

Federal Labor Laws

Paul K. Rainsberger, Director
University of Missouri – Labor Education Program
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VI. NLRB Procedures in Representation (“R”) Cases

A. Petition and Preliminary Investigation

1. Representation cases are initiated by the filing of a petition alleging that a question of representation exists. Depending upon the type of case involved, a union, a “substantial” number of employees, or an employer may file a petition.
2. For RC, RD or UD petitions, a showing of interest is required with the petition. The showing of interest is evidence that a substantial number of employees support the objective of the petition. The required showing is 30% of the proposed or actual bargaining unit affected by the petition. Normally, the union uses authorization cards signed by unit employees as the showing of interest.
3. Collection and use of authorization cards: Authorization cards are used for three distinct purposes. Under normal circumstances, a union involved in an organizing drive will collect cards from a substantial majority of workers in the desired unit, even though only 30% of the unit must be obtained as a showing of interest. The uses of cards are:
 - a. To support a showing of interest in conjunction with a representation petition, or to establish the right to intervene in an election initiated by a different union's petition,
 - b. To show evidence of majority support to justify a demand for voluntary recognition by the employer, and
 - c. To show the existence of majority support to justify a bargaining order if the employer's serious unfair labor practices cause the union to lose its support in the election campaign.
4. A number of issues may be raised concerning the validity of authorization cards. Some of the issues include the following:
 - a. The use of single or dual purpose authorization cases. The potential significance is illustrated in Case VI-A.

Case VI-A: Single vs. Dual Purpose Authorization Cards

Which of the following choices of wording on an authorization card is preferable for a union involved in an organizing drive:

Single Purpose Card:

"I hereby authorize the Extrusion Workers Union of North America to represent me for purposes of collective bargaining"

Dual Purpose Card:

"I want a National Labor Relations Board election, and I authorize the Extrusion Workers Union of North America to represent me for purposes of collective bargaining"

- b. Most authorization cards are "single purpose" cards which state that the signing employee authorizes the union to act as his or her representative for purposes of collective bargaining. A single purpose card is preferable because it can be used both as evidence of union majority support and as part of a showing of interest. A dual purpose card is valid for a showing of interest, but is not necessarily evidence of actual support for the union.
- 1) An employee is presumed to read and understand what he or she has signed.¹ A signed authorization card can be used as evidence of majority support unless it is clear that the union stated that the only use for the card is to get an election.
 - 2) Cards must be signed, dated and reasonably current.² The age of a card may be considered in determining the adequacy of a showing of interest.
 - 3) The employer is not permitted to see the authorization cards³, nor is the Board agent review of cards subject to challenge except in extreme circumstances, usually involving fraud, misconduct, forgery, or supervisory involvement.⁴

¹ *E.g., Tipton Electric Co.*, 621 F2d 890 (8th Cir. 1980).

² *Werman & Sons*, 114 NLRB 629 (1955), exceptions to this rule have been allowed, see *e.g., Farris Fashions Inc.*, 312 NLRB 547 (1994).

³ *E.g., Howard Johnson Co., Inc.*, 618 F2d 1 (6th Cir. 1980).

⁴ *O.D. Jennings & Co.*, 66 NLRB 516 (1946).

5. A showing of interest is required only in those cases initiated by a union or group of employees seeking certification, decertification or deauthorization. The other types of R cases are supported by the following:
 - a. An employer's RM petition must be based upon the employer's good faith belief that a question of representation exists following a union's demand for recognition.⁵ The employer, however, is under no obligation to petition for an election if a demand is made. The employer may simply refuse to recognize the union, leaving the burden on the union to initiate the petition.⁶
 - b. In AC and UC cases, no showing of interest is required because the union is already the representative of a certified unit and is seeking clarification of that unit or its certification.
6. Adequacy of the showing of interest is normally determined on the basis of the size of the unit during the last payroll period immediately prior to a petition. This period is used even if the nature of the unit is seasonal or fluctuating in size.⁷
7. If a valid petition is filed, a second or subsequent union seeking to represent the same unit may intervene. A full showing of interest is not required for intervening unions.⁸
 - a. With a full showing of interest (at least 30%), a union may become a cross-petitioner. A cross-petitioner could urge adoption of a bargaining unit significantly different than that proposed by the petitioner.
 - b. With a 10% showing of interest, a union may qualify as a full intervenor. A full intervenor may not challenge the proposed bargaining unit, but it could attempt to block an election agreement for other reasons.
 - c. A union with a single authorization card from the bargaining unit may be qualified as a participating intervenor. Such status would allow the union to appear on the ballot and participate in hearings, but it could not block stipulations entered into by the other parties.

