TENTATIVE DRAFT

GUIDE TO BOARD PROCEDURES

OFFICE OF THE EXECUTIVE SECRETARY

Foreword

A tentative draft *Guide to Board Procedures* has been prepared under the auspices of the Office of the Executive Secretary to assist parties in complying with the Board's Rules and Regulations and administrative practices. The *Guide* is intended to assist the practitioner who is generally familiar with the Board's procedural requirements, but it is especially designed to help those with little or no familiarity with those rules. The *Guide* covers filing requirements, and answers questions concerning many other procedures and practices. It includes, among other helpful provisions, a quick reference guide for unfair labor practice case filings, a checklist for preparing exceptions, cross-exceptions, and briefs, and a number of helpful hints on how to avoid common filing mistakes. The *Guide* also includes a table of contents that facilitates finding the rules that pertain to particular areas of concern quickly and easily.

The practitioners and the public are encouraged to provide feedback on how well the draft presents the information in terms of organization, clarity, succinctness, ease of use, and thoroughness. Comments may be sent to E-Filing@nlrb.gov. Revisions to the *Guide* will take into consideration the comments we receive.

The draft *Guide* has not been approved by the Board, and the Board retains the discretion to amend the *Guide* at any time. The *Guide* also does not have the force of law or regulation, it is not intended to provide legal advice, and it does not limit or extend the Board's authority.

The Office of the Executive Secretary expresses its great appreciation to Board legal staff who contributed to the preparation of the draft *Guide*: Assistant Chief Counsels Kirk Franklin and Marc Seidman, and Senior Staff Counsel Jennifer White, as well as Staff Attorneys Mary Hermann, Amy Bryant, and Jennifer Kaufman. We especially thank Associate Executive Secretary Richard D. Hardick, who lead the drafting project and put to great use his unparalleled command of the Board's rules, regulations, and practices.

Lester A. Heltzer, Executive Secretary
December 10, 2010

National Labor Relations Board
Guide to Board Procedures

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1. Introduction

1.1 Purpose

This Guide describes procedures, requirements, and recommendations for practice before the National Labor Relations Board. It is provided for the information and convenience of the general public and for parties and their representatives who appear before the Board. This guide DOES NOT provide guidance for practice before the Board's regional offices, the General Counsel, or the Division of Judges.

1.2 Disclaimer

This guide does not carry the weight of law or regulation. It is not intended, nor should it be construed in any way, as legal advice, nor does it extend or limit the jurisdiction of the Board as established by law and regulation. Parties with business before the Board are strongly encouraged to consult the Board's Rules and Regulations prior to taking any action on a case.

1.3 Revisions

The Office of the Executive Secretary reserves the right to amend or revoke the text of this guide at its discretion.

2. The Board

2.1 Function, Jurisdiction and Authority

The National Labor Relations Board is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act, the primary law governing labor-management relations in the private sector. The statute guarantees employees the rights to organize, form or join unions, and bargain collectively with their employers; to engage in other protected concerted activity concerning workplace issues, with or without a union; and to refrain from all such activity.

The Board's mission is to enforce those rights. To that end, the Board's General Counsel, through the Board's regional offices, conducts elections for employees to decide whether they will have union representation, and investigates and prosecutes alleged unlawful acts, called unfair labor practices, by employers, unions, or both. The 5-member Board itself serves as an appellate body, reviewing decisions of Regional Directors and hearing officers in representation cases and of administrative law judges in unfair labor practice cases.

This Practitioner's Guide is for parties who are practicing before the Board itself. Parties with business before the Board's regional offices, the General Counsel, or the Division of Judges should consult the Board's website (www.nlrb.gov) for guidance concerning filing documents with those offices. See especially "How do I file a charge against an employer or union?" and "How do I file a petition to start or remove a union?" under "I am new to this Website" on the Board's home page. See also the "e-filing" instructions under the "E-Gov" tab on the home page.

2.2 Location and Hours of Operation

The Board's main administrative offices are located at 1099 14th Street, N.W., Washington, D.C., 20570. Hours of operation are 8:30 a.m. until 5 p.m. Eastern Time, Monday through Friday. The office is closed on Saturdays and Sundays and on the following federal holidays:

- New Year's Day
- Birthday of Martin Luther King, Jr.
- Washington's Birthday (Presidents Day)
- Memorial Day
- Independence Day
- Labor Day
- Columbus Day
- Thanksgiving Day
- Christmas Day

3. Common to All Cases

3.1 Filing with the Board

(a) Do I need an attorney or a legal representative?

No. There is no requirement that you be represented by an attorney or have other representation for any matter before the Board. The Board, however, expects that you will follow all applicable rules and regulations in all filings. Thus, parties may find it beneficial to have a legal representative who is familiar with the Board's procedures and rules.

(b) How do I designate a representative or notify the Board of a change of counsel or representative?

Ideally such a notification should be filed by a party. A party that retains or changes its counsel or representative when the case is pending before the Board must either file a Form NLRB 4701, obtainable from any NLRB field office, or submit a letter to the Board's Executive Secretary that includes the party's name, title and address; the case name and number; and the name,

address (street and e-mail), and facsimile and telephone numbers of the new attorney or representative. Sign and date the form or letter and serve it on all parties and the new attorney or representative and, if applicable, on the attorney or representative that is being replaced. (Addresses of the parties can be obtained by telephoning the Executive Secretary's Office at (202) 273-1067.) Enclose a certificate of service with the form or letter you file with the Board.

The form or letter may be filed by the new attorney if the above information is included. The certificate of service should reflect that a copy was sent to the client and, if applicable, the attorney or representative being replaced.

Either the party or the attorney or representative can notify the Board that it has severed its relationship with its representative or client as the case may be. Indicate the date the representative's services ceased if it is different from the date of the letter. Serve all parties, including the client or attorney, as the case may be.

3.2 Methods of Filing

(a) Where and when can I file documents with the Board?

Generally, documents that a party desires the Board to consider should be filed with the Board's Office of the Executive Secretary at the address set forth below, during the Board's normal operating hours.

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Caution: **Misaddressing documents intended for the Board is a frequent problem. Practitioners often inadvertently send Board filings to the General Counsel's Office of Appeals, the administrative law judge, the Regional Director or the Board itself rather than to the Executive Secretary of the Board. Because prior filings had been sent to the judge or Regional Director, the practitioner may consider "the Board" in the generic sense and mail a filing to the judge or Regional Director that is intended for the Board. Although the Division of Judges and regional offices usually recognize when a document they receive is intended to be filed with the Board and refer it to the Office of the Executive Secretary, you should not rely on them to correct this mistake.**

(b) How do I file documents with the Board?

Documents can be filed by personal hand delivery, private delivery service, regular mail, or e-filing using the Board's website (http://www.nlrb.gov). Some

items can be filed by facsimile, but others may not. Permission from the Executive Secretary must be obtained before filing certain types of documents by facsimile. Documents *cannot* be filed by e-mail.

(c) What do I need to know about each method of filing?

(1) Personal hand delivery, private delivery service and regular mail.

All documents that a party wishes the Board to consider can be filed with the Office of the Executive Secretary at the address shown above by personal hand delivery, private delivery service or regular mail.

Filings by personal hand delivery must arrive before 5:00 p.m. Eastern Time on the due date in order to be considered timely. The Board will also accept as timely most documents that are postmarked on the day before (or earlier than) the due date. “Postmarking” includes depositing the document in the regular mail (United States Postal Service) or with a private delivery service that will provide a record showing that the document was deposited with that service in sufficient time for delivery by the due date (but in no event later than the day before the due date). Be aware that the “postmark” rule does not apply to the following documents, which must be *received* by the Board on or before 5:00 p.m. Eastern Time on the due date (unless they are e-filed): requests for extensions of time to file any document and applications for awards and fees and expenses under the Equal Access to Justice Act (EAJA).

Authority: Rule 102.111(b).

(2) E-filing using the Board’s website.

The Board's E-Filing Program allows parties or other persons to use the Agency's website to file selected documents with the Office of the Executive Secretary in unfair labor practice and representation cases. In order to file documents electronically, access the Agency’s website at http://www.nlrb.gov, click on E-Gov, then click on the e-filing link on the pull-down menu. Enter the case number, click on “Search Case,” and then follow the directions. If you have a “My NLRB Account,” you can access the e-filing link from your account.

Any document which may, under the Board’s Rules, be filed with the Office of the Executive Secretary may be filed electronically, provided that it is no more than 20 megabytes in size.

E-FILINGS MUST BE TIMELY.

E-filings must be received by the Board before midnight on the due date in order to be considered timely. Be aware that a failure to timely e-file a document will

not be excused on the basis of a claim that transmission could not be accomplished because of technical or other problems on the user's end.

Authority: E-filing instructions on the Agency's website at http://www.nlrb.gov, under the e-filing tab; Rule 102.114(i).

(3) Facsimile.

Certain documents may be filed with the Board by facsimile transmission with the advance permission of the Executive Secretary obtained by telephone. These documents include, but are not limited to, the following:

- Requests for Special Permission to Appeal
- Oppositions to Requests for Special Permission to Appeal

Requests for extensions of time may be filed with the Board by facsimile transmission without advance permission.

THE FOLLOWING DOCUMENTS MAY NOT BE FILED BY FACSIMILE:

- Exceptions and Cross-Exceptions
- Briefs
- Requests for Review of Regional Director Decisions
- Objections to Settlements
- EAJA Applications
- Motions for Default Judgment
- Motions for Summary Judgment
- Motions to Dismiss
- Motions for Reconsideration
- Motions to Clarify
- Motions to Reopen the Record
- Motions to Intervene
- Motions to Transfer, Consolidate or Sever
- Petitions for Advisory Opinions

FACSIMILE FILINGS MUST BE TIMELY.

Filings by facsimile must be received before 5:00 p.m. Eastern Time on the due date in order to be considered timely. Be aware that the midnight filing rule applicable to e-filings does not apply to documents that are filed by facsimile. A failure to timely file or serve a document will not be excused on the basis of a claim that transmission could not be accomplished because the receiving machine was off-line or unavailable for any other reason.

COPIES MAY BE SUBMITTED SEPARATELY.

Persons filing a document by facsimile may be required to submit the original and any additional copies required by the Board's Rules and Regulations to the Executive Secretary's Office by overnight delivery service.

Authority: Rule 102.114(f-g).

All filings, whether submitted by hand, private delivery service, regular mail, e-filing or facsimile, must be accompanied by a statement of service on the other parties. See Section 3.6 for information regarding service on other parties, statements of service and proof of service.

(d) How do I determine if the Board received my filing?

If you use a messenger for personal hand delivery, be sure the messenger asks the individual to whom he/she gives the document for a receipt. If you use the United States Postal Service or a private delivery service, choose the type of service that provides a return receipt or record of delivery. If you file electronically using the website, the Board's e-filing system generates an e-mail receipt when it is received. If you file by facsimile be sure your own facsimile machine is capable of printing a report of the date and time and whether the transmission was successful.

If you file using regular mail delivery, you may include a stamped self-addressed return envelope and request the Executive Secretary to date-stamp an extra copy of your document and return it in the envelope provided. Otherwise, use of regular mail may be problematic because there is no proof of receipt by the Board, and on occasion a document may not be delivered and the filer cannot demonstrate that it was timely filed. In addition, since 2001 the United States Postal Service diverts mail addressed to Federal agencies, including the NLRB, for irradiation to assure dangerous substances are not included. Irradiation causes significant delay in delivery and may blacken the postmark so that the postmark cannot be determined.

Regardless of the method you choose, you may telephone the Executive Secretary's Office to confirm receipt within a reasonable time after the documents are sent. Allow sufficient time, however, to make other delivery arrangements in case the document has not been received.

3.3 Number of Copies

You should send eight copies of your filing to the Board. Although some filings require fewer copies, you can never go wrong by sending eight copies. Each copy should be complete, including appendices, attachments and exhibits. If you e-file, you need not file any additional hard copies.

Authority: Rules 102.24(a); 102.46(h) and (j); 102.47; 102.65; 102.67(k)(1); 102.69(j)(1); 102.71(c); 102.90; 102.99(b); 102.101; 102.102; 102.106(e); 102.108; 102.109; 102.110; e-filing instructions on the Agency's website at http://www.nlrb.gov, under the E-Filing tab.

3.4 Due Dates and Extensions

(a) What is the Board's definition of a due date or deadline for a filing?

The due date or deadline is the date on which the filing must arrive at the Board. The Board will accept as timely any document that is hand delivered to the Executive Secretary's Office on or before 5:00 p.m. Eastern Time on the due date. The Board will also accept as timely most documents that are postmarked on the day before (or earlier than) the due date. "Postmarking" includes depositing the document in the regular mail or with a private delivery service that will provide a record showing that the document was deposited with that delivery service in sufficient time for delivery by the due date (but in no event later than the day before the due date). Be aware that the "postmark" rule does not apply to the following documents, which must be *received* by the Board on or before 5:00 p.m. Eastern Time on the due date (unless they are e-filed): requests for extensions of time to file any document and applications for awards and fees and expenses under EAJA.

E-Filings must be received by the Board before midnight Eastern Time on the due date in order to be considered timely.

Filings allowed by facsimile must be received before 5:00 p.m. Eastern Time on the due date in order to be considered timely.

Authority: Rule 102.111(b), Rule 114, and the e-filing instructions on the Agency's website at http://www.nlrb.gov, under the E-Filing tab.

(b) How are due dates determined?

Some documents, e.g., orders to show cause, transfer orders, and grants of extensions, contain the specific date a document is due. For others, e.g., answering and reply briefs and certain oppositions, you must compute deadlines in accord with the Board's Rules. With respect to answers in unfair labor practice cases, if the due date for the filing of exceptions in the transfer order was inadvertently computed as less than the 28 days allowed, bring it to the Executive Secretary's attention and he will issue a correction. If the incorrect date is longer than 28 days, however, the Board adheres to the longer date and does not issue a correction.

With respect to deadlines that you must compute, determine the number of days allowed by the Rules and determine the date of the initiating document (the one

to which you will file a response). Do not count the day of the act from which the time runs. The first day following issuance or service of the initiating document is day one, even if it falls on a weekend or holiday. The last day of the time limit is included, unless it falls on a weekend or holiday. Thus, if you desire to file an answering brief to another party's exceptions brief, the due date begins to run from the last due date for filing of the exceptions. The next day following that due date is day one. Since answering briefs are due within 14 days from the last day exceptions can be filed, the 14th day thereafter is the due date.

