

NLRB Election Rules

EFFECTIVE DATE: Cases filed on or after April 30, 2012.

FILING A PETITION: May be filed by fax, mail or in person BUT NOT electronically. Cards must be filed within 48 hours. Upon receipt, the regions will mail, fax and/or email a docket letter to the employer with copy of the petition, NOH and other materials.

NOTICE OF HEARING: The Region will issue a Notice of Hearing on the date the petition is filed and schedule a hearing 7 days (5 working days) from the date of the issuance of the NOH.

The hearing date may be postponed for good and sufficient grounds, but a hearing date more than 14 days after the petition is filed will normally not be granted, absent extraordinary circumstances.

Procedure for requesting a postponement:

- A written request must be filed with the regional director.
- Copies must be simultaneously served on all parties.
- The request must be received no later than 24 hours before the scheduled hearing, absent extraordinary circumstances.
- Grounds for the postponement must be set forth in detail.
- Alternative dates must be given (which have been cleared with the parties).
- The positions of all other parties must be ascertained in advance and stated in the request.

EXCELSIOR LIST: The docket letter will notify the parties of their right to waive having the eligibility list for 10 days before the election. A new waiver form has been created for waiving *all or part* of the 10-day period. All parties entitled to receive the list must agree to waive the same number of days. At the conclusion of a pre-election hearing, if conducted, the parties will again be asked if they wish to waive all or any part of the 10-day period for the list.

PRE-HEARING CONFERENCE: If the issues appear to require a hearing, the regions *should*, where appropriate, conduct a pre-hearing conference to further explore the possibility of an election agreement or to narrow the issues for hearing.

AMENDING A PETITION: The petition may be amended at any time prior to hearing and during the hearing at the discretion of the hearing officer.

PRE-ELECTION HEARINGS: A pre-election hearing is required in all cases where the parties have not entered into an election agreement, but a full scale "evidentiary hearing" is not required in every case, only "an appropriate hearing." The hearing officer's role and responsibilities:

- Is to ensure that a complete record is made on issues relevant to the existence of a QCR;
- To play a very active role in precluding the parties from presenting evidence that is irrelevant, duplicative, or otherwise unnecessary;
- The hearing officer may preclude the introduction of evidence on individual eligibility and inclusion issues.
- To ensure that the record includes:

- the job titles and, if feasible, the names of individuals voting subject to challenge;
- a summary on the record of all relevant off-the-record discussions; and,
- the parties' positions on the preferred method (manual, mail, or mixed) for balloting, and the date, time and place of the election.

OFFERS OF PROOF: A party seeking to rebut a presumption under Board law or to meet a burden of proof must present specific, detailed evidence in support of its position; general conclusory statements by witnesses are not sufficient.

CONSECUTIVE DAYS FOR HEARING: CHM Section 11143 requires that hearings be held on *consecutive days* until completed; see GC Memorandum 96-2.

ISSUES FOR A PRE-ELECTION HEARING: The pre-election hearing is limited to issues "relevant to a question concerning representation." The presentation of evidence will be limited to matters related to a QCR and about which the parties have taken a position. Issues to be litigated include: jurisdiction, labor organization status, scope of and appropriateness of the unit, and bars to an election.

JURISDICTION: The employer or any other party has the right to present evidence regarding statutory jurisdiction even if it takes no position on the issue and even if the employer has not provided commerce information. But if the employer does not submit jurisdictional information, jurisdiction will be asserted without regard for any specific monetary jurisdictional standard if the record at a hearing establishes that the Board has statutory jurisdiction.

UNIT DESCRIPTIONS - MUST BE RESOLVED PRE-ELECTION:

- If the union is seeking a presumptively appropriate unit and the employer declines to take a position, the employer may be precluded from presenting evidence relevant to the determination of an appropriate unit.
- If the unit the union is seeking is not presumptively appropriate, the record will have to contain sufficient evidence to establish whether the petitioned-for unit is appropriate.
- Examples of unit scope issues:
 - Multi-facility and multi-employer issues
 - Single vs. multi-facility
 - Single employer or alter ego issues
 - Whether independent entities have a joint-employer relationship

Other issues that must be resolved pre-election:

- Expanding and contracting unit issues — the employer does not presently employ a substantial and representative complement of employees
- Independent contractor status of the petitioned-for employees
- Whether employees are seasonal (but the reasonable expectation of future employment of a small number of seasonal employees may be deferred to post-election).
- Whether individuals in the unit are professional employees (because professional employees must be given an opportunity to decide whether to be included in a non-professional unit through a special balloting procedure).