⁵ *U.S. Gypsum Co.*, 157 NLRB 622 (1966).

⁶ *Linden Lumber Div. v. NLRB*, 419 U.S. 301 (1974). See discussion in *The Developing Labor Law*, 2nd Ed., vol. 2, Washington, D.C.: BNA. pp. 522-524.

⁷ *Higgins, Inc.*, 111 NLRB 797 (1955); *Holly Sugar Corp.*, 94 NLRB 1209 (1951); *Pike Co.*, 314 NLRB 691 (1994).

⁸ Further explained in *The Developing Labor Law*, note 6, *supra*, pp. 381-382 "Details of an Election."

8. If a proposed bargaining unit is enlarged through the investigation process, a petitioning union will be given an additional opportunity to obtain sufficient authorizations to meet the required showing of interest.
9. The adequacy of a showing of interest is a purely administrative matter. It may not be challenged in a representation case hearing or in an unfair labor practice case processed through the Board or its agents.
10. Although informal information may be provided at any time, formal NLRB involvement in a representation case begins when a petition is filed at a Regional Office. The showing of support for the petition must normally be received within 48 hours of the petition.
 - a. The assigned Board agent will immediately notify the employer of the filing and will provide a copy of the petition. The employer will be provided an opportunity to complete a commerce questionnaire (to determine jurisdiction) and will be asked to submit a payroll list.
 - b. The payroll list is a list of all employees and classifications in the proposed bargaining unit for the last payroll period prior to the petition. If submitted, it will be used in determining whether the showing of interest in support of the petition is adequate. If the employer does not file a payroll list in a timely manner, the estimated size of the unit included in the petition will be accepted.
 - c. At the initial stages, efforts will be made to identify all interested parties. Interested parties will include the employer, the petitioner, other employers that may be joint employers, unions that are actively organizing the same workers or have recently been involved in a representation case with the same or a related unit, and other unions that have a current or recent bargaining relationship with the unit or a related unit of the employer.
11. The Regional Office will conduct a preliminary investigation to determine whether it appears that a valid question of representation exists. The Regional Office will look at the following issues:
 - a. Whether the employer and employees involved are within the jurisdiction of the Board,
 - b. Whether the proposed unit appears to be appropriate under the Act,
 - c. Whether the showing of interest or other allegations are sufficient,
 - d. Whether an election is precluded by an election bar, contract bar, or certification bar.

- e. If it is determined administratively that a question of representation does not exist, the Regional Director may dismiss the petition. A dismissal may be appealed to the NLRB on the limited grounds discussed in Subsection C(3), *below*.
 - f. If the preliminary investigation shows that a question of representation does exist, the Regional Office will attempt to get the parties to agree to a consent election under the provisions described in Subsection B.
11. If it appears that the petition raises a representation issue that is also subject to the constitutional provisions of the AFL-CIO, processing of the petition may be suspended to provide an opportunity for the AFL-CIO procedures to work. While it attempts to accommodate the AFL-CIO procedures, the Board is not bound to accept jurisdictional decisions of the AFL-CIO.
- a. Two articles of the AFL-CIO constitution are relevant. Article XX applies to efforts of one affiliated union to organize workers with whom another affiliate has an established bargaining relationship. Article XXI applies in situations in which more than one AFL-CIO affiliate is attempting to organize the same workers.
 - b. The NLRB may also suspend its investigation if other no-raid agreements between unions are relevant to the petition.

B. Procedures in Consent Election Cases

- 1. If there is no substantial issue in dispute between the employer and unions involved in a representation case, the parties may agree to a "consent" election. The critical issues which must be worked out in any case include:⁹
 - a. Date, time and place for the election,
 - b. The description of the appropriate bargaining unit,
 - c. The payroll eligibility date, or date upon which a person must be employed to be eligible to vote, and
 - d. The eligibility of specific employees (usually an issue of who is a supervisor or other questions of unit composition).¹⁰
- 2. There are actually two types of informal election procedures, consent elections and stipulated elections. In both types, the

⁹ *NLRB Casehandling Manual, Pt II Representation Elections*, §11084.3.