Be aware that the date you received the initiating document is irrelevant for counting purposes. All responsive documents run from the due date of the document to which you will respond, not the date you received it. Thus, if you will be responding to a document filed by another party, and that document was filed early, your response time still starts to run from the due date. Most due dates are in multiples of 7 except for the due date for a petition to revoke a subpoena. See Section 102.111(a) of the Board's Rules. Thus, most due dates do not fall on weekends, but may fall on a holiday, in which case the document is due the next business day. Be aware that the Board does not add additional days when the initiating document was served on you by mail.

If you are responding to a judge's decision or Board notice to show cause, the clock starts on the date those documents were placed in the mail or the date an e-mail with a link to the decision was sent to you. That usually coincides with the date on the document.

The computation of some due dates requires you to count backwards from a certain date or event, in the same manner as described above. Thus, if you wish to file a motion to dismiss, pursuant to Section 102.24 of the Board's Rules, it is due no later than 28 days prior to the scheduled hearing (in most situations). You can determine the due date for the motion by counting 28 days backwards from the scheduled hearing date. Do not count the hearing date. The day before the hearing date is day one. The 28th day prior is the last date before the hearing that you may file the motion.

Authority: Rule 102.111

(c) What kind of due dates can be extended?

All Board filing deadlines can be extended for a reasonable period except the deadline for reply briefs and for the filing of an EAJA application, which is established by statute. (The deadlines for the filings of charges pursuant to Section 10(b) of the Act and petitions to revoke subpoenas also are statutory, but those are ordinarily filed with the Regional Director or the administrative law judge and are therefore outside the scope of this guide.) Repeat requests for extensions may not be granted, especially if the prior extension was granted with the condition that no further extensions will be granted. Also, be aware that an

extension of time to file a request for review or opposition regarding a decision and direction of election may be limited to only a few days.

(d) How do I obtain an extension?

Those seeking an extension should always provide a specific reason for the request and must serve the request on all other parties. The Executive Secretary's Office may wait a few days before ruling on such requests to afford other parties an opportunity to file an opposition, unless the request accurately represents that all the other parties agree. The Board may grant the entire amount sought, grant part of the time sought, or deny the request. If filed prior to 3 days before the due date, requests for reasonable extensions will be granted because of the nature of the issues involved and the amount of other work the practitioner is handling, court dates, and other prescheduled matters occurring within the briefing period. If an unusually long extension is sought, it may be granted under the condition that no further extensions will be granted or denied. Parties should be mindful, however, that the Board considers its cases to be important and they should take priority over many other matters. Whether an injunction has been granted and/or whether there is an ongoing strike or picketing are important considerations in limiting or denying an extension.

Frequently, a party requests an extension for the filing of an answering brief or opposition noting that the number of days sought is equal to that previously granted for the filing of the exceptions or request for review. While the extension may be warranted for other reasons, such a basis for an extension is not deemed compelling. The briefing schedule outlined in Sections 102.46, 102.67 and 102.69 of the Rules provides for answering briefs or oppositions to be filed in half the time that exceptions or requests for review are filed. Thus, under the Rules, answering briefs or oppositions are not usually considered to require the same time as that needed to file a brief in support of exceptions or a request for review.

(e) When should I file my extension request?

File the request as soon as you know that you need additional time. The Rules allow for the filing of extension requests up to and including the due date for the filing of the document for which you seek additional time. However, requests filed within 3 days of the due date must be grounded on circumstances not reasonably foreseeable in advance. Thus, requests within 3 days of the due date based on the press of other work, vacation, trial appearances, or other reasons that do not appear to be unforeseen, will be denied.

There are two exceptions to this 3-day rule. 1) The rule recognizes that during the 3 days prior to the due date the other parties may have submitted their exceptions or requests for review. Thus, if an extension is granted during this time, the requesting party will have the benefit of the other parties' brief before it perfects its own brief. The Board will grant the request even if the reason is not

unforeseen if all the other parties agree. (This is the only Rule that the Board allows the other parties to waive.) The waiver by the other parties must be unconditional. For example, frequently a party consents to an extension for the other parties' filings if they consent to an extension for their subsequent responsive brief. The Board may grant an extension for a response, but will not do so until the operative document has been filed. 2) Also, the Board may grant the request if the request was filed late (within 3 days of the due date) based on excusable neglect.

Authority: Rule 102.111(b).

(f) Do I share the extension granted to another party?

It depends. An extension granted to one party affords the same extension to all parties who are eligible to file the same document. Thus, if you are filing an answering brief and another party is granted an extension for filing an answering brief, that extension also applies to you. But an extension to file one document does not extend the time to file a different document, even for the same party. Thus, the grant of an extension for filing an answering brief does *not* extend the time for filing cross-exceptions by any party. An exception exists when a party is granted an extension for filing cross-exceptions: that party automatically receives the same extension for filing an answering brief, and therefore so do all other parties who are eligible to file cross-exceptions and/or answering briefs. See *P&M Cedar Products*, 282 NLRB 772 (1987).

Extensions also affect the due dates for responsive documents. An extension to file exceptions for example, will affect the due date for answering briefs, which are due 14 days after the due date for the filing of exceptions.

3.5 Late Filings

(a) Are there any allowances for late filings?

Notwithstanding the due date, a document will be considered timely filed regardless of when it arrives at the Board, if it was sent by regular mail or private delivery service and the postmark or the record of depositing with the delivery service reflects that it was placed in the mail or provided to the delivery service on the day before the due date, or earlier. This "postmark rule" does not apply to requests for extensions of time to file any document or to EAJA applications.

A late document will be allowed if the other party's initiating document that began the time period for filing was served on the other parties in a slower manner than that utilized to file with the Board. Unlike some courts, however, the Board does not allow an additional 3 days if the initiating document was filed by mail or was e-filed.

The Board may also allow a late document under its excusable neglect rule.

Authority: Rule 102.111(b) and (c).

(b) How do I obtain permission to file a late document under the Board's excusable neglect rule ?

File the late document along with a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion must be set forth in an affidavit and sworn to by individuals with personal knowledge of the facts. *International Union of Elevator Constructors, Local No. 2 (Unitec Elevator Services Company)*, 337 NLRB 426 (2002). It would be prudent if the affidavit was submitted by someone with direct knowledge of the facts.

In determining whether neglect is excusable, the Board takes into account all relevant circumstances including any prejudice to the non-moving party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. The Board currently places the greatest weight on the reasons for the delay. In this regard, "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." Id. at 427. Thus, inattentiveness or carelessness, absent other circumstances or further explanation, will not excuse a late filing.

Authority: Rule 102.111(c).

3.6 Service on Other Parties, Statement of Service and Proof of Service

(a) Am I required to serve my filings on other parties?

Yes. Documents must be served on all other parties in the same manner that they were filed with the Board, or faster, with the following exceptions.

- When filing with the Board is accomplished by e-filing, the other parties must be served by electronic mail (email), if possible. If a party to be served does not have the ability to receive electronic service, that party must be notified by telephone of the substance of the transmitted document and a copy of the document must be served by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission.
- When filing with the Board is accomplished by hand delivery, the other parties must be promptly notified by telephone and served in a manner designed to insure receipt by the close of the next business day (e.g., personal service, overnight delivery service or, with the permission of the party receiving the document, facsimile transmission).

- When filing with the Board is accomplished by facsimile transmission, the same method must be used to serve other parties whenever possible. The consent of the party receiving the document must be obtained prior to service by facsimile transmission. When a party cannot be served by facsimile, or chooses not to accept service by facsimile, the party must be notified personally or by telephone of the filing and a copy of the document must be served by personal service or overnight delivery service.
- In addition, all filings in representation cases must be served on the Regional Director.
- Individual Charging Parties in unfair labor practice cases must always be served.

Authority: Rules 102.46(a), (h), and (j); 102.67(k)(2); 102.69(j)(2); 102.114(a-c), (h), and (j).

(b) Am I required to provide a statement of service and/or proof of service?

All filings must be accompanied by a statement of service on other parties. The statement of service must specify the name or title of all parties served, the date of service, and the means of service (i.e., hand delivery, private delivery service, regular mail, e-filing or facsimile). In representation cases, service on the Regional Director should be reflected on the certificate of service.

It is also helpful if you include in your certificate of service the addresses of the parties you served and the date and manner that the document was transmitted to or filed with the Board

Proof of service (e.g., return post office receipt or private delivery service receipt) will be required only if subsequent to the receipt of the statement of service a question is raised with respect to proper service.

Authority: Rule 102.114(e).

3.7 Format and Length

(a) Does the Board require a specific format for filings?

Yes. Documents must be typed on 8 ½” by 11” plain white paper. Margins must be 1” on all sides. The Board discourages typing on both sides of the paper. Type should be no smaller than 12 characters-per-inch, the equivalent of elite, in both text and footnotes. Documents should be double-spaced, except that quotations and footnotes may be single spaced.

The Executive Secretary’s Office always assures that the document is within the page limit before accepting it. The Board has the discretion to reject any document that is not properly formatted. Its current policy, however, is to provide

the non-complying party an opportunity to resubmit a correctly formatted document.

There is no requirement for special binding.

Authority: Rules 102.46(j); 102.67(k)(1); 102.69(j)(1); 102.114(d).

(b) Are there limitations on the length of my filing?

Yes. Unless a request for additional pages is granted, all documents, except for reply briefs and *Reliant* submissions, discussed below, are limited to 50 pages. Parties will find it advisable to start planning or outlining their briefs early because any request for additional pages must be received no later than 10 days (5 days, including weekends and holidays in representation cases) before the document is due. Reply briefs are limited to 10 pages and no additional pages will be allowed for them under any circumstances. *Reliant* submissions and responses to them are limited to 350 words, about 1 ½ pages. The Executive Secretary's Office always assures that the document is within the page limit before accepting it.

Authority: Rules 102.46(h) and (j); 102.67(k)(1); 102.69(j)(1); *Reliant Energy*, 339 NLRB 66 (2003).

(c) How do I obtain permission to exceed the 50-page limit?

A motion requesting permission to exceed the page limitation must be filed with the Board not less than 10 days before a brief's due date (5 days, including Saturdays, Sundays and holidays for all documents filed in representation cases) and must set forth the reasons supporting the request.

The Board is reluctant to grant additional pages unless you demonstrate that you are briefing an extraordinary case based on the complexity, novelty or national impact of the issues involved. That the case involves numerous issues may not be sufficient, but is considered. Likewise, the length of the judge's, Regional Director's or hearing officer's decision and the number of days of hearing will be considered, but are not dispositive. The length of the briefs to the judge, director or hearing officer is usually given little weight because as the case progresses to the Board and the issues become more refined, it is assumed the briefs should become shorter, not longer.

Authority: Rules 102.46(j); 102.67(k)(1).

(d) Does the permission for additional pages obtained by one party automatically extend to another party?

No, you must file your own request, unless the original request was submitted on your, as well as the submitter's, behalf. It is assumed that not all parties have the same need for additional pages.

3.8 Case Information

(a) How do I obtain information about the status of a case?

You may call the Executive Secretary's Office when you desire to know the status of a case pending before the Board. The telephone number is (202) 273-1067. Such a request is not a prohibited ex parte communication. Generally, however, the case status information provided by the Executive Secretary's Office is limited to whether a case remains pending or whether it has issued. Given the volume and the varying complexity of the cases before the Board, the Board cannot predict processing times upon request. If you have registered for e-issuance, you will be notified by e-mail on the same day that the Board issues its decision. Registration assures that you will not be inadvertently omitted from service of the decision, which sometimes but rarely happens, if you are not registered and the decision is issued by mail.

The Executive Secretary's Office will not reveal the panel assigned to a pending case or the processing stage of a pending case, except as noted above. The Executive Secretary's Office also will not reveal why a case has been pending for what may be perceived to be a long period as a response to such an inquiry may reveal the Board's deliberations on a case, which is prohibited by the ex parte rules.

You may also obtain information about the status of a case, including whether any rulings or decisions have been issued and whether any motions or pleadings have been filed on the Board's Internet website (http://www.nlrb.gov), under the E-Gov tab.

3.9 Public Access to Information

(a) Can I examine and copy case records?

The formal documents constituting the official record in a case or proceeding are available to the public for inspection and copying at the appropriate regional office or at the Board's main administrative offices in Washington, D.C. Limited self-service copying of records may be available on site. More extensive copying may be done for a prescribed fee.

Authority: Rule 102.117(b)(1).

(b) What other records are available to the public?

Many of the Board's records are readily available to the public, at no charge and without the necessity of a request, either in the Board's reading room during business hours or electronically at the Board's website (http:///www.nlrb.com). Examples of such records include:

- Board decisions and orders.
- The Board's Rules and Regulations.
- The General Counsel's Casehandling Manuals for unfair labor practice cases, representation cases, and compliance proceedings.
- Certain General Counsel advice memoranda.
- Agency public notices and press releases.
- Guide to requesting information under the Freedom of Information Act (see below).

Contact the Executive Secretary's Office if you desire to use the Board's reading room.

Authority: Rule 102.117(a)(2).

Records other than those covered by Section 102.117(a) may be requested under the Freedom of Information Act, 5 U.S.C. Sec. 552 (FOIA). The procedures for making FOIA requests; the kinds of records that are and are not subject to disclosure; and the potential costs involved are addressed in detail on the Board's website. In brief, a FOIA request must be clearly identified as such; must be submitted in writing to the appropriate office within the Agency; and must describe the materials requested in a manner that will permit their identification and location. The request must also contain a statement assuming financial liability for the direct costs of responding to the request.

Authority: Rule 102.117(c-d).

3.10 The Board's Decision

(a) Will the full Board decide my case?

Not usually. To expedite casehandling the Board, pursuant to Section 3(b) of the Act, ordinarily decides cases through the use of five three-member panels with each Board Member acting as head of one panel. Each panel considers and decides the cases assigned to the member who is head of the panel. In some cases, the panel may direct that the case be discussed and decided by a full complement of the Board.

(b) Will I have an opportunity for oral argument before the Board?

Not usually. The Board rarely allows oral argument. Any request for oral argument should be filed when you file exceptions (or cross-exceptions). The Executive Secretary rejects those filed any other time.

The Board, however, has the discretion to hold oral argument at any time on any case or motion, and will provide an official Notice of Oral Argument when it so decides.

Authority: Rule 102.46(i) and 102.67(j)

(c) Is there a procedure in which a party can ask the Board itself to decide my case in the first instance rather than appeal to the Board a decision or ruling by a hearing officer, Regional Director or administrative law judge?

No. The Rules have no provision for a party to so move the Board. In order to effectuate the purposes of the Act and to avoid unnecessary costs or delay, the Board on its own motion may transfer a case to itself, or any of its members, following issuance of a complaint, to hear and decide a case in place of an administrative law judge. The Board has not exercised this prerogative in many years.

