearing officer's report.

H. Relevant Areas of Inquiry

Make sure that the parties cover the following areas of inquiry. If the parties do not cover these issues, the hearing officer must make sure that the record is complete.

1. Testimony to show that the work assignment is disputed by the unions.
2. Are the unions certified by the NLRB to represent any of the employer's employees?
3. Precise description of the disputed work.

4. Relative skills necessary to perform disputed work.
5. Do the members of the respective unions possess these skills?
6. Certification and collective-bargaining agreements.
7. Employer preference.
8. Area and industry practice.
9. Past practice of employer.
10. Economy and efficiency of operations.
11. Arbitration awards and grievances.
12. Evidence to show no agreed-on method of handling dispute.
13. Conduct violative of Section 8(b)(4)(D).
14. Current status of the dispute.

I. Concluding Remarks

When the parties have called all their witnesses and put in all the documentary evidence, state on the record the following:

Does anyone have more witnesses to call or any documentary evidence to submit?

Does anyone wish to argue orally on the record? (If so, give them the opportunity; if not:) That being the case, I will read the following closing statement into the record:

Should any party desire to file a brief with the Board in this case, such brief must be printed or otherwise legibly duplicated, double spaced on 8-1/2- by 11 inch paper. An original plus seven copies must be filed with the Board in Washington, D.C. within 7 days after the close of this hearing. A copy must also be served on each of the other parties and proof of such service must be filed with the Board at the time the briefs are filed. Any request for an extension of time must be made of the Board, through the Executive Secretary, in Washington, D.C. not later than 3 days before the date the briefs are due. Such request must be made in writing and copies must be served immediately on each of the parties. Is there anything further?

The hearing is now closed.

(Obtain number of transcript pages from the reporter.)