¹⁰ For other employees in question, see pp. 385-390, *The Developing Labor Law*, note 6, *supra*, "Eligibility."

election is informal because the preliminary issues listed above are resolved, at least tentatively, without the need for a hearing. The distinctions are:

- a. In a "consent" election, the parties agree to all preliminary issues and agree to allow the Regional Director to resolve any objections or challenges which occur in the election.
 - b. In a "stipulated" election, the parties agree to all preliminary issues. However, any objections or challenges arising during the election are resolved by the NLRB after submission of a final report by the Regional Director.
3. In practice, it may often be advantageous for a union to agree to a consent election on less than ideal terms. The reason for this is that time works almost inevitably to the advantage of the employer in the election campaign. If the union can concede minor procedural points in exchange for a quick election, it may be wise to do so. An important study concerning representation case procedures indicates that a union has a 50% chance of winning an election if it goes into the campaign with a 62.5% card majority.¹¹

C. Procedures in Directed Election Cases

1. If the parties cannot reach agreement on the issues listed above, it may be necessary to use the formal hearing procedures available for representation cases.
 - a. Representation cases are technically non-adversarial and are conducted by a staff member of the Regional Office.
 - b. The hearing officer conducts an informal hearing and prepares a record based on the evidence and arguments presented by the parties involved in the case. The hearing officer makes no recommendation, but forwards the findings to the Regional Director who issues a decision directing an election or dismissing the petition.
 - c. The authority of the Regional Director is extensive. The authority of the Board in representation cases is delegated to the Regional Directors under provisions of the Landrum-Griffin amendments to the NLRA in 1959.
 - c. While the rules of evidence are not controlling in a representation case hearing, they are generally followed.
 - d. The actual arrangements for an election are administrative matters and are not dependent on the evidence obtained in the hearing process.

¹¹ Cooper, "Authorization Cards and Union Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's Gissel Decision," 79 NW.U.L.Rev. 87 (1984).

2. Evidence of unfair labor practices is not admissible in a representation case hearing, nor is evidence of alleged union violation of other laws. If unfair labor practices are involved in a representation case, the matters will be consolidated and treated as an unfair labor practice matter. Consolidated case procedures are discussed in Outline IX.
3. Appeal to the NLRB -- Request for Review:
 - a. The pre-election issues may reach the NLRB before the election in one of two ways. Either the Regional Director may transfer the case to the Board or a party may request NLRB review based on the action of the Regional Director.
 - b. A request for review does not automatically stay the election.
 - c. A Request for Review must be based on one of four limited issues. Board review is discretionary. If the Board refuses a request, it has the effect of upholding the action of the Regional Director. The grounds upon which a Request for Review must be based are:
 - 1) The case raises a substantial question of policy or law,
 - 2) The Regional Director committed a clear factual error based upon the record,
 - 3) Prejudicial error was committed in the hearing procedures, or
 - 4) There are compelling reasons to reconsider an established Board policy.
 - d. The Board may direct an election, dismiss the petition or remand the case to the Regional Director. A final decision of the Regional Director in a representation case may not be relitigated before the Board in an unfair labor practice case.¹²
 - e. If the Board does not review a case or if the Board is evenly split on review, the decision of the Regional Director is upheld.¹³

D. Election Issues

¹² *I.O.O.F. Home of Ohio*, 322 NLRB 921 (1997).

¹³ *United Health Care Services*, 326 NLRB 1379 (1998).