In pre-election representation cases the Regional Director may transfer a case to the Board if the case raises questions which he/she believes should be decided by the Board. No cases have been transferred to the Board in these circumstances in many years. Further, the provision does not appear to apply to post-election matters.

Authority: Rules 102.34; 102.50; and 102.67(h - j).

(d) How long will I have to wait for a Board decision on my case?

In fiscal year 2009, the median time elapsed from the judge's decision to the Board's decision was 175 days (In 2008, the median time was 269 days) Decisions on motions issued in a substantially shorter period. In representation cases, requests for review of directions of election usually are decided within 30 days of the Regional Director's decision. In fiscal year 2008, decisions on requests for review issued in a median of 14 days for those cases in which the request was denied. Decisions on review following a grant of review issued in a median of 132 days in fiscal year 2008. Decisions on post-election matters issued in a median of 68 days.

Authority: Table 23, Annual Report of the National Labor Relations Board (2008).

(e) Can a party move the Board to expedite its decision?

The Rules do not prohibit such motions. The Board recognizes, however, and does not have to be reminded, that most parties feel their cases are special and warrant prompt attention. The Board is also well aware that labor disputes are disruptive of the work place, frequently divide the work force and affect productivity and future planning. Pursuant to Section 10(m) of the Act, the Board must give priority to cases involving secondary boycotts, recognitional strikes, injunctions and those alleging violations of Section 8(a)(3) and 8(b)(2) of the Act. In this regard, the General Counsel or any of the parties may bring to the Board's attention when an injunction has been granted and the date, if any, when the injunction expires.

(f) How will I be notified of the Board's decision?

The Board serves its "published" decisions on the parties in one of two ways. If a party or its representative or attorney enrolls in the e-issuance project, at 5 p.m. on the issue date, he/she will receive an e-mail notification from the Board that a decision in their case has issued. The e-mail will contain a link to the decision. Enrollment in the e-issuance project is voluntary. To enroll, visit www.nlrb.gov and click on "My NLRB" to create a user name and password and obtain a unique pin number. If you opt for e-issuance, you agree that service of the decision is the date the Board sends you the e-mail notification that the decision has issued.

If you are not enrolled in the e-issuance project, you will receive a copy of the decision by mail. Representatives and attorneys are sent a copy of the decision by certified mail as well as regular mail. A party that has a representative or attorney will receive a copy by regular mail. A party that is unrepresented will receive a copy by both certified and regular mail.

In situations where a party has been represented by different counsels or representatives at various stages of the case, please be aware that the Board will serve its documents and decisions (e-issuance or certified or regular mail) on the current representative of record. It is the responsibility of the party or the last attorney of record to forward the documents to the former representative if he/she will resume representing the party before the Board.

You will receive Board unpublished decisions on requests for review by mail. You will receive unpublished decisions on all motions in both representation and unfair labor practice cases by facsimile. Board decisions that, in the absence of exceptions, adopt the judge's decision are served on the parties and their representatives by regular and certified mail as noted above. Board decisions that, in the absence of exceptions, adopt the Regional Director's or hearing officer's post election report issue by facsimile.

Authority: Rule 102.113(b) and Section 11(4) National Labor Relations Act.

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(g) What decisions does the Board publish in its bound volumes?

The Board includes in its bound volumes decisions and orders on exceptions to the administrative law judge's decision. The Board does not usually include in its bound volumes decisions and orders in representation cases, orders remanding to an administrative law judge, or orders ruling on requests for review, motions, interlocutory appeals or petitions to revoke subpoenas. Decisions and orders on motions for summary judgment are included in the Board's slip opinions but not usually in the bound volumes. The Board has the discretion, however to publish any of its decisions or orders.

Parties should be aware that a vacatur of a Board decision will be published. Vacaturs of judges' decisions are unpublished. Further, the Board is not responsible for the handling of vacaturs by services like Westlaw. Thus, although a decision may be vacated, it may still be available for viewing by subscribers of the service.

Finally, vacated decisions that are based on a settlement retain their precedential value regarding the legal holding of the decision. They may continue to be cited by practitioners in this regard. See, e.g., *Caterpillar, Inc.,* 332 NLRB 1116 (2000).

(h) Can I move the Board to publish the decision in my case (motion)?

There is no prohibition to requests that any decision be published and included in the Board's bound volumes, but, as indicated above, whether or not a Board decision, order or ruling is included in the bound volumes is within the Board's sole discretion.

4. Representation Cases

4.1 Delegation

Representation cases and resolution of questions concerning representation are expedited. Most representation matters have been delegated to Regional Directors. Parties may raise issues with the Board by filing motions, requests for special permission to appeal, requests for review, or exceptions as provided by Section 102.50 through 102.71 of the Rules.

4.2 Motions and Requests

(a) When can I file a motion with the Board?

Motions, including motions to intervene, may be filed with the Board only when the case is pending before the Board or after it has been transferred to the Board. Earlier in the case, motions should be filed with either the Regional Director or the hearing officer. The failure to grant a motion may be appealed to the Board when the aggrieved party files a request for review disputing the Regional Director's determination of the appropriate unit, existence of a question concerning representation, direction of election or dismissal of the petition.

Authority: Rule 102.65.

(b) Can I file a Motion to Intervene with the Board?

Motions to Intervene should be filed with the Regional Director prior to the pre-election hearing or with the hearing office after the hearing has opened.
If intervention has been granted over the other parties' objections, the other parties may appeal the decision as part of a request for review as noted in (a) above. Although there is no provision to appeal denial of intervention directly to the Board, as the proposed intervenor has no status to file a request for review, it may appeal the denial to the Board in a request for special permission to appeal.

Authority: Rule 102.65(a - b)

(c) How do I request amicus status in a representation case?

The Rules do not provide for the filing of amicus briefs. Regional Directors and hearing officers may allow them in special cases. Those seeking to file amicus briefs should make their request of the Regional Director or the hearing officer if the hearing has commenced. There is no provision in the Rules for appealing their decision.

After the case has been transferred to the Board, the request should be sent to the Board. The Board allows them in certain circumstances. Sometimes the Board solicits amicus briefs. The Board will consider the motion unless it was filed after the Board made its decision and the case is in the issuance process. Thus, after the case has been transferred to the Board you should file your request as soon as possible. Waiting to file the motion may result in rejection on timeliness grounds. The best practice includes filing the amicus brief with the motion.

The Board looks most favorably on amicus motions from groups or organizations whose constituent members will be affected by the Board's decision. The Board is not interested in "me too" briefs. Generally, a proposed amicus should

demonstrate that the Board will benefit from its brief, i.e., it has a unique perspective that the parties are not likely to have.

Usually, amicus briefs should be no longer than 50 pages and follow all other Rules. The Board has discretion whether to allow replies to amicus briefs.

The Board is not bound by the Regional Director's, hearing officer's or administrative law judge's decisions on amicus requests. Thus, even if they granted your request, you should move the Board for permission to participate as an amicus before the Board.

4.3 Requests for Special Permission to Appeal

(a) When can I file a request for a special permission to appeal a hearing officer's or Regional Director's ruling?

Generally, rulings by the Regional Director or by the hearing officer should not be appealed directly to the Board, but instead should be filed when the aggrieved party files a request for review disputing the Regional Director's determination of the appropriate unit, existence of a question concerning representation, direction of election or dismissal of the petition. Notwithstanding the foregoing, the Board's current practice is to allow the filing of such requests. It may deny or grant permission and it may proceed to rule on the appeal if it grants permission.

Authority: Rule 102.65(c)

(b) When should my request for special permission to appeal be filed?

The Rules say requests for special permission to appeal should be filed "promptly," but do not specify a definite time period.

Authority: Rule 102.65(c)

(c) Will my request for special permission to appeal stay the hearing or election?

The Board's Rules do not specifically address this question. However, the Board practice is that a request for special permission to appeal does not stay a hearing or an election. By filing a request for special permission to appeal, the requesting party does not waive its opportunity to file a request for review or exceptions on the issue.

Authority: Rule 102.65(c)

(d) What must I include in my request for special permission to appeal?

The request must include the reasons permission should be granted and the grounds relied on. The request must include a certificate that the other parties and the Regional Director were served with the request.

Authority: Rule 102.65(c)

(e) Can other parties file a response to the request for special permission to appeal?

Yes, and the response should be filed promptly and include a certificate reflecting service on the other parties and the Regional Director.

Authority: Rule 102.65(c)

4.4 Subpoenas

(a) Can I appeal an adverse ruling by the Regional Director or the hearing officer on a subpoena?

There is no provision in the Rules for such a filing directly to the Board. The aggrieved party may appeal the adverse ruling in its request for review disputing the Regional Director's determination of the appropriate unit, existence of a question concerning representation, direction of election or dismissal of the petition.

Authority: Rule 102.66(c); *Marion Manor for the Aged and Infirm, Inc.*, 333 NLRB 1084 (2001); *Millsboro Nursing & Rehabilitation Center, Inc.*, 327 NLRB 879 (1999).

4.5 Pre-Hearing Dismissals Unrelated to Pending Unfair Labor Practices

(a) How do I appeal the Regional Director's pre-hearing administrative dismissal of the petition?

If the dismissal is unrelated to any pending unfair labor practice, file a request for review within 14 days of service of the notice of dismissal.

Authority: Rule 102.71(a) and (c)

(b) What do I have to show for the Board to reverse the Regional Director?

You must include a complete statement of the facts and reasons upon which the request is based including at least one of the following:

(1) The absence of or departure from officially reported Board precedent raises a substantial question of law or policy.
(2) Existence of compelling reasons for reconsideration of an important Board rule or policy.
(3) Documentary evidence, previously submitted to the Regional Director, that raises serious doubts as to the Director's factual findings that can best be resolved upon the basis of a record developed at a hearing.
(4) A demonstration that the Director's action is arbitrary or capricious on its face.
(5) A demonstration that the petition raises issues that can best be resolved based on a record developed at a hearing.

Authority: Rule 102.71(a)

4.6 Pre-Hearing Dismissals Based on Pending Unfair Labor Practice Charges

(a) What do I file if the pre-hearing dismissal is based on a merit finding in a related unfair labor practice case?

File a request for review within 14 days of service of the notice of dismissal.

Authority: Rule 102.71(b)

(b) What do I have to show for the Board to reverse the Regional Director?

You must include a complete statement of the facts and reasons upon which the request is based including at least one of the following:

(1) The absence of or departure from officially reported Board precedent raises a substantial question of law or policy.
(2) Existence of compelling reasons for reconsideration of an important Board rule or policy.
(3) A demonstration that the Director's action is arbitrary or capricious on its face.

Authority: Rule 102.71(b)

4.7 Decisions to Hold the Processing of the Petition in Abeyance

(a) How do I appeal the Regional Director's decision to hold the processing the petition in abeyance because of pending concurrent unresolved charges of unfair labor practices?

File a request for review within 14 days from service of the notification of the decision to hold processing the petition in abeyance, and satisfy at least one of items 1, 2, or 4 of 4.5(b) above.

Authority: Rule 102.71(b)

4.8 Decisions to Continue Processing Petition Despite Pending Concurrent Unresolved Charges of Unfair Labor Practices

(a) How do I appeal the Regional Director's decision to continue to process the petition despite the existence of pending concurrent unresolved charges of unfair labor practices?

File a request for special permission to appeal as noted in 4.3 above.

4.9 Rehearing, Reopening of the Record, or Reconsideration of Regional Director's or Board Decision

(a) When must I file my motion for rehearing, reopening the record or reconsideration?

Section 102.65(e)(2) of the Rules provides that a party shall file for reconsideration or rehearing within 14 days after service of a Regional Director's decision or report or after a Board decision or order. A motion to reopen the record shall be filed after the close of the hearing or after service of the Regional Director's decision or report or after service of the Board decision or order, but it must be filed promptly on discovery of the evidence to be adduced. If the evidence is discovered after the close of the hearing but before the issuance of the Regional Director's decision, file the motion to reopen promptly with the Regional Director.

(b) Can I receive an extension for the filing of my motion?

Yes. You can move the Board to grant an extension to file a motion for rehearing or reconsideration.

Authority: Rule 102.65(e)(2)

(c) What must I demonstrate in my motion for rehearing, reopening the record or reconsideration?

All such motions must demonstrate that extraordinary circumstances require granting the motion. In addition, a motion for rehearing or to reopen the record must specify the error alleged to require a rehearing or hearing de novo; the prejudice to the movant resulting from the error; the additional evidence sought to be adduced; why it was not produced previously; and what result it would require if adduced and credited. Such a motion will be granted only if the evidence is either newly discovered, became available only after the close of the hearing, or in the Board's opinion should have been taken at the hearing. Newly discovered evidence is evidence in existence at the time of the hearing which could not be discovered at that time by the exercise of reasonable diligence. *Point Park University*, 344 NLRB 275, 276 (2005). A motion for reconsideration, in addition to extraordinary circumstances, shall state with particularity the material error claimed, and shall specify the page of the record relied on with respect to any finding of material fact.

Authority: Rule 102.65(e)(1)

(d) Can I move for reconsideration, rehearing or reopening the record because I forgot to raise an issue, place a document in evidence or call an important witness?

No. Such do not constitute extraordinary circumstances. Further, Section 102.65(e)(1) of the Rules specifies that, if the motion raises a matter that could have been but was not raised, it will not be entertained.

(e) Will the filing of any of these motions stay further proceedings?

No. They do not stay the time for filing a request for review of a decision or exceptions to a report. They will not stay the effectiveness of any action taken or directed to be taken. However, if a motion states with particularity that the granting of the motion will affect the eligibility to vote of specific employees, their votes in any election will be challenged and impounded while the motion is pending. Further, the Regional Director has discretion, upon notice to the Board, to treat a request for review of a decision or exceptions to a report as a motion for reconsideration. The Regional Director in those circumstances may decide to stay certain further proceedings previously ordered.

Authority: Rule 102.65(e)(3)

4.10 The Regional Director’s Pre-Election Decision or Order Following a Hearing.

(a) How do I appeal the Regional Director’s Decision and Direction of Election or Order based on a record developed at a hearing?

File a request for review within 14 days from service of the Decision or Order.

Authority: Rule 102.67(b)

(b) ***Will the filing of a request for review stay the election?***

No. The Regional Director will schedule and conclude the election even if a request for review has been filed and granted, unless ordered otherwise by the Board.

Authority: Rule 102.67(b)

(c) How will the filing of my request for review affect the eligibility of employees who are the subject of the request for review?

If the request for review is not ruled on or if it is granted (but a decision on review remains pending), the ballots of those whose validity may be affected by the Board’s decision will be segregated and all ballots will be impounded and remain unopened pending the decision. Thus, when the prospective voters in dispute appear at the polls, they will be provided ballots and may vote, but their ballots will be challenged and placed in challenge envelopes.