- An eligibility formula different from the Board's standard formula for, e.g., part-time employees.
- Whether a petitioned-for craft unit is appropriate

ELIGIBILITY OR INCLUSION ISSUES - "ORDINARILY NEED NOT" BE LITIGATED PRE-ELECTION: Regional directors have discretion to defer the resolution of up to 10% of the unit to the post-election stage and may exceed the 10% threshold where appropriate. Examples of individual eligibility or inclusion questions that need not be litigated pre-election:

- Whether specific individuals are employees within the meaning of the Act;
- Whether specific individuals fall within the unit description, e.g., whether, in a unit of "production employees," production foremen are supervisors, whether a specific employee is a supervisor, whether quality control workers are production employees, or whether a particular employee is a production employee;
- Supervisory status of specific individuals, unless that individual filed the petition;
- Managerial employees;
- Whether an individual is employed by his/her parent or spouse;
- Confidential employees;
- Whether an individual should be excluded as temporary or part-time or casual.

PRESUMPTIONS: The burden of proof rests with the party seeking to contest a presumptively appropriate unit. If the unit the union is seeking is not presumptively appropriate, the hearing officer must still garner appropriate evidence needed to make a unit determination. If the employer declines to take a position on whether a unit is appropriate, the employer is, in effect, not making a contention and would not be entitled to introduce evidence on that issue. The following are presumptions related to appropriate units:

- Single plant or store unit presumptively appropriate unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity. *Hilander Foods*, 348 NLRB 1200, 1200 (2006); *J & L Plate*, 310 NLRB 429 (1993);
- Acute care hospital units. [Board's healthcare rules establishing eight appropriate units through rulemaking (§103.30), 29 C.F.R. Sec. 103.30 (1990), upheld *American Hospital Association v. NLRB*, 499 U.S. 606 (1991)];
- Plant-wide unit. *Airco, Inc.*, 273 NLRB 348 (1984); *Livingstone College*, 290 NLRB 304 (1980) (all nonprofessionals in a college/university setting);
- Service and maintenance unit. *Laurel Associates, Inc.*, 325 NLRB 603 (1998);
- Single-branch unit. *Wyandotte Savings Bank*, 245 NLRB 943 (1979);
- Single-employer unit. *Central Transport, Inc.*, 328 NLRB 407 (1999);
- Single store unit in retail industry. *Haag Drug Co.*, 169 NLRB 877 (1968); *Sav-On Drugs*, 138 NLRB 1032 (1962);
- Single-terminal unit. *Groendyke Transport*, 171 NLRB 997 (1968); *Alterman Transport Lines*, 178 NLRB 122 (1969); and *Wayland Distributing Co.*, 204 NLRB 459 (1973); and,
- System-wide unit with public utility. *Colorado Interstate Gas Co.*, 202 NLRB 847 (1973); *Deposit Telephone Co.*, 328 NLRB 1029 (1999).

BURDENS OF PROOF: The burden of proof rests with the party seeking to contest the presumptively appropriate unit.

Unit Determinations: The burden of proof is on the party challenging the presumptively appropriate unit to establish that employees in excluded classifications share an "overwhelming community of interest" with those employees in the presumptively appropriate, petitioned-for unit. See, *DTG Operations, Inc.*, 357 NLRB No. 175, fn. 16 (2011). Under *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), if the petitioned-for unit employees are "readily identifiable as a group (based on job classifications, departments, functions, work locations, skills or similar factors)," and meet the traditional community-of-interest principles to constitute an appropriate unit, the burden is on the employer to demonstrate that the additional employees it seeks to include share "an overwhelming community of interest with the petitioned-for employees," such that there "is no legitimate basis upon which to exclude certain employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely."

When the unit sought is not presumptively appropriate, the petitioner must show that it seeks "an appropriate" unit, not the "only" or the "most" appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951).

Eligibility: The party seeking to exclude any individual based on exclusions allowed under the statute or the Board's policies, including supervisors, managerial employees, confidential employees, independent contractors and agricultural workers, has the burden of proof.

OFFERS OF PROOF: A hearing officer can require an offer of proof from the party seeking to overcome a presumption or meet an assigned burden. If the offer of proof is insufficient, the hearing officer may refuse to allow litigation of the issue.

Offers of proof should take the form of a narrative statement; offers may be presented in question and answer format, but only in exceptional circumstances.

REQUESTS FOR SPECIAL PERMISSION TO APPEAL:

- Requests for special permission to appeal from a ruling of the hearing officer may be taken to the regional director.
- Should be made promptly, in writing, and served on the hearing officer and other parties.
- The hearing officer may grant minimal time to a party to prepare a special appeal or may deny a requested adjournment and direct that the appeal be filed during a break.
- A request filed with the Board for special permission to appeal from the regional director's ruling will only be considered by the Board under "extraordinary circumstances" when it appears that the "issue will otherwise evade review." [This standard does not apply to requests for special permission to appeal ruling of the hearing officer to the regional director.]
- A party need not take a special appeal to preserve its right to review in the post-election process.
- A special appeal will not stay an election or require that ballots be impounded unless specifically ordered by the Board.