1. For a person to be eligible to vote in a Board election, he or she must be a part of the election unit, must be on the payroll eligibility list, and must be employed at the time of the election.
 - a. As part of the consent or hearing procedures, one important issue is the determination of a payroll eligibility date. Only workers employed on that date and the date of the election may vote in the election.
 - b. The payroll eligibility date is normally the final day in the last payroll period preceding the order directing an election.
 - c. The employer must furnish to the union a list of active employees as of the payroll eligibility date. This is known as the *Excelsior List*.¹⁴
 - d. Failure to provide an Excelsior List or serious omissions or errors on the list may be grounds for objecting to the outcome of the election. Minor inaccuracies will not cause the election to be set aside.¹⁵
2. Other factors may affect an individual's right to vote. The parties are free to challenge voter eligibility in a directed election, but not in a consent or stipulated election where eligibility is specified in the election agreement.
 - a. Workers on vacation or sick leave are eligible to vote as are workers on a temporary lay-off, if they have a reasonable expectation of returning to work. To vote, they must appear at the polling place.
 - b. Workers on leave for military service have a right to vote and do not have a specific right to a mail ballot.
 - c. The fact that an employee has been laid off does not prevent the worker from voting as long as there is a reasonable expectation of recall in the near future as of the eligibility date.¹⁶
3. A strike may also affect the right to vote in a representation election. The nature and timing of a strike and the extent to which the employer has hired replacement workers will have an impact on voter eligibility.

¹⁴ *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *North Macon Health Care Facility*, 315 NLRB 359 (1994).

¹⁵ *Woodman's Food Markets, Inc.*, 332 NLRB 503 (2000).

¹⁶ *The Pavilion at Crossing Pointe*, 344 NLRB No. 73 (2005).

- a. Workers engaged in a strike are presumed to be engaged in an economic strike. By statute, permanently replaced economic strikers retain a right to vote in representation elections for a period of twelve months after the beginning of a strike.
 - b. Economic strikers that have not been replaced remain eligible to vote even after the twelve month period, as long as they have not otherwise lost their right to reinstatement.
 - c. Temporary replacements for strikers or locked out workers do not have a right to vote in a representation election.
 - d. Permanent replacements for economic strikers hired after the voter eligibility date have a right to vote in representation elections only if the strike began after the eligibility date.
 - e. It is presumed that strikers have reinstatement rights and that replacements are permanent. Employer designation of a replacement as permanent is not controlling.
4. Special rules apply to voter eligibility in industries with unusual hours or seasons of employment. In the construction industry, workers are eligible to vote if they have been employed in the unit for 30 days or more within twelve months of the eligibility date, or if they have been employed for 45 days or more in the preceding 24 months with some of those 45 days being in the more immediate 12 month period.¹⁷ Similar rules apply in other industries involving sporadic work arrangements, including stagehands and employment on oil rigs.¹⁸
 5. The election should be held within thirty days of the order directing the election or the election agreement. The employer is required to post a notice of the election for at least three days prior to the election.
 - a. The election is conducted by paper ballot, normally at the employer's place of business. Off-site elections and mail ballots are permitted at the discretion of the Regional Director.
 - b. Each side is entitled to have an equal number of election observers. Observers must be non-supervisory employees.
 - c. No campaigning is permitted at the polling place, including an area of 200 feet in each direction of the polls.

¹⁷ *Daniel Construction Co.*, 133 NLRB 264 (1961); *Steiny & Co.*, 308 NLRB 1323 (1992).

¹⁸ *NLRB v. Hondo Drilling Co.*, 428 F.2d 943 (5th Cir. 1970); *Medion, Inc.*, 200 NLRB 1013 (1972).

6. In all elections except those in deauthorization cases, the outcome is determined by a majority of the votes cast in the election. In union security deauthorization elections, a majority of the votes in the unit must be cast in favor of deauthorization.
 - a. For a union to be certified in an RC or RM case, a majority of the votes cast must be in favor of the union.
 - b. For a union to be decertified in an RD case, a majority of the votes cast must be in favor of decertification. However, if 100% of the unit votes, and the result is a tie, the union is decertified.
7. In all RC and RM cases, one choice on the ballot is for "no union." Thus, if more than one union seeks representation, there could be three or more choices on the ballot. If no option receives a majority of the votes cast in the first election, a run-off election is held with only the top two choices listed on the ballot.