Authority: Rule 102.67(b)

(d) What do I have to show to persuade the Board to grant my request for review?

You must demonstrate that there exists a compelling reason to grant review based on one or more of the following grounds:

(1) The absence of or departure from officially reported Board precedent raises a substantial question of law or policy.
(2) The decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
(3) The conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
(4) There are compelling reasons for reconsideration of an important Board rule or policy.

With respect to ground 2, and other grounds when appropriate, you must include a summary of all evidence or rulings bearing on the issue. You must also include a summary of the argument.

Authority: Rule 102.67(c)

(e) Can I presume that the Board will read the transcript of the hearing before ruling on my request for review?

No. The Rules require that any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. Parties filing a request for review should include with the filing a summary of the arguments, excerpts from the record, and page citations to the relevant portions of the record.

Authority: Rule 102.67(d)

(f) Can I raise an issue with the Board that I did not raise with the Regional Director?

No. You may not raise any issue or allege any facts not timely presented to the Regional Director.

Authority: Rule 102.67(d)

(g) Can another party file an opposition to a request for review? If so, when?

Yes. It must be filed within 7 days after the last day a request for review must be filed.

Authority: Rule 102.67(e)

(h) Will the Board wait for an opposition before deciding the request for review?

The Board may deny the request for review anytime before the expiration of the time limit for the filing of an opposition. It will await the expiration before granting a request for review.

Authority: Rule 102.67(e)

(i) What effect will my failure to file a request for review have on related unfair labor practice cases? What effect does a denial have?

The failure to file a request for review precludes the party from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was or could have been raised in the representation proceeding.

A denial of a request for review is an affirmance of the Regional Director's action which shall also preclude relitigation of any such issue in an unfair labor practice case.

Authority: Rule 102.67(f)

(j) Can I waive my right to a request for review?

Yes. If you plan to waive your right to file a request for review, then you should notify the Regional Director pursuant to Statement of Procedure 101.21(d).

Authority: Rule 102.67(f)

(k) Can I withdraw my request for review?

Yes. Seek permission to withdraw from the Board any time prior to the issuance of the Board's decision. Serve the other parties and the Regional Director with your request.

Authority: Rule 102.67(g)

(l) What types of decisions will the Board issue?

The Board may deny review, issue an order granting review and rule on the issue in the same document, or grant review without ruling on the issue.

(m) If the Board grants review without ruling on the issue, can I file another brief?

Yes, all parties can file a brief on review within 14 days after issuance of the order granting review. These briefs may be a reproduction of the earlier brief requesting review and/or response to the request for review. You may not file responses to the briefs submitted following a grant of review.

Authority: Rule 102.67(g)

(n) Must a brief on review be a self-contained document?

No, after review is granted the Board will consider the entire record in light of the grounds relied on for review.

Authority: Rule 102.67(g)

(o) What is the record the Board relies on following a grant of review?

The record consists of the petition, notice of hearing with affidavit of service, motions, rulings, orders, the stenographic record of the hearing, oral argument (if any) before the Regional Director, stipulations, exhibits, briefs or other legal memoranda submitted to the Regional Director or the Board, and the decision of the Regional Director.

Authority: Rule 102.68

(p) Can the Regional Director treat a brief on review as a request for reconsideration?

No, the director cannot reconsider his/her decision following a grant of review. However, pursuant to Rule 102.65(e)(1), the director may treat a request for review as a motion for reconsideration of his/her decision prior to action by the Board.

(q) Can the party requesting review withdraw that request following the Board's grant of review?

Yes, with permission of the Board.

Authority: Rule 102.67(g)

4.11 Post Election Decisions and Filings

(a) What can I file when the Regional Director decides challenges and/or objections following an administrative investigation?

The type of document you can file and where you file is determined by the authority on which the election was conducted (Consent Election Agreement, Full Consent Election Agreement, Stipulated Election Agreement or Decision & Direction of Election) and the manner by which post-election issues were resolved (administrative investigation or hearing). Use the following chart to determine the type of document to file and where it is to be filed.

Resolution by Regional Administrative Investigation		
If Election Conducted Pursuant to…	**Regional Director Issues…**	**Appeal by Filing with the Board**
Consent or Full Consent	Report	Not Appealable. Regional Director's Decision is final.
Stipulated Agreement	Report with Recommendations to the Board	Exceptions due within 14 days from service of Report.
Decision and Direction of Election	Report with Recommendations to the Board Or Supplemental Decision	Exceptions to the Board due within 14 days of issuance of Report. Or Request for Review due to the Board due within 14 days of issuance of Report. Regional Director's determination is final unless Board grants review.

Authority: Rule 102.69

(b) What can I file to appeal the Regional Director's decision to issue a notice of hearing on challenges and/or objections?

If the election was conducted pursuant to a consent election agreement, final consent election agreement or decision and direction of election, the decision to issue a notice of hearing is final and not appealable. If the election was conducted pursuant to a stipulated election agreement, you can challenge the decision to proceed to a hearing by filing a request for special permission to appeal promptly.

Authority: Rule 102.69

(c) What must be shown to warrant a hearing?

The challenges and/or objections must raise substantial and material factual or legal issues to warrant resolution based on record testimony obtained at a hearing.

Authority: Rule 102.69

(d) What can I file to appeal a decision on challenges and/or objections that issues following a hearing?

The type of document you can file and where you file it is determined by the authority on which the election was conducted (Consent Election Agreement, Full Consent Election Agreement, Stipulated Election Agreement or Decision & Direction of Election) and the instructions to the hearing officer in the notice of hearing. Use the following chart to determine the type of document to file and where to file it.

<u>Resolution by Hearing</u>		
If Election Conducted Pursuant to…	**Hearing Officer will Issue…**	**Appeal by Filing**
Consent or Full Consent	Report to Regional Director	Appeal to Regional Director, not the Board.
Stipulated Agreement	Report with Recommendations to the Board	Exceptions to Hearing Officer's Report due within 14 days of issuance of Report.
Decision and Direction	Report to Regional Director Or Report with Recommendations to the Board	File exceptions to Hearing Officer's Report with Regional Director, not the Board. Regional Director will decide exceptions in supplemental decision. Party may file request for review with the Board within 14 days from issuance of supplemental decision. Or File exceptions to Hearing Officer's Report within 14 days of issuance of this report.

Authority: Rule 102.69

5. Unfair Labor Practice Cases

5.1 Pretrial Motions

After an unfair labor practice complaint has issued, parties may seek to avoid the necessity of a hearing by filing with the Board motions for default judgment, motions for summary judgment, or motions to dismiss the complaint.

(a) What is a motion for default judgment?

Following issuance of a complaint, but before a hearing has opened, the General Counsel may file with the Board a motion requesting the Board to dispense with a hearing and enter a default judgment on the grounds that the respondent has failed to file an answer to the complaint.

The Board may either deny the motion or issue a notice to show cause why the motion should not be granted. If the Board issues a notice to show cause, it will normally postpone the hearing indefinitely.

After a notice to show cause has issued, the respondent may file a response, even if it filed an opposition prior to issuance of the notice. The time for filing the response will be stated in the notice to show cause.

Absent good cause being shown for the failure to file a timely answer, the Board may find that the allegations of the complaint are true and grant the motion for default judgment.

Authority: Rule 102.24.

(b) What is a motion for summary judgment or a motion to dismiss?

Following the issuance of a complaint, but before a hearing has opened, any party may file with the Board a motion requesting the Board to dispense with a hearing and enter summary judgment on all or some of the allegations in the complaint. A respondent may also file with the Board a motion to dismiss or partially dismiss the complaint.

The General Counsel may move for summary judgment or partial summary judgment when the answer admits or fails to adequately deny all or some of the material allegations in the complaint The General Counsel may also file a motion for summary judgment on the grounds that the respondent is attempting to relitigate in an unfair labor practice proceeding issues that were or could have been litigated in a prior representation proceeding.

A respondent may move for dismissal or partial dismissal of the complaint when the facts in the complaint, even if true, do not constitute a violation of the Act.

Motions for summary judgment and motions for dismissal ordinarily must be filed no later than 28 days before the scheduled hearing date. However, if no hearing is scheduled or if the hearing is scheduled less than 28 days after the answer to the complaint is due, the motion must be filed "promptly."

The Board may either deny the motion or issue a notice to show cause why the motion should not be granted. If the Board issues a notice to show cause, it will normally postpone the hearing indefinitely. If the non-moving party wishes to prevent postponement of the hearing, it may file an opposition to the motion. The opposition must be filed no later than 21 days prior to the hearing to prevent postponement of the hearing.

After a notice to show cause has issued, the non-moving party may file a response, even if it filed an opposition prior to issuance of the notice. The time for filing the response will be stated in the notice to show cause.

In addition, although not expressly provided for in the Board's rules, it is the Board's practice to permit the party moving for summary judgment or dismissal to file a reply brief to the opposition or response. *Baker Electric*, 330 NLRB 521 fn.4 (2000). Sur-reply briefs are generally not permitted, "except by special leave of the Board." Id.

It is not necessary to attach affidavits or other documentary evidence to a motion for summary judgment or dismissal, or to an opposition, response or reply.

The Board will grant a motion for summary judgment or a motion to dismiss only where there are no genuine issues of material fact requiring a hearing and the moving party is clearly entitled to judgment as a matter of law.

Authority: Rule 102.24.

(c) How do I file a motion for summary judgment or a motion to dismiss?

If you wish the Board to consider a motion for summary judgment or a motion to dismiss, you must file it with the Executive Secretary of the Board in Washington, D.C., by personal hand delivery, private delivery service, regular mail, or e-filing.

You must file eight copies of the motion, together with a statement of service on the parties. No hard copies are required if you e-file.

To expedite consideration of your motion, you should attach all documents that bear upon the motion, i.e., complaints, answers to complaints in unfair labor practice cases and decisions on requests for review and decisions and certifications in representation cases.

Authority: Rule 102.24(a).

(d) What is the due date for the filing of a motion for summary judgment or a motion to dismiss?

Generally, 28 days before the scheduled hearing. If a notice of hearing has not issued or if one has issued without a hearing date, you may be able to file anytime, but it should be filed "promptly." Be aware, however, that if you wait to file and a notice of hearing subsequently issues with a hearing date less than 28 days from service you may be precluded from filing. You may also be able to file when less than 28 days remains before the hearing if the hearing date is less than 28 days from the date an answer to the complaint is due.

Authority: Rule 102.24 (b).

(e) Can I file a reply to an opposition to my motion or to a response to a notice to show cause even if the Rules do not provide for it?

The Rules are silent as to such filings. In *Baker Electric*, 330 NLRB 521 fn.4 (2000), the Board decided to allow a reply to a response to a notice to show cause in a summary judgment case. The Board said it would follow the briefs allowed in Section 102.46 of the Rules, in which each party gets one response to a movant's document. Since then, the Board has accepted replies to oppositions and responses in all motion cases, petitions to quash subpoena cases, motions for reconsiderations and special appeals cases.

(f) If I can file a reply, when is it due?

As the Rules are silent on such filings they are obviously also silent on when such replies are due. The Board does not wait for them or wait a particular period of time to allow for them. Therefore, if you intend to file such replies, file a letter with the Board advising that you wish to file a reply and tell the Board when they can expect it. In unfair labor practice cases, select a reasonable period such as 14 days. Since there is no provision in the Rules for them, the Board does not have to wait for your reply before issuing its decision.

(g) Will the Board decide my motion for summary judgment or my motion to dismiss before the hearing opens?

Before granting these motions, the Board will issue a notice to show cause which will include a postponement of the scheduled hearing. It may deny the motions, however, without issuing a notice to show cause. The Board always attempts to decide whether to issue a notice to show cause or deny these motions before the scheduled hearing date, but occasionally these decisions are made after the hearing opens. For the purpose of trial preparation, you should always assume that the trial will open as schedule.

5.2 Requests for Special Permission to Appeal

(a) How do I file a special appeal?

Section 102.26 of the Rules provides that adverse rulings of a Regional Director or an administrative law judge shall not be appealed to the Board directly, except by special permission. Following the adverse ruling, the request for special permission, together with the appeal, should be filed "promptly," as soon as reasonably practicable given the circumstances. The request should contain a brief statement of the reasons special permission to appeal should be granted and the grounds relied on for the appeal.

Statements in opposition to the request should also be filed "promptly."

Filing of the request generally does not stay continuation of the hearing or implementation of the ruling.

The special appeal and any statement in opposition thereto may be filed with the Board by facsimile with advance telephonic permission from the Executive Secretary's Office. See Section 3.2(c)(3) above and Section 102.114(f) and (g) of the Rules and Regulations. Of course you may also file by any other means allowed by the Rules.

(b) Can I request special permission to appeal the General Counsel's refusal to issue complaint?

No. Section 3(d) of the Act provides that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . ." Further, the Supreme Court has declared that the General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

(c) If the administrative law judge grants a motion to dismiss my case before the judge files his/her decision, should I file a request for special permission to appeal with the Board?

No. Instead, you should file a request for review with the Board within 28 days of the judge's decision. See Section 102.27 of the Rules.

File a request for special permission to appeal only if the judge dismisses part of the case over your objections.

(d) How long will it take for the Board to rule on my request for special permission to appeal?

The Board will rule as soon as possible, but it may not rule before the hearing has completed.

5.3 Subpoenas

(a) Can I obtain subpoenas to compel testimony or production of documentary evidence during the investigation of an unfair labor practice charge and prior to issuance of a complaint?

No. The Board will deny a charging party's and/or a respondent's subpoena request submitted prior to the issuance of a complaint. Only the General Counsel can utilize an investigative subpoena.

(b) How do I obtain subpoenas to compel testimony or production of documentary evidence after issuance of a complaint?

You may obtain such subpoenas by written application, which are returnable at a hearing. The parties may agree on an earlier return date for subpoenas duces tecum.

Specify the number and type requested, i.e., ad testificandum or duces tecum. Although you can apply for subpoenas to the Board through the Executive Secretary in Washington, D.C., you will find it more expeditious to apply to the Regional Director prior to a hearing or to the administrative law judge after the hearing opens. You do not have to serve the other parties with the application. The application will be granted, as providing such subpoenas is considered a ministerial act involving no exercise of discretion.