ELECTION POSTPONEMENTS: If a request for special permission to appeal is made and/or ruled on after the hearing closes, the regional director may order that the record be reopened to take evidence excluded by the hearing officer and may grant a stay, either on his/her own initiative or upon request, under appropriate circumstances. If the Board grants a request for special permission to appeal a ruling of the hearing to the regional director, the parties may request a stay or that the ballots be impounded, but special appeals will not automatically stay the election or require that the ballots be impounded unless specifically ordered by the Board.

POST-HEARING BRIEFS: Post-hearing briefs will not be allowed in most cases and only by special permission of the hearing officer. The hearing officer will determine whether a brief will be filed, when it will be filed and what subjects the brief should address. A party may file a brief, memorandum or points and authorities or other legal arguments with the hearing officer before the hearing closes. The parties have a right to present oral argument at the close of the hearing.

Factors to be considered by the hearing officer in determining whether to permit briefs:

- Number and complexity of issues;
- Whether significant issues are presented that are factual, legal or both;
- Whether the law is in flux, settled, or recently changed;
- Whether the case presents issues that are of first impression, unusual, or novel; and
- Parties' positions on the need for briefs.

The hearing officer may, as an alternative to permitting the filing of post-hearing briefs, allow:

- A brief period to file short post-hearing briefs on legal authority only;
- Submission of a case list with summary argument; or,
- Oral argument supplemented with a list of relevant cases.

TIME, PLACE AND MANNER OF ELECTION: The Board agent will attempt to reach the parties as expeditiously as possible following issuance of the Decision and Direction of Election, to obtain agreement before the region specifies the method, date, time and place of the election.

NOTICES OF ELECTION: The Notice of Election will include language stating that certain individuals may vote subject to challenge if their eligibility has not been resolved.

CHALLENGE PROCEDURE: The challenge procedure will not be used in addressing unit scope issues, but may be used in certain circumstances to defer to the post-election process individuals' eligibility or inclusion in the unit, if necessary.

In elections conducted pursuant to an election agreement, the parties will be responsible for making the agreed-upon challenges.

In a directed election, the Board agent conducting the election should be prepared to challenge voters whose eligibility is deferred to the post-election stage. The letter requesting the eligibility list will ask that the names and addresses of those subject to challenge be placed on a separate page of the list or a separate portion of the list so that individuals subject to challenge are clearly identified.

REQUESTS FOR REVIEW:

If there are no objections or determinative challenged ballots, requests for review must be filed within 14 days after the tally of ballots has been prepared and made available to the parties.

If determinative challenged ballots and/or objections are filed, requests for review of pre-election decisions must be filed within 14 days after the regional director's decision on challenged ballots, on objections, or both.

A request for review of the pre-election decision may be combined with a request for review of the decision on objections/challenged ballots.

Regional directors may treat requests for review as motions for reconsideration and may supplement their decisions after receiving and reviewing requests for review.

POST-ELECTION PROCEDURES:

A regional director's decision disposing of objections and/or determinative challenges based on an investigation should include a certification of the results of the election, including a certification of representative where appropriate.

Ordinarily, regional directors should not conduct affidavit investigations, but, instead, determine whether a hearing is appropriate.

The regional director should evaluate objections and supporting evidence and investigate challenges and supporting offers of proof to determine whether the evidence "raises material and substantial issues." If yes, the objection and/or challenge should be set for hearing.

Exceptions to hearing officer's reports are to be filed with regional directors instead of the Board. A regional director's decision should include, as appropriate, a certification of results, certification of representative, and direction to open and count ballots, or direct a rerun election.

All exceptions will be decided by the regional director instead of the Board. The Board may grant or deny requests for review and, if denied, the denial is summary affirmance of the actions of the regional director.

TIMING OF CERTIFICATION IF THERE ARE NO OBJECTIONS OR DETERMINATIVE CHALLENGES:

- If the election was conducted pursuant to an election agreement, the certification may issue after the expiration of the 7-day period for filing objections.
- If the election was directed, the certification would normally issue after the expiration of the 14-day period for filing a request for review of the decision directing the election.

BURDENS OF PROOF IN POST-ELECTION SETTINGS: The burden of proof is on the objecting party to prove its case because a Board-conducted representation election is presumed to be valid. A party seeking to challenge a voter's eligibility bears the burden of proving the voter is ineligible to vote.