E. Objections and Challenges

1. If the right of an individual to vote in an election is challenged by either party, the worker casts his or her ballot in a sealed envelop which is held pending the outcome of the election by the NLRB election officer. Challenges to ballots are resolved only if the number of challenged ballots could affect the outcome of the election.
 - a. If the number of challenged ballots could not affect the outcome, the eligibility of the challenged voter is left undecided, and the ballot is not counted.
 - b. If the outcome could change as a result of the challenged ballots, the Board or the Regional Director determines the eligibility of the voter. If it is decided that the voter is eligible, the challenged ballot is counted and the results adjusted accordingly.
 - c. If the outcome of the election is certified without resolving challenged ballots, the inclusion of the challenged voters in the bargaining unit is negotiable. If the parties cannot agree, the case may be decided by a petition for clarification of the bargaining unit (UC).
2. The outcome of an election may also be affected by the campaign tactics employed by either side. There are two ways in which tactics may be questioned.
 - a. If the questionable tactics are potential unfair labor practices and charges are filed, the unfair labor practice issues must be resolved before the results of the election are certified.
 - b. If tactics are employed in the campaign which could improperly affect the outcome, objections may be filed with

and received by the Board within seven days of the election. A number of tactics are grounds for setting aside an election, even though those tactics are not unfair labor practices.

- c. If an election is set aside because of objections, the normal procedure is to conduct a new election.

F. Contested Election Cases

1. In consent election cases, the parties agree to allow the Regional Director to determine the outcome of any challenges or objections filed during the election and campaign.
2. In stipulated or directed election the Regional Director prepares a recommended report resolving outstanding challenges and objections. The Regional Director may conduct a hearing in directed election cases to resolve the outstanding issues. The report and recommendations of the Regional Director are subject to discretionary Board review.
3. If both objections and unfair labor practices are filed to protest election tactics, the representation case issues and the unfair labor practice case issues are consolidated and treated as unfair labor practices. Thus the outcome of a representation election may be resolved as an unfair labor practice case.
4. There is no statutory right to judicial review of Board orders in representation cases. If either party seeks court review of Board decisions in a representation case, the party must use the unfair labor practice procedures to challenge the action.

G. Effect of Certification of Election Results

1. Certification bar: If the union wins a representation election, it is certified as the bargaining agent for employees in that unit. No certification or decertification election may be held in that unit for at least one year §9(c)(3).
 - a. With certification as a bargaining agent, the union is conclusively presumed to represent the unit for one year. Any refusal of the employer to bargain during this one year period is a *per se* violation of its duty to bargain.¹⁹
 - b. After the one year period, there is a rebuttable presumption that the union continues to represent the designated bargaining unit. An employer may refuse to bargain after this one year period only if it knows in fact that the union no longer represents a majority of the workers or if it has a good

¹⁹ See, *NLRB v. Curtis Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 107 S.Ct. 2232 (1987).

faith belief, supported by objective evidence, that the union has lost its majority status.²⁰

2. **Election Bar:** If the union loses the election, no certification election may be held in the same unit or a subdivision of that unit for one year. The effect of this election bar is to insulate the employer from the threat of unionization for this one year period.

G. Petition and Election Timing Issues -- Contract Bars

1. **Contract bar:** If a union has a valid collective bargaining agreement with an employer, that contract may bar any certification or decertification elections for the life of the contract. The conditions under which the collective bargaining agreement bars an election are:
 - a. The contract must be in writing and signed.
 - b. The contract must contain substantial provisions dealing with wages and working conditions.²¹
 - c. The contract must be for a fixed term, and will bar an election only for the term of the contract or three years, whichever is shorter.²²
 - d. The contract must not include illegal provisions.
2. At the end of a term in which a contract bar prevents a representation election, there is a window period, during which representation petitions are timely.
 - a. A petition is timely during a period beginning 90 days before the expiration of the contract, and ending 60 days before the expiration date.²³ In the health care industry, the window period runs from 120 days to 90 days before the expiration of the bar.
 - b. A petition is again timely at the expiration of the collective bargaining agreement, unless a new contract meeting the conditions for a contract bar is negotiated.²⁴

²⁰ See, *NLRB v. Curtin Matheson Scientific, Inc.*, *supra* at note 19, and *Station KKHI*, 284 NLRB 1339 (1989).

²¹ *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958).

²² *General Cable Corp.*, 139 NLRB 1123 (1962).

²³ *DeLuxe Metal Furniture Co.*, 121 NLRB 995 (1958).

²⁴ *Id.*

- c. If a petition is filed during the window period, the employer is still obligated to negotiate with the incumbent union. If it turns out that the union loses representation rights, any agreement reached is void.²⁵

²⁵ *RCA del Caribe*, 262 NLRB 963 (1982).