Authority: Rule 102.31

In addition, although rarely invoked or granted, the Act and/or the Rules provide for:

- the subpoena of Board members, officers and employees or documents in their possession, but prior permission must be granted by the Board (Rule 102.118);
- a Board order, after approval by the Attorney General, requiring testimony and other information necessary in the public interest in circumstances where the subpoenaed individual has refused to provide the testimony or information based on his/her privilege against self-incrimination (Rule 102.31[c]);

- furnishing to “the Board” records, papers and information in the possession of the several departments and agencies of the “Government” when directed by the President and related to any matter before the Board. (Section 11[6] of the National Labor Relations Act)

(c) How can I obtain enforcement of the subpoena if the person on whom I served it refuses to comply?

Section 102.31(d) indicates that the General Counsel on behalf of the Board and “on relation of such private party,” shall institute proceedings in the appropriate district court for enforcement. It is your responsibility, however, to prosecute enforcement thereafter. Before the General Counsel will institute enforcement proceedings, you may be required to demonstrate an undue hardship in obtaining substantially equivalent materials by other means.

Authority: *Marian Manor for the Aged and Infirm, Inc.*, 333 NLRB 1084 (2001).

(d) If I or my client have been served with a Board subpoena and do not intend to comply, should I file a request for special permission to appeal with the Board?

No. If you do not intend to comply, you should file a petition to revoke with the Regional Director. *Do not file the petition with the Board.* You must file the petition within 5 days from the date you receive the subpoena. The Regional Director may either grant your petition, modify the subpoena in light of the issues raised in the petition or oppose the petition.

If the Regional Director opposes the petition, he/she will forward your petition along with his/her opposition to the Board (if the hearing has not opened) or the administrative law judge (if the hearing has opened). If the Regional Director refers your petition to the Board, you may file a response to the Regional Director’s opposition. If the Regional Director refers your petition to an administrative law judge and the judge denies your petition in whole or in part, you can challenge the judge’s decision by filing a request for special permission to appeal with the Board.

Authority: Rule 102.31(b); Section 11(1) National Labor Relations Act.

(e) What do I have to show to revoke the subpoena?

You must show that the evidence subpoenaed does not relate to any matter under investigation; that the subpoena does not describe with sufficient particularity the evidence whose production is required; or “any other reason sufficient in law.”

Authority: Rule 102.31; *Brink's Incorporated*, 281 NLRB 468 (1986); Federal Rules of Civil Procedure 26(b)(1) and (c) and 45(b).

(f) Should I withdraw my petition to revoke the subpoena if the matter has been resolved?

The Board encourages the parties to seek an amicable resolution of subpoena issues. If, after a petition to revoke has been referred to the Board and the parties engage in such discussions, they should include an understanding on the manner that the Board will be notified of any resolution. This may include rescinding the subpoena or withdrawal of the petition to revoke. In any event, the General Counsel or the subpoenaing party should notify the Board that the matter no longer needs to be decided.

5.4 Review of Administrative Law Judge's Decisions and Orders

(a) How do I obtain review of an administrative law judge's decision and order?

After the close of the hearing and the submission of post-hearing briefs, the administrative law judge issues a decision containing findings of fact, conclusions and the reasons or basis therefore, together with a recommended order. The administrative law judge files his/her decision with the Board and copies are served upon each of the parties with an order transferring the matter to the Board. All motions, exceptions or other documents submitted after the transfer must be filed with the Board in Washington, D.C.

Within 28 days from the date of service of the order transferring the case to the Board, any party may file exceptions to all or any part of the judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions.

Exceptions must identify:

- The questions of procedure, fact, law or policy to which exception is taken.
- The part of the judge's decision to which objection is made, citing page and line.
- The precise page citations to the parts of the official record (transcripts and exhibits) that are being relied upon.
- The grounds for each exception.

The Board may disregard any exception that does not meet these four criteria.

If a supporting brief is filed, the exceptions must not include any argument or the citation of authorities relied upon. If a supporting brief is not filed, however, the exceptions must include the supporting arguments. Rule 102.46(b)(1).

There is no page limit to the exceptions document unless you combine it with a brief in which situation the combined document is limited to 50 pages, absent the grant of a request for additional pages. If you combine the exceptions and brief, the document should also include the citation of authorities. When the brief is a separate document, its limit is also 50 pages, absent the grant of additional pages.

If you file a separate brief, it should not contain any matter that is not within the scope of the exceptions, and it must contain the following, in order:

- A clear and concise statement of the case containing all that is material to consideration of the questions presented.
- The questions involved and to be argued "together with a reference to the specific exceptions to which they relate."
- Argument that clearly presents the points of fact and law relied on in support of the position taken with specific reference to the record.

Any brief that exceeds 20 pages must also contain a subject index with page references and an alphabetized table of cases and other authorities cited.

The Board will find it helpful if you relate your numbered exceptions to the argument as well as the questions involved.

Exceptions that are not specifically urged are considered waived. Accordingly, you should be careful to take exception to any of the judge's *rulings, findings of fact, conclusions of law, and recommended remedial provisions* that you wish the Board to review. Rule 102.46(b)(2) and 102.46(g).

However, the Board has held that a judge's *failure to rule* on a contested matter does not come within the ambit of Rule 102.46(b), which applies to *rulings, findings*, etc., and therefore that a party does not waive the right to argue the matter before the Board by failing to file exceptions. Thus, when the judge rules in favor of a party on one of two alternative theories and, accordingly, finds it unnecessary to rule on the other theory, the Board will consider the party's argument based on the alternative theory (provided that it was raised and litigated before the judge), even though the party does not file exceptions, but raises the issue either in its brief in support of the judge's decision or in its answering brief. *Pay Less Drug Stores Northwest*, 312 NLRB 972, 973 (1993), enf. denied on other grounds 57 F.3d 1077 (9th Cir. 1995).

Authority: Rules 102.46; 102.48(c).

(b) What happens if no party files exceptions to the administrative law judge's decision?

If no party files proper exceptions within the time period allowed by the Board, the findings, conclusions and recommendations contained in the judge's decision, pursuant to Section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions and order.

Authority: Rule 102.48(a).

(c) In addition to exceptions and a brief in support of exceptions, what other documents can be filed after a judge's decision issues?

In addition to exceptions and a brief in support of exceptions, you can file:

(1) A brief in support of the judge's decision.

Briefs that solely applaud the judge's decision are permissible, but they are not necessary and are rarely filed. Such briefs are due when exceptions are due, usually within 28 days from the date of service of the order transferring the case to the Board. Therefore, an extension granted for the filing of exceptions serves as an extension to file a brief in support of the judge's decision.

Particular care should be exercised to ensure that a brief that asserts to be a brief in support of the judge's decision does not raise arguments that are properly raised in exceptions, e.g., that the judge "got it right for the wrong reasons" or got it right but there is a better rationale. The failure to raise such arguments in exceptions may result in their not being considered by the Board. The distinction between an exceptions brief and a brief in support of the judge's decision is critical because the Rules allow a party to file an answer to the exceptions brief, but answers to briefs in support of the judge's decision are not allowed.

Authority: Rule 102.46(a) and (b)(2).

(2) Cross-exceptions and a brief in support of cross-exceptions.

A party may file cross-exceptions and a brief in support of cross-exceptions, but only if it has not already filed exceptions and a brief in support of exceptions.

Cross-exceptions are due within 14 days from the last date on which exceptions and any supporting brief may be filed.

Cross-exceptions and supporting briefs are subject to the same requirements as exceptions and supporting briefs with regard to content, format and length.

Authority: Rule 102.46(e).

(3) One answering brief to each party's exceptions or cross-exceptions.

(If two parties file exceptions, you can file two answering briefs.)

Answering briefs to exceptions are due within 14 days from the last date on which exceptions and any supporting brief may be filed.

Answering briefs to cross-exceptions are due within 14 days from the last date on which cross-exceptions and any supporting briefs may be filed.

Answering briefs must be limited to the issues raised in the other party's exceptions or cross-exceptions and supporting briefs, and must, with respect to each issue, clearly present the facts and points of law relied upon to support the position taken.

Authority: Rules 102.46(d) and (f).

(4) A reply brief to each party's answering brief

A reply brief, limited to 10 pages and only addressing issues raised in an answering brief to which it is replying, may be filed within 14 days of the date on which the answering brief is due. The time may not be extended.

Authority: Rule 102.46(h).

(d) What documents can not be filed after judge's decision issues?

You *cannot* file:

(1) An answering brief to another party's brief in support of the judge's decision.

Authority: Rule 102.46(d)(1)

(2) A responsive brief to a reply brief (except by special leave of the Board)

Authority: Rule 102.46(h).

(e) Can I file my brief to the judge, in whole or in part, with the Board?

You may file with the Board the same brief you filed with the judge. Generally, when a party refiles with the Board its brief to the judge, the brief is filed as a brief in support of exceptions or a brief in support of the judge's decision. The brief to the judge when refiled with the Board, however, counts toward the page limit for briefs. Thus, if you do not obtain permission to file a brief in excess of the standard 50 pages and your brief to the judge that you are submitting to the

Board exceeds 50 pages, it will be rejected. If you file a brief in which you incorporate by reference your brief to the judge, the pages for both will be counted toward the page limit.

Although you may file an exact copy of the brief you submitted to judge with a cover letter indicating you are submitting it to the Board, such copies will often contain extraneous material, e.g. argument on issues with which the judge subsequently agreed. Therefore, the better practice is to change the title and make other appropriate changes (e.g. delete portions in which you prevailed before the judge) and reprint it for submission to the Board. Such changes are critical if the brief is submitted as an answering brief or reply brief, both of which are limited to issues raised in the brief to which you are responding.

(f) Can I adopt another party's brief?

Yes. However, if the adoption is accompanied by your own argument or brief, the pages for both briefs will be counted toward the page limit. For example if you file a brief of 10 pages with respect to one or two issues and you adopt another party's 50-page brief with regard to the remaining issues and you have not obtained permission for additional pages, it will be rejected because you have exceeded the limit.

(g) Can I file attachments to my briefs?

It depends. Generally, if the document you attach is not part of the record, the Board will disregard it and, upon the filing of a motion to strike, it will be rejected. Affidavits and documentary evidence, for example, which are not part of the record will be rejected. Charts that the filer constructs may be allowed, but, if they contain argument or are intimately connected to arguments in the brief, they may be counted toward the page limit for argument. If the total exceeds the page limit, the entire brief with attachments will be rejected. There is no prohibition to attaching exhibits already in evidence, but it is unnecessary.

(h) Must my cross-exceptions be related to exceptions filed by the other parties?

No. In fact, the purpose of the provision for filing cross-exceptions contemplates that they be unrelated.

(i) What must be shown for the Board to accept a late brief or filing?

Follow the suggestions in Section 3.5 above. In addition, the Board accepts late-filed exceptions and briefs in support of exceptions as cross-exceptions if another party filed timely exceptions.

(j) Can I combine the briefs I want to file?

Generally, no. Section 102 46(j) of the Rules states that any brief filed as part of the briefing schedule precipitated by an administrative law judge's decision shall not be combined with any other brief. Thus, do not combine answering briefs and reply briefs; answering briefs that respond to exceptions filed by two other parties; or reply briefs that respond to answering briefs filed by two other parties. The prohibition against combining briefs assures that parties do not devote more than the allowable pages to one brief. Further, the prohibition assures that the Board can determine which briefs and legal arguments are being addressed.

Notwithstanding the prohibition in Section 102.46(j) of the Rules, the Executive Secretary's Office has allowed combining of briefs where subject headings in the brief make clear which briefs and arguments of the opposing parties are being addressed and the brief does not exceed the number of pages allowed to address each brief.

(k) What do I file to correct errors in the transcript?

The best procedure is to file such requests with the administrative law judge before the judge issues his decision. If you do not notice the errors until after the case has been transferred to the Board, file a motion with the Board identifying the mistakes and indicating the pages and lines of the transcript where they are found, and how they should be corrected. As with all filings, be sure to serve this motion on the other parties. Upon receipt of your motion, the Executive Secretary's Office will invite the parties to provide a position on the alleged errors with a due date for a response. If no opposition is filed by the due date, the record is corrected as requested.

(l) How do I file an amicus brief?

There are no Board Rules on the filing of amicus briefs. The Board allows them in certain circumstances, however. Indeed, sometimes the Board solicits amicus briefs. Unless amicus briefs are solicited, those seeking amicus status should file a motion. The Board will consider the motion unless it was filed after the Board made its decision and the case is in the issuance process. Thus, waiting to file the motion may result in rejection on timeliness grounds. The best practice is to file the amicus brief with the motion early after the case has been transferred to the Board.

The Board looks most favorably on amicus motions from groups or organizations whose constituent members will be affected by the Board's decision. The Board is not interested in "me too" briefs. Generally, a proposed amicus should demonstrate that the Board will benefit from its brief, i.e., it has a unique perspective that the parties are not likely to have.

Usually, amicus briefs should be no longer than 50 pages and follow all other Rules. The parties are often allowed to file replies which may be noted in the Order granting amicus status.

The Board is not bound by the Regional Director's or administrative law judge's decisions on amicus requests. Thus, you should move the Board for amicus status regardless of their decision.

(m) If I am neither a charging party, respondent nor amicus, can I intervene in a Board proceeding?

Except for intervention in cases seeking an advisory opinion or declaratory order, the Rules do not contemplate filing a request for intervention directly with the Board. Sections 102.29 and 102.65(b) discuss seeking intervention with the Regional Director and the administrative law judge, and such matters should be resolved when the case is before them, rather than in the later stages when the case is before the Board. On occasion when special circumstances arise, the Board has granted intervention requests to permit the filing of exceptions by an interested party. The Board has discretion to grant intervention in special cases to such an extent and upon such terms as it deems proper.

(n) In addition to the exceptions and briefs, what does the Board review and consider in making its decision?

Section 102.48(b) of the Rules specifies that the Board decides unfair labor practice matters based on the record. Section 102.45(b) of the Rules states that the record comprises the charge and amended charge, complaint and amended complaint, notice of hearing, answers and amended answers to the complaint, motions, rulings and orders of the judge or the Board, the transcript of the hearing, stipulations, exhibits, documentary evidence, depositions, the judge's decision and the parties' exceptions, cross-exceptions, answering briefs, and reply briefs.

Briefs to the judge are not part of the record**.** Also, rulings on petitions to revoke subpoenas become part of the record only upon request of the party aggrieved by the ruling.

The Board does not contact or discuss the case with the General Counsel, counsel for the General Counsel or any administrative law judge. See Statements of Procedures Section 101.12

(o) How do I bring the Board's attention to a matter after the briefing schedule has closed?

Generally, the issuance of Federal court decisions and other decisions that relate to the issues in your case do not warrant additional briefing. The Board allows such decisions to be brought to its attention, however, pursuant to its policy announced in *Reliant Energy*, 339 NLRB 66 (2003). Essentially, the Board follows Rule 28(j) of the Federal Rules of Appellate Procedure. A party can call the Board's attention to "pertinent and significant authorities" that "come to a party's attention after the party's brief has been filed." This is accomplished usually through a letter setting forth the case citations, pages and lines in the brief where the citations belong, and the bases of their relevance. The body of the letter must not exceed 350 words (approximately 1½ pages). It will be helpful if you note that the letter is filed pursuant to *Reliant Energy*. The case allows the other parties to file an equally short reply within 14 days of service of the letter in unfair labor practice cases and 7 days in representation cases.

5.5 Motions for Reconsideration, Rehearing, or Reopening the Record

(a) How do I request a rehearing, reopening of the record, or reconsideration of a Board decision?

Section 102.48(d)(1) of the Rules provides that, in extraordinary circumstances, a party may move for reconsideration, rehearing, or reopening of the record after a Board decision or order.

A motion to reopen the record must state the evidence sought to be adduced, why it was not produced previously, and that, if adduced and credited, the evidence would lead to a different result. Such a motion will be granted only if the evidence is either newly discovered, became available only after the close of the hearing, or in the Board's opinion should have been taken at the hearing. Newly discovered evidence is evidence in existence at the time of the hearing which could not be discovered at that time by the exercise of reasonable diligence. *Point Park University*, 344 NLRB 275, 276 (2005).

Motions allowed under this section must be filed within 28 days after service of the Board's decision or order, unless the Board allows additional time. A motion for leave to adduce additional evidence will be timely, even if filed after the end of the 28-day period, if it is filed promptly after the evidence is discovered.

Authority: Rule 102.48(d).

(b) How do I request that the Board clarify its decision?

Motions for clarification are most appropriate if you suspect that an omission or error in an uncontested fact or conclusion was inadvertent. The Board can

modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it provided that "reasonable notice" is provided and the record has not been filed in a court of appeals.

Authority: Section 10(d), National Labor Relations Act; Rule 102.49..

(c) If I lost my case before a Board panel, can I request consideration by the full Board?

There is no Rule prohibiting such requests, but they are rarely granted. These types of motions often are filed by a losing party in a case in which the panel split 2-1. The movant presumes that the other two members, if given the opportunity to participate, will take the minority view changing it into a majority. You should be aware, however, that before any published case issues the non-participating members review the decision. During that review, they have the opportunity to join the panel. Thus, any assumption that the non-participants were not aware of the decision or were precluded from participating would be erroneous.

5.6 Court Review of Board Decisions

(a) Can I obtain court review of the Board's decision?

Any person aggrieved by a final order issued by the Board may petition a United States court of appeals for review of the order. No time limitations have been set within which review or enforcement must be sought. A petition for review may be filed in the United States court of appeals for the circuit in which the unfair labor practices allegedly occurred, or in which the parties reside or conduct business, or in the District of Columbia Circuit. Review petitions may be filed by a respondent, a charging party, or any other person who is aggrieved, including, for example, an alleged discriminatee.

Authority: Section 10(f), National Labor Relations Act.

(b) Can I obtain a stay of the Board's decision until I file a request for reconsideration with the Board or a request for review with a United States court of appeals?

No. Section 102.48(d)(3) of the Rules clearly states that a request for reconsideration "shall not operate to stay the effectiveness of the action of the Board unless so ordered."

With respect to a stay sought pending a request for review, Board orders are not self-enforcing. A respondent cannot be compelled to take affirmative action required by a Board order until the order is enforced by a court of appeals. If the stay is sought to avoid accruing additional liability pending review, either for engaging in additional conduct in violation of the Board's order or for failing to

provide benefits or backpay currently accruing under the order, an application for review affords no basis for granting a stay. A respondent that fails to comply with a Board order pending court review acts at its peril and assumes the risk that liability will continue to accrue. A contrary result would prejudice innocent employees while benefiting the violator of the Act. See *Maywood Do-nut Co., Inc.*, 256 NLRB 507 (1981).

(c) What happens if a court of appeals remands a case to the Board?

After the court of appeals issues a formal notice of decision remanding the case to the Board, the General Counsel will recommend to the Board whether it should accept the remand or seek certiorari before the Supreme Court. Most often, the Board decides to accept the remand. The Board panel to which the case was originally assigned will then decide whether to accept the decision of the court as the law of that case, issue another decision based solely on the issues the court remanded without the benefit of additional briefs by the parties, or solicit additional briefs on the remanded issues. Occasionally, the Board may remand the matter to an administrative law judge for further hearing and/or supplemental decision. The Executive Secretary issues a letter to the parties advising them of the Board's decision on the remand and whether briefs will be entertained and their due date. Usually, if the Board asks for briefs on the remanded issue, it does not allow answering briefs.

6. Settlements

(a) Can I settle my case after the administrative law judge has issued a decision and the case has been transferred to the Board?

Yes. You should contact the Regional Compliance Officer if you desire to settle. Follow the procedure in (b) below.

(b) How does the Board's ADR Program work?

The Board created the ADR program to assist the parties in settling unfair labor practice cases pending before the Board on exceptions to decisions issued by the Agency's administrative law judges. Participation in the program is voluntary, and a party who enters into settlement discussions under the program may withdraw its participation at any time. No party will be charged fees or expenses for using the Program. The Board will provide the parties with an experienced neutral, usually an administrative law judge, to facilitate confidential settlement discussions to explore resolution options that serve the parties' interests. Where feasible, the settlement conferences will be held in person at the parties' location, but some conferences may be held telephonically or by video conference. The Board will stay further processing of the unfair labor practice case for 30 days from the first meeting with the neutral or until the parties reach a settlement, whichever occurs first. Extensions of the stay beyond the 30 days may be granted by the neutral

only with the agreement of all parties and the Program Director. The neutral has no authority to impose a settlement, and the case will be settled only when the parties themselves reach what they consider to be a workable solution. Representation by counsel is not required, but the representative must have the authority to bind the party to the terms of a settlement agreement. Those who would like to participate in the ADR program should contact ADR Program Director Gary Shinners at (202) 273-3737. The ADR Program is not intended to discourage or interfere with settlement negotiations that the parties wish to conduct outside the Program.

(c) What must I file if a case pending before the Board has settled?

Except for formal settlements that provide for a Board Order and court judgment, the Board does not approve settlements or approve withdrawals. It prefers to remand the case to the Regional Director for approval of settlements and withdrawals. Thus, the best procedure is to file a motion for remand. Although the Board generally will not approve the settlement, this is not to say that the settlement and its terms are irrelevant. Indeed, the movant must disclose the terms of the settlement to the Board. Merely stating that the case has settled is insufficient. If the settlement is written, a copy should be submitted with the motion. The Board must balance public policy concerns with the wishes of the parties. To do so, the Board will analyze all the surrounding circumstances, including, but not limited to: 1) whether the charging party, the respondent and individual discriminatees have agreed to be bound, and whether the General Counsel agrees with the settlement; 2) whether the settlement is reasonable in light of the nature of the alleged violations, the risks of continued litigation and the stage of litigation; 3) whether the settlement was obtained through fraud, coercion or duress by any of the parties; and 4) whether the respondent has a history of violating the Act or breaching previous settlements. See *Independent Stave*, 287 NLRB 740, 744 (1987). The Board does not require that pending exceptions be withdrawn, but the parties may want to do so as an indication of their good faith (subject to reinstatement if the motion for remand is denied). Even if the settlement satisfies the *Independent Stave* criteria, the Board may refuse to remand the case because it deems that a public policy pronouncement on the issues outweighs the wishes of the parties.

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(d) Can I settle my case after the Board has issued a decision?

Yes, with qualifications. Before issuing a complaint, the General Counsel can settle cases in a manner that he/she determines will best effectuate the Act, in the circumstances of the case. After a case is transferred to the Board, those determinations rest with the Board. The optimal time to settle is early in the process. Except in circumstances where circuit court precedent indicates significant risk in court enforcement of the Board's decision, a respondent's influence in obtaining a post-Board Order settlement is substantially diminished. After the Board Order issues the Regional Director serves as an agent of the

Board in effecting compliance with the Board Order. Generally, unless there are certain financial exigencies which indicate full compliance is not immediately possible, or changed circumstances, the Regional Director will expect a respondent to fully comply with the Board's Order. Although the Regional Director will assess all settlement overtures, he/she usually will not delay seeking enforcement of the Board Order, which if obtained further diminishes the position of a respondent in settlement discussions.

Even when the respondent has demonstrated special circumstances that may warrant some remedial modifications, the respondent, as a condition for a settlement, may be required to agree to a formal compliance stipulation, consent to court enforcement, and/or provide security collateral.

The Board will entertain post-Board Order requests from a prevailing charging party that desires to immediately settle for less than full compliance rather than await the resolution of compliance issues through litigation**.**

(e) Will the Board vacate a judge's or Board decision as part of a settlement?

The Board rarely agrees to vacate either a judge's decision or one of its own decisions as part of a settlement. Parties must demonstrate that extraordinary circumstances warrant vacating the decision. The few times the Board has done so involved settlements of numerous and complex unfair labor practice cases pending in various stages, and the "global" settlement saved the Board and the parties extensive time and the costs involved in continued litigation.

Parties should be aware that a vacatur of a Board decision will be published. Vacaturs of judges' decisions are unpublished. Further, the Board is not responsible for the handling of vacaturs by services like Westlaw. Thus, although a decision may be vacated, it may still be available for viewing by subscribers of the service.

Finally, decisions that are vacated pursuant to a settlement retain their precedential value regarding the legal holding of the decision. They may continue to be cited by practitioners in this regard. See, e.g., *Caterpillar, Inc.,* 332 NLRB 1116 (2000).

7. Compliance Proceedings

(a) How do I obtain review of a Regional Director's compliance determination?

As noted in 6(c) above**,** after the Board Order issues, the Regional Director serves as an agent of the Board in effecting compliance with the Order. During the compliance investigation, the Regional Compliance Officer will have numerous discussions with the charging party(ies) and the respondent regarding satisfaction of the affirmative provisions of the Board's Order. The Compliance

Officer will share his/her conclusions regarding the backpay period, backpay amount and benefits that will satisfy the Board's Order.

When a charging party disputes the Region's determination of what constitutes compliance with the Board's Order, the charging party has a right to request a written determination by the Regional Director of compliance requirements. Within 14 days of the issuance of the written compliance determination, the charging party may file an appeal with the General Counsel in Washington D.C. Should the General Counsel deny the appeal of a compliance determination, the charging party may file a request for review with the Board within 14 days. Only the charging party can file the appeal with the General Counsel and the request for review with the Board.

Should the respondent contest the compliance requirements determined by the Region, the Regional Director will issue a compliance specification and notice of hearing before an administrative law judge.

Authority: Rules 102.52 – 102.54.

(b) How do I obtain review of an administrative law judge's decision on a compliance matter?

A party that is aggrieved by an administrative law judge's decision on a compliance matter may file exceptions with the Board. Such exceptions are due within 28 days of the judge's decision. Answering briefs and reply briefs are also allowed.

Authority: Rule 102.46.

8. Advisory Opinions and Declaratory Orders

(a) Does the Board provide advisory opinions?

Yes. Whenever an agency or court of any State or Territory is in doubt whether the Board would assert jurisdiction over the parties in a labor dispute pending before the agency or court, the agency or court may file a petition with the Board for an advisory opinion as to whether the Board would decline to assert jurisdiction based either on its commerce standards or because the employer is not within the jurisdiction of the Act. The Board will only accept such petitions if filed by the agency or court itself. A private party may not file a petition for an advisory opinion.

The petition must set forth, among other things, the nature of the proceeding; the general nature of the business involved; and the findings of the agency or court relating to the commerce operations of the business or, in the absence of such findings, a statement of the evidence relating to the commerce operations of the

business. The Board will not issue an opinion unless the relevant jurisdictional facts are undisputed or the state agency or court has already made the relevant factual findings.

The petitioning agency or court is required to serve a copy of the petition on each party to the agency or court proceeding. Within 14 days after service, any party served may respond to the petition, admitting or denying the facts asserted therein. Eight copies of the response must be filed with the Board and a copy must be served on all other parties. Briefs may not be filed except by special permission of the Board.

Any persons may request intervention by filing with the Board a written motion stating their interest in the petition. Eight copies of the motion must be filed with the Board.

Authority: Rules 102.98 – 102.104.

(b) Does the Board provide declaratory orders?

Yes. Where both an unfair labor practice charge and a representation petition relating to the same employer are pending in a regional office, and the General Counsel is in doubt over whether the Board would assert jurisdiction over the employer involved, the General Counsel may petition the Board and obtain a declaratory order concerning whether, under its discretionary jurisdictional standards, the Board would assert jurisdiction over the employer's operations.

The petition must set forth, among other things, the general nature of the employer's business and the commerce data relating to the operations of the business.

The General Counsel is required to serve the petition on all of the parties to the representation and unfair labor practice proceedings. Within 14 days after service, any party served may file a response to the petition, admitting or denying the facts asserted therein. Any party may also file a brief with the Board. Eight copies of the response and brief must be filed with the Board and a copy must also be served on the General Counsel and all other parties.

Any persons may request intervention by filing with the Board a written motion stating their interest in the petition. Eight copies of the motion must be filed with the Board.

Authority: Rules 102.105 - 102.110.

9. Prohibited Ex Parte Communications

(a) What is a prohibited ex parte communication?

An "ex parte communication" is an oral or written communication relevant to the merits of an Agency preceding that is not on the public record and with respect to which reasonable prior notice to all parties is not given. With certain limited exceptions, such private, off-the-record communications by interested persons in an Agency proceeding to any Agency official or employee who may reasonably be expected to participate in the decision in the proceeding is prohibited. Specific examples of prohibited ex parte communications are set forth in Section 102.129 of the Board's Rules. These include, but are not limited to, communications by an interested party in an unfair labor practice case to an administrative law judge assigned to hear the case or to the Board Members and/or their legal assistance relevant to the merits of the case. Examples of ex parte communications that are not prohibited are set forth at Section 102.130 of the Rules. These include, among other things, requests for information solely with respect to the status of a proceeding and communications proposing settlement or an agreement for disposition of any issues in the proceeding.

Authority: Rules 102.126 – 102.131.

(b) How does the Board enforce prohibitions on ex parte communications?

Any Agency official or employee who receives a prohibited communication is required to place the communication in the public record, if it was written, or to place a memorandum stating the substance of the communication in the public record, if it was oral. The Agency will then serve copies on all parties to the proceeding. Within 14 days after service, any party may file a statement admitting or denying any facts or contentions contained in the prohibited communication.

The Agency may also issue a notice to show cause why penalties should not be imposed on a party who knowingly makes a prohibited communication or knowingly causes a prohibited communication to be made. Penalties may include dismissal of the party's claim or interest in the proceeding, censure, or suspension or revocation of the privilege to practice before the Agency.

Authority: Rules 102.132; 102.133.

(c) How do I report a prohibited ex parte communication?

The Rules do not specify any means by which private parties should report prohibited communications. However, as discussed in greater detail in Section 10 of this Guide, allegations that an attorney or other representative appearing or practicing before the Agency has engaged in misconduct, including knowingly

making or causing to be made a prohibited ex parte communication, may be brought to the attention of the Associate General Counsel in the Division of Operations-Management by any person.

10. Misconduct by an Attorney or Other Representative

(a) How do I report misconduct of an attorney or representative in a Board proceeding and what action will the Board take after receiving my report?

Any attorney or other representative appearing or practicing before the Agency is required to conform to the standards of ethical and professional conduct required of practitioners before the courts. Misconduct by an attorney or other representative at any stage of any Agency proceeding may be grounds for discipline.

Allegations that an attorney or other representative has engaged in misconduct may be brought to the attention of the Associate General Counsel in the Division of Operations-Management by any person.

All such allegations will be investigated by the Associate General Counsel or his/her designee. Following an investigation, a recommendation will be made to the General Counsel, who will make the determination whether to institute disciplinary proceedings against the attorney or representative. The General Counsel's determination not to institute such proceedings is final and nonreviewable.

If the General Counsel determines that disciplinary proceedings are warranted, the General Counsel or his/her designee will serve the respondent with a complaint describing the alleged misconduct. The respondent may thereafter file an answer admitting or denying the allegations, and may request a hearing. Following the hearing, if any, a decision will be issued by an administrative law judge. The respondent may file exceptions to the judge's decision with the Board. If it is found that the respondent has engaged in misconduct, the Board may issue a final order imposing such discipline as it deems appropriate.

The Board's rules specifically provide for two sanctions that can be applied. 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 also issued notes of censure, reprimand or admonishment for less serious misconduct.

Any person found to have engaged in misconduct warranting disciplinary sanctions may seek judicial review.

Authority: Rule 102.177(a - f); *In re: Kirk Caraway,* 347 NLRB No. 86 (2006); *In re: James Simpson,* 347 NLRB No. 85 (2006); *In re: Stuart Bochner*, 322 NLRB 1096 (1997).

11. Equal Access to Justice Act (EAJA) Filings

(a) How do I know if I am eligible for an award of fees and expenses under EAJA?

You are eligible if you were a respondent in an adversary adjudication (unfair labor practice or backpay proceeding), you prevailed in a significant and discrete substantive portion of the proceeding, the General Counsel's position in the proceeding was not substantially justified and your net worth or the number of employees you employ does not exceed certain thresholds:

- Individuals are eligible if their net worth does not exceed $2 million.
- Other applicants are eligible if their net worth does not exceed $7 million and they do not employ more than 500 employees.
- There is no net worth limit for charitable and other tax exempt organizations or cooperative associations, but they may not employ more than 500 employees.

Net worth and number of employees is determined as of the date of the complaint in an unfair labor practice proceeding or the date of the notice of hearing in a backpay proceeding. Net worth and the number of employees of the applicant and all its affiliates will be aggregated.

Authority: Rules 102.143; 102.144

(b) How do I apply for an award of fees and expenses?

File with the Board an application that includes the following:

(1) The identity of the applicant and the adversary adjudication.
(2) A statement of the particulars in which you prevailed, and a description of the positions of the General Counsel that you allege were not substantially justified.
(3) A statement of the number, category, and work location of your employees and those of each of your affiliates.
(4) A brief description of the type and purpose of your business.
(5) A statement that you did not exceed the standards for net worth and number of employees.
(6) A statement of the amount of fees and expenses for which an award is sought.
(7) Your signature or the signature of your attorney or agent, including a signed written verification under oath or under penalty of perjury that the information in the application is true.

(8) A detailed exhibit showing the your net worth and that of your affiliates that fully discloses all assets and liabilities.
(9) An exhibit fully documenting the fees and expenses you are seeking, including separate itemized statements for each professional firm or individual whose services are covered by the application showing the dates of services, hours spent in connection with the proceeding by each, a description of specific services performed, the rates at which the fees were computed and the total amounts claimed and paid.
(10) A certificate of service indicating that you served all parties with the application.

Authority: Rule 102.147

(c) How is my application processed?

Upon the filing of the application, the Board refers it to the administrative law judge who heard the adversary adjudication upon which the application is based. After the application is referred, file all documents and/or motions with the judge, not the Board. Generally, the judge will issue a decision based on the record. A hearing usually is not conducted. The judge's decision on the application, including the judge's decision to grant a motion to dismiss filed by the General Counsel, is appealable to the Board. Parties may also file requests for special permission to appeal with the Board concerning any interim ruling by the judge.

Authority: Rule 102.148(b)

(d) Is my net worth exhibit disclosable to the public?

Yes. The net worth exhibit is part of the public record. If you object to the disclosure of the exhibit or any part of it, submit the exhibit or that portion in a sealed envelope labeled "Confidential Financial Information" accompanied by a motion to withhold the information from the public, which should include a description of the information sought to be withheld and a detailed explanation why public disclosure will adversely affect the applicant and is not required in the public interest. Serve the motion on all parties.

Authority: Rule 102.147(g)(2)

(e) If I file a motion to withhold disclosure of the net worth exhibit, must I serve the exhibit on all parties?

You must serve the exhibit on the General Counsel, but you do not have to serve it on the other parties.

Authority: Rule 102.147(g)(1)

(f) If the judge grants my motion, can I assume the net worth exhibit will never be disclosed?

No, it may be disclosed if required at a hearing on the application. Also, the judge's decision granting the motion is not determinative regarding requests under the Freedom of Information Act when requested under the provisions of Section 102.117 of the Board's Rules. Finally, the General Counsel may disclose the information to others if required in the course of an investigation to verify the claim of eligibility.

Authority: Rule 102.147(g)(2)

(g) Can I file a motion to withhold disclosure of my exhibit documenting the fees and expenses?

No. The Rules do not provide for such a motion. The exhibit documenting fees and expenses is part of the public record.

(h) When do I have to file the application?

The application must be filed within 30 days "after entry of the Board's final order." Thus, the 30-day period begins to run on the date of the order, not the service or issuance date.

Authority: Rule 102.148(a)

(i) Can I obtain an extension to file the application?

No. The Board does not have authority to change EAJA's statutory deadlines.

Authority: Rule 102.111(b)(2)

(j) Is there a limitation on the fees I may claim?

Yes. An award for attorney or agent fees may not exceed $75 per hour, but any person may file a petition with the Board for rulemaking to increase this rate. The petition should specify the rate the petitioner believes should be established and fully explain why the higher rate is warranted by the increase in the cost of living or a special factor.

Authority: Rules 102.145; 102.146

(k) Will the Board decide my petition for rulemaking before the judge issues a decision on my application?

No. The petition for rulemaking is held by the Board's Office of the Executive Secretary until exceptions to the judge's decision are filed. If the judge dismisses the application and no exceptions are filed, or if the Board rules against the award of fees and expenses, the petition will be deemed moot.

(l) What can be filed with the Board following issuance of the judge's decision on my application?

Parties may file the briefs allowed following a judge's decision in an unfair labor practice case outlined in Section 102.46 of the Rules and in Section 5.4 above. These include exceptions and briefs in support, briefs in support of the judge's decision, cross-exceptions and briefs in support, answering briefs, and reply briefs.

APPENDIX A: CHECKLIST FOR PREPARATION OF EXCEPTIONS, CROSS-EXCEPTIONS AND BRIEFS IN UNFAIR LABOR PRACTICE CASES

I. Exceptions, Cross-Exceptions, and Supporting Briefs

A. TIME REQUIREMENTS

1. **Exceptions and Supporting Briefs:** Due 28 days from the date of service of the order transferring the case to the Board. (The service date of the Transfer Order is the date it was placed in the mail or the date an e-mail was sent to you with a link to the Transfer Order.) The due date will appear in the "Note" at the bottom of the Transfer Order.

   Authority: Rule 102.46(a).

2. **Cross-Exceptions and Supporting Briefs:** Due 14 days from the last date on which exceptions and any supporting brief may be filed.

   Authority: Rule 102.46(e).

Note: The Board will accept as timely exceptions, cross-exceptions and briefs that are: 1) hand delivered on or before 5:00 p.m. Eastern Time on the due date; 2) postmarked on the day before (or earlier than) the due date; or 3) e-filed no later than 11:59 p.m. Eastern Time on the due date.

Authority: Rule 102.111(b). Also see the e-filing instructions on the Agency's website at http://www.nlrb.gov, under the E-Filing tab.

B. REQUESTS FOR EXTENSIONS OF TIME

Due dates for exceptions and cross-exceptions and supporting briefs may be extended for a reasonable period with permission of the Board requested no later than the due date. Extension requests filed within 3 days of the due date must be grounded on circumstances not reasonably foreseeable in advance.

Authority: Rule 102.111(b).

C. CONTENTS

1. **Exceptions and Cross-Exceptions:** Each exception and cross-exception must specifically set forth:

   a. The questions of procedure, fact, law or policy to which exception is taken.

b. The part of the judge's decision to which objection is made, citing page and line.
c. The precise page citations to the parts of the official record (transcripts and exhibits) that are being relied upon.
d. The grounds for each exception.

Note: If no supporting brief is filed, each exception must also include the citation of authorities relied upon and the argument in support of the exception. If a supporting brief is filed, the exceptions cannot include any argument or the citation of authorities relied upon.

The Board may disregard any exception that does not comply with the requirements set forth above. In most instances, exceptions that are not specifically urged are considered waived. The Board may refuse to consider any issue that is raised in a brief but was not presented in exceptions. Accordingly, particular care should be exercised to ensure that exception is taken to both the findings of fact and law and to the recommended order. Exceptions not accompanied by supporting arguments may also be considered waived. Particular care should be taken, therefore, to ensure that supporting argument is presented for each exception, either in the exceptions document itself or in the supporting brief, if one is filed.

Authority: Rule 102.46(b) and (c).

2. **Briefs in Support of Exceptions and Cross-Exceptions:** A brief filed in support of exceptions or cross-exceptions must not contain any matter that is not within the scope of the exceptions, and it must contain, in order, the following:

a. A clear and concise statement of the case containing all that is material to consideration of the questions presented.
b. The questions involved and to be argued "together with a reference to the specific exceptions to which they relate."
c. Argument that clearly presents the points of fact and law relied on in support of the position taken with specific reference to the record.

Any brief exceeding 20 pages must also include a subject index with page references and an alphabetical table of cases and other authorities cited.

Authority: Rules 102.46(c)(1-3) and (j).

D. LENGTH: Briefs are limited to 50 pages (not including the subject index and table of cases and other authorities), unless a request for additional pages is granted. Any request for additional pages must be received no later than 10 days before the due date. There is no page limit to the exceptions document

unless it is combined with a brief, in which situation the combined document is limited to 50 pages.

Authority: Rule 102.46(j).

E. FORMAT

1. **Paper Size:** 8 ½" by 11".
2. **Margins:** No less than 1" on all sides.
3. **Line Spacing:** Double, except that quotations and footnotes may be single spaced.
4. **Type:** No smaller than 12 characters per inch (elite or the equivalent).
5. **Binding:** No special requirements.

Authority: Rules 102.46(j) and 102.114(d).

F. NUMBER OF COPIES TO BE FILED: Eight, in most instances. However, if a document is e-filed, there is no need to file any additional hard copies. If a document is filed by facsimile, you may be required, at the discretion of the Executive Secretary, to submit the original and any additional copies required by the Board's Rules and Regulations to the Executive Secretary's Office by overnight delivery service.

Authority: Rule 102.46(j) and 102.114(f). Also see the e-filing instructions on the Agency's website at http://www.nlrb.gov, under the E-Filing tab.

G. HOW TO FILE: Personal hand delivery, private delivery service, regular mail, or e-filing at the Agency's Web site (http://www.nlrb.gov). Documents that are more than 20 MB in size may not be e-filed.

Authority: Rule 102.114 (a-i). Also see the e-filing instructions on the Agency's website at http://www.nlrb.gov, under the E-Filing tab.

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H. WHERE TO FILE: Documents, except those that are e-filed, should be filed with the Board's Executive Secretary at the address set forth below:

Lester A. Heltzer, Executive Sec
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570

I. SERVICE ON OTHER PARTIES

1. **Methods of Service**: Filings must be served on all other parties in the same manner that the document was filed with the Board, or in a more expeditious manner, with the following exceptions.

a. Hand Delivery: When filing with the Board is accomplished by hand delivery, other parties must be promptly notified by telephone and served in a manner designed to ensure receipt by the close of the next business day (e.g., personal service, overnight delivery service or, with the permission of the party receiving the document, facsimile transmission).

b. E-Filing: When filing with the Board is accomplished by e-filing, the other parties must be served by electronic mail (e-mail), if possible. If the other parties do not have the ability to receive electronic service, they must be notified by telephone of the substance of the document and a copy of the document must be served by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission.

c. Facsimile: When filing with the Board is accomplished by facsimile transmission, the same method must be used to serve other parties whenever possible. However, the consent of the party receiving the document must be obtained prior to service by facsimile transmission. When a party cannot be served by facsimile, or chooses not to accept service by facsimile, the party must be notified personally or by telephone of the filing and a copy of the document must be served by personal service or overnight delivery service.

Authority: Rule 102.114(a), (c), (h) and (i).

2. **Statement of Service and Proof of Service:** All filings must be accompanied by a statement of service on other parties. The statement of service must specify the names of the parties served and the date and manner of service. It is also helpful if you indicate the date and method of filing with the Board. Proof of service (e.g., return post office receipt or private delivery service receipt) is ordinarily not required. Proof of service will be required only if a question is raised with respect to proper service.

Authority: Rule 102.114(e).

II. Briefs in Support of a Judge's Decision

A. TIME REQUIREMENTS: Due on the same date that exceptions and supporting briefs are due, 28 days from the date of service of the order transferring the case to the Board. An extension granted for the filing of exceptions applies to briefs in support of the judge's decision.

Authority: Rule 102.46(a).

B. CONTENTS: Briefs in support of the judge's decision, i.e., briefs solely urging that the judge's decision be adopted by the Board, are not required and are rarely filed. Particular care should be exercised to ensure that a brief in support of the judge's decision does not raise arguments that are properly raised in exceptions. In most instances, the failure to raise such arguments through exceptions may result in their not being considered by the Board. Any brief exceeding 20 pages must include a subject index with page references and an alphabetical table of cases and other authorities cited.

Authority: Rule 102.46(b)(2), (g) and (j).

Briefs in support of the judge's decision are subject to the same requirements as exceptions and supporting briefs with regard to requests for extensions of time, length, format, number of copies to be filed, filing, and service.

Authority: Rule 102.46(j).

III. <u>Answering Briefs</u>

A. TIME REQUIREMENTS: Due 14 days from the last date on which exceptions or cross-exceptions and any supporting brief may be filed.

Authority: Rule 102.46(d)(1).

B. CONTENTS: Answering briefs must be limited to the questions raised in the other party's exceptions or cross-exceptions and supporting briefs and must clearly present:

1. The facts and points of law relied upon to support the position taken.
2. The page citations to the parts of the official record (transcripts and exhibits) that are being relied upon to support the position taken.

Parties may not file answering briefs to briefs in support of the judge's decision.

Any answering brief exceeding 20 pages must also include a subject index with page references and an alphabetical table of cases and other authorities cited.

Authority: Rule 102.46(d)(2) and (j).

Answering briefs are subject to the same requirements as exceptions and supporting briefs with regard to requests for extensions of time, length, format, number of copies to be filed, filing, and service.

Authority: Rule 102.46(j).

IV. <u>Reply Briefs</u>

A. TIME REQUIREMENTS: Due 14 days from the date on which the answering brief is due. No requests for extensions of time will be granted.

Authority: Rule 102.46(h).

B. CONTENTS: Reply briefs must be limited to the matters raised in the answering brief to which it is replying.

Authority: Rule 102.46(h).

C. LENGTH: Limited to 10 pages. No requests for additional pages will be granted.

Authority: Rule 102.46(h).

Reply briefs are subject to the same requirements as exceptions and supporting briefs with regard to format, number of copies to be filed, filing, and service.

Authority: Rule 102.46(j).

APPENDIX B: QUICK REFERENCE GUIDE FOR UNFAIR LABOR PRACTICE FILINGS

Document	Rule	Due Date	Answer Date	Reply Date	Means[1]
Motion for Summary Judgment (MSJ) or Dismissal	102.24(b)	28 days before hearing.	21 days before hearing.	Prior to Board action.	Do not fax.
Motion for Default Judgment	Policy	Prior to hearing.	Prior to Board action.	Prior to Board action.	Do not fax.
MSJ or Dismissal when no hearing scheduled or when hearing is less than 28 days after due date for answer to complaint.	102.24(b)	Promptly.	Prior to Board action.	Prior to Board action.	Do not fax.
Response to Notice to Show Cause (NSC)	102.24	As noted in NSC.	Prior to Board action.	Prior to Board action.	Do not fax.
Requests for Special Permission to Appeal	102.26	Promptly.	Promptly.	Prior to Board action.	Prior permission from Executive Secretary's Office (ESO) required for fax filing.
Request for Review of Pre-Decision Administrative Law Judge's (ALJ) Dismissal	102.27	28 days from "date of the order."	Prior to Board action.	Prior to Board action.	Do not fax.
Response to	Policy	Prior to	Not	NA	Do not

[1] Unless noted otherwise, all documents may be e-filed and filed by US mail, delivery service or hand delivery.

General Counsel's Opposition to Petition to Revoke Subpoena		Board action.	applicable. (NA)		fax.
Request for Board Order compelling testimony from individual who is likely to refuse to testify on basis of privilege against self-incrimination.	102.31(c)	Anytime prior to hearing or after transfer to Board.	NA	NA	Prior permission from ESO required for fax filing.
Special Appeal of ALJ's denial to compel testimony from witness who claims privilege against self-incrimination	102.31(c)	Within 24 hours of ALJ's ruling.	NA	NA	Prior permission from ESO required for fax filing.
Briefs following Board acceptance of stipulation of facts	102.35(a)(9)	As set forth in Order accepting stipulation.	14 days from last date for initial briefs.	Not allowed except by special permission.	Do not fax.
Exceptions to Judge's Decision (JD)	102.46(a)	28 days from service of JD.	14 days from last due date for exceptions.	14 days from last due date for answers.	Do not fax.
Brief in Support of JD	102.46(a)	Same as exceptions.	Not allowed.	Not allowed.	Do not fax.
Cross-Exceptions	102.46(e)	14 days from last due date for exceptions.	14 days from last due date for cross-exceptions.	14 days from last due date for answers.	Do not fax.
Request for Extension to due date for exceptions	102.46(a)	Before exceptions due date, but if w/i 3 days of due date must be based	Prior to Board action.	Prior to Board action.	Can be faxed to 202-273-4270.

		on unforeseen circumstances.			
Request for Extension to due date for answers	102.46(d)(3)	Before answers due date, but if w/i 3 days of due date must be based on unforeseen circumstances.	Prior to Board action.	Prior to Board action.	Can be faxed to 202-273-4270.
Request for Extension to due date for cross-exceptions	102.46(f)(2)	Before cross-exceptions due date, but if w/i 3 days of due date must be based on unforeseen circumstances. Extension will also extend due date for answers.	Prior to Board action.	Prior to Board action.	Can be faxed to 202-273-4270.
Request for Extension to due date for answers to cross-exceptions	102.46(f)(2)	Before answers due date, but if w/i 3 days of due date must be based on unforeseen circumstances.	Prior to Board action.	Prior to Board action.	Can be faxed to 202-273-4270.
Request to enlarge 50-page limit. (May not be filed for reply briefs)	102.46(j)	No later than 10 days before due date for filing document for which enlargement is requested.	Prior to Board action.	Prior to Board action.	Can be faxed to 202-273-4270.
Any Motion filed after case is transferred to Board	102.47	Anytime prior to Board Decision.	Prior to Board action.	Prior to Board action.	Prior permission from ESO required for fax filing.
Requests for reconsideration,	102.48(d)(2)	No later than 28 days from	Prior to Board	Prior to Board	Do not fax

rehearing, or reopening record		service of Board Decision. For reopening, must be filed promptly after discovery of new evidence.	action.	action.	
Extension to due date for reconsideration, rehearing, or reopening record	102.48(d)(2)	Before due date, but if w/i 3 days of due date must be based on unforeseen circumstances.	Prior to Board action.	Prior to Board action.	Can be faxed to 202-273-4270
Request for review of GC compliance determination	102.53(c)	14 days from service of GC decision; Only Charging Party (CP) can file.	Prior to Board action.	Prior to Board action.	Do not fax
Brief after Section 10(k) hearing	102.90	7 days after close of hearing; None in national defense industry unless by special permission based on good cause filed expeditiously.	Not allowed except by special permission.	NA	Do not fax
Petition for Advisory Opinion or Declaratory Order	102.98 102.108	No deadline.	14 days after service of petition.	NA	Do not fax. Do not e-file Petitions for Advisory Opinions.
Briefs in Advisory Opinions	102.103	None allowed except by special permission.	NA	NA	Do not fax or e-file

Briefs in Declaratory Orders	102.109	No deadline.	NA	NA	Do not fax
Opposition to Placement in Record of Unauthorized Ex Parte Communications	102.132(b)	No deadline.	14 days after service of such material.	NA	Do not fax
Response to NSC re: remedial action in Ex Parte Communications	102.133(a)	No deadline.	As noted in NSC, but not less than 7 days from date of NSC.	NA	Do not fax
Response to NSC re: discipline for Ex Parte Communications	102.133(b)	No deadline.	As noted in NSC, but not less than 7 days from date of NSC.	NA	Do not fax
EAJA Application	102.148(a)	w/i 30 days of date of Board Order.	35 days after service of application, unless stayed by motion to dismiss or filing of intent to negotiate. Then, answer due 35 days after issuance of Order denying motion to dismiss or 35 days after filing of intent to	21 days after service of answer	Do not fax

			negotiate.		
Motion to Dismiss EAJA Application*	102.150(a)	35 days after service of application.*	21 days from service of Motion.*	NA	Do not fax
Request for Review of Order granting dismissal of EAJA Application	102.150(a) and 102.27	28 days from date of Order dismissing.	NA	NA	Do not fax
Filing of Comments on Application by party who is neither GC nor applicant*	102.150(e)	35 days from service of Application.*	NA	NA	Do not fax
Filing of Comments on answer to Application by party who is neither GC nor applicant*	102.150(e)	21 days after service of answer.*	NA	NA	Do not fax
Demand for award payment	102.155	No deadline, but applicant must affirm it will not seek court review. Payment to be made 60 days from receipt of demand.	NA	NA	Do not fax

* File this document with the administrative law judge after the Board transfers the application to the judge.

APPENDIX C: AVOIDING PROBLEMS

The following list contains helpful hints that will assist parties in avoiding common problems that may result in delay in Board consideration of the document or rejection of the document.

1. Acquaint yourself with the applicable Rules and Regulations. Many of the Board's Rules are unique to it. Never assume that the Board has the same rules as the Federal Courts or other Federal agencies. Failure to know the applicable Board Rules usually does not excuse a late filing. Most of the applicable Rules for filings in unfair labor practice cases are found in Sections 102.24 through 102.29, 102.31, 102.46 through 102.51 and Section 102.111 through 102.114. Applicable Rules in representation cases are found in Sections 102.65 through 102.71 and Sections 102.111 through 102.114. The unfair labor practice rules apply when unfair labor practice cases and representation cases are consolidated.
2. Send your documents, briefs, and motions that you want the Board to consider to the Executive Secretary's Office in Washington, D.C. Inadvertent filing with the General Counsel, Regional Director or the Judge's Division is a common problem which will delay consideration and may cause rejection of documents meant to be filed with the Board.
3. Provide the required number of copies when you file. In most situations you can satisfy this by filing 8 copies. (Filings allowed by facsimile, except for requests for extensions, should be followed by overnight delivery of 7 copies. No additional copies are required when you e-file.)
4. If you opt for e-filing through the Board's website and do not receive a receipt from the Board, check that that your spam blocker will accept messages from nlrb.gov and/or temporarily disable your pop-up blocker. Remember that the receipt for a successful e-filing will be sent to the e-mail address entered on the website form for e-filing.
5. If you encounter problems uploading and transmitting your document using e-filing, call the Executive Secretary's Office if the problem occurs before 5:00 p.m., Eastern Time. If the problem develops after 5:00 p.m. on the due date, check the website to determine if the Board's e-filing system is offline because of scheduled service, system maintenance or upgrades. If there is no announcement on the website, assume the problem is on your end and try to e-file using another computer with internet access, such as another computer in the office, a home computer, a computer at a public library, or a computer at a commercial business service center. User-end problems will not excuse a late filing. These problems may be avoided if you file before the due date and/or before 5 p.m.
6. Serve all other parties with the document you file with the Board. Inactivity by the charging party does not excuse your failure to serve the charging party. All filings with the Board in representation cases must be served on the Regional Director as well as the other parties. Your document will not be forwarded to the

7. Serve your document on the parties in the same, or faster, manner that you filed it with the Board. If you intend to accomplish service by facsimile, you must obtain permission from the party being served. If a party cannot be served by facsimile or indicates it will not accept facsimile service, telephone the party and inform them of the substance of your document and provide personal or overnight service so that it is received by the next business day. For documents that are e-filed, serve the other parties by electronic mail (e-mail), if possible. If the other party does not have the ability to receive electronic service, telephone the party and inform them of the substance of your document and provide personal or overnight service so that it is received no later than the next day, or, with the permission of the party receiving the document, serve the document by facsimile transmission. See Section 102.114 of the Rules.

8. File timely. Be aware that some deadlines, especially in representation cases, require a quick filing or request for an extension.

9. Know how the Board uses these terms:
    a. Filing date. The date the Board must receive a filing. It is not the date you send it. A filing is untimely if it is mailed on the due date and arrives after the due date.
    b. Service date. The date the document served is placed in the mail. It is not the date you receive it. The Board does not add additional days for your response even if you were served by mail.
    c. Answering brief. A brief responding to exceptions, cross-exceptions, or motion. Parties often erroneously call this a reply brief, which has a specific meaning at the Board. Use "answer" or "answering brief" rather than "response" or "responsive brief."
    d. Reply brief. A brief responding to an answering brief. Do not call it an answering brief. Use this term instead of "response" or "responsive brief.
    e. Sur-reply brief. A brief responding to a reply brief. Sur-replies are usually not allowed.
    f. *Opposition.* A response to a request for review. Reply briefs are not permitted in representation cases.

10. Be aware that extension requests filed within 3 days of the due date must be grounded on unforeseen circumstances. That you have to be in court, will be away on vacation, or have other work are not usually considered unforeseen. An extension request filed within 3 days of the due date will be granted, however, if your request accurately reflects that the other parties, including individual charging parties, have stated that they consent or that they do not object.

11. Extension of a due date applies to all parties who can file the same document.

12. In unfair labor practice cases, the granting of an extension to file an answering brief does not serve to extend the time to file cross-exceptions, but the granting

13. Unless the Board grants you permission, do not exceed the page limit, which is 50 pages for most documents and 10 pages for reply briefs.

14. In unfair labor practice cases, a request for permission to exceed the page limit must be filed no later than 10 days before the due date for the document to be filed. In representation cases the request must be filed no later than 5 days before the due date. The other parties do not share in the grant of additional pages.

15. Do not include argument in your exceptions if you file a separate brief in support of exceptions. All argument, including argument about facts or the facts relied on by the judge, belongs in the brief.

16. Documents attached to your brief that have not been received in evidence may be stricken on motion by the other parties.

17. Your brief to the administrative law judge is not part of the official record reviewed by the Board unless you incorporate it into your brief to the Board. However, in that circumstance it will be counted toward the page limit.

18. Be aware that a request for review of a Regional Director's decision and direction of election or order must be a self-contained document enabling the Board to rule without the necessity of recourse to the record. You may wish to include excerpts from the record when filing a request for review.

19. The filing of a request for review does not stay an election. Note that a request for a stay of the election is rarely granted by the Board.

20. Depending on the type of election held (directed after a hearing, stipulated) and the type of decision/report issued by the Regional Director/Hearing Officer, a party may file either a request for review or exceptions in post-election proceedings involving objections and/or challenges. Affidavits and other documents filed during a Region's investigation of objections and/or challenges, which are not subsequently attached to the Regional Director's report, must be attached to exceptions filed by a party if the party wishes the Board to consider such evidence in ruling on the exceptions.

21. Be sure that you keep the Board advised regarding any changes that may delay contact with you or delivery of decisions to you, including firm name, street and e-mail addresses, and phone and facsimile numbers. If you have registered for e-service, you may change this information yourself. Please also keep the Board advised of any similar changes regarding your client.