

# Federal Labor Laws

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## VIII. NLRB Procedures in “C” (Unfair Labor Practice) Cases

### A. The Onset of an Unfair Labor Practice

1. An unfair labor practice case is initiated by a "charge" filed with the Regional Office, alleging that an employer, union or both have committed an unfair labor practice under one or more of the provisions of Section 8.<sup>1</sup>
2. The NLRB is a passive agency that does not seek out violations of the law on its own initiative. It becomes involved in an unfair labor practice case only if someone files a charge.
3. All charges must be accepted by the Regional Office. No matter how frivolous, how untimely, or how far outside the jurisdiction of the Act, some formal action must be taken by the Regional Office. Of course, that action may be a dismissal of the charge.
4. To determine priorities for action, the Regional Offices use an Impact Analysis system. Cases are assigned to one of three categories, based on the urgency of the matter and the potential impact of the case on the fundamental purposes of the law.
  - a. Category III cases receive the highest priority for action. These cases have an exceptional impact on the mission of the NLRB. Examples of Category III cases are those in which injunctions may be issued, many unfair labor practices related to representation cases, many strike and picketing cases, and cases in which permanent job loss is likely.
  - b. Category II cases are those having a significant impact on the law. Examples include bargaining cases involving access to information or unilateral changes, some picket line misconduct cases, duty of fair representation issues, and discrimination cases not involving permanent job loss.
  - c. Category I cases receive the lowest priority for action. Cases in which the Board defers to a grievance procedure are examples of this category.

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<sup>1</sup> See, §§102.9--12 "Charge" for a detailed description of procedure, in National Labor Relations Board. (1989). *Rules and Regulations and Statement of Purpose. National Labor Relations Act and Labor Management Relations Act*. Government Printing Office: Washington, D.C.

## B. Timeliness of a Charge

1. To be timely, unfair labor practice charges must be filed within six months of the alleged violation of the law under §10(b).<sup>2</sup>
  - a. Time begins when a person has actual or constructive notice of conduct that gives rise to the unfair labor practice charge.
  - b. For a person in the armed forces, the time limits begin on the day after discharge.
2. The six month time limit is a bar to prosecution of unfair labor practices. An untimely charge will be dismissed, no matter how serious the alleged violation.
3. There are limited circumstances under which conduct occurring more than six months prior to a charge may be considered by the Board in a subsequent unfair labor practice case. One exception is the “closely related amendment” to a timely charge.
  - a. In these cases, there must first be a timely charge filed based on conduct occurring within the applicable six month period. Later, the charge is amended to include conduct that occurs outside the six month time limit.
  - b. Under these circumstances, the Board will consider the conduct underlying the untimely amendments if it is sufficiently connected to the timely charge. To be considered as a closely related amendment, the untimely allegation must be based on the same legal theory as the timely charge. Second, both the timely and untimely allegations must be based on the same factual circumstances or series of events. Finally, the Board considers whether the respondent’s defenses to both allegations are the same. If all three factors are met, the Board may consider the closely related amendment as timely.<sup>3</sup>
4. An otherwise untimely charge may also be accepted if the respondent is guilty of “fraudulent concealment.”
  - a. The six month time limit will not bar a charge if the respondent fraudulently concealed facts in order to prevent knowledge of a potential unfair labor practice.

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<sup>2</sup> 29 USCA §10(b), which states:

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint . . . *PROVIDED*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge . . . .

<sup>3</sup> *Redd-I, Inc.*, 290 NLRB 1115 (1988).

- b. For a case to be considered timely under the fraudulent concealment theory, the respondent must have deliberately concealed material facts from the injured party in a manner that kept the injured party ignorant of those facts.<sup>4</sup>
5. Allegations of continuing violations may also be timely even if the violation began more than six months prior to the charge. However, at least some period of the time of the continuing violation must be within the six month period.<sup>5</sup>

### **C. Regional Office Investigation and Action**

1. Upon receipt of a charge, the Regional Office will conduct a preliminary factual and legal investigation of the allegations.
2. Among the issues which would be subjects of the preliminary investigation are:
  - a. Jurisdictional issues, or whether the employer meets the definitions and standards determining Board jurisdiction.
  - b. The merits of the case, or whether there appears to be evidence supporting the allegations in the charge.
  - c. The existence of a grievance and grievance procedure available to resolve the same issue contractually.
3. The Board agent conducting the investigation will conduct interviews, accept other evidence, and take affidavits from the charged and charging parties, and any other witnesses identified.
4. After a preliminary investigation, at least one of the following six things will happen to a charge:
  - a. Initially, if the Regional Office determines that a charge has merit, it will recommend that the parties accept a proposed settlement.
    - 1) An informal settlement is an agreement entered into by the charged party and the regional director under which the charged party agrees to remedy the unfair labor practice and the charging party agrees to withdraw the charge when the remedial action is taken. Informal settlements must be approved by the regional director.
    - 2) The regional director has the authority to settle a charge informally without the approval of the charging

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<sup>4</sup> *Brown & Sharpe Mfg. Co.*, 321 NLRB 924 (1996); *Kanakis Co.*, 293 NLRB 435 (1989).

<sup>5</sup> E.g., *Al Bryant, Inc.*, 260 NLRB 10 (1982).

party. However, the charging party has the right to request review by the General Counsel because the effect of such an informal settlement would be dismissal of the charge.

- 3) The parties may enter into a formal settlement after a charge is issued. A formal settlement agreement includes a remedial order issued by the Board.
  - 4) The Board will approve a formal settlement agreement if it furthers the purpose of the law. Four criteria are used to determine whether an agreement should be given effect. These criteria are: (a) whether the parties have agreed to be bound by the settlement; (b) whether the settlement is reasonable in light of the nature of the violations and the risks inherent in further litigation; (c) whether there has been fraud, coercion or duress in obtaining agreement; and (d) whether the respondent has a history of past violations of the law or breaches of past settlement agreements.<sup>6</sup>
- b. If a settlement is rejected and the Regional Office determines that the charge has merit, a complaint may be issued, which triggers the formal hearing and appeals procedures outlined, *below*.
  - c. In some cases, the Regional Office may seek preliminary injunctive relief in a federal district court to stop the unlawful activity. See subsection C, *below*, for conditions under which the Regional Office may and must seek injunctions in unfair labor practice cases.
  - d. If the charge is based on an underlying issue which is subject to a contractual grievance and arbitration procedure, the charge may be deferred by the Board. The Board will retain jurisdiction over a deferred charge, but will not pursue further formal actions until the grievance mechanisms have been used.<sup>7</sup>
  - e. If the Regional Office believes that the charge lacks merit, it will attempt to get the charging party to withdraw the charge. A withdrawal is without prejudice, allowing the charging party to refile the charge if additional evidence becomes available.
  - f. If the Regional Office believes that the charge lacks merit, but the charging party will not withdraw it, the Regional

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<sup>6</sup> *Independent Stave*, 287 NLRB 740 (1987).

<sup>7</sup> The Board deferral doctrines are discussed in *Federal Labor Laws, Outline XXXV*. In these cases, resolution of the unfair labor practice issues is directly related to enforcement of the associated collective bargaining agreement.

Office may dismiss the charge. The charging party has a one step appeal to the Office of the General Counsel to contest the dismissal of a charge. The discretionary power of the General Counsel over unfair labor practice charges is extensive. There is no inherent right to pursue a charge to hearing.

### **C. Injunctive Relief in Unfair Labor Practice Cases**

1. Under Section 10(j) of the Act, the Board is empowered to seek preliminary injunctive relief whenever it determines in the preliminary investigation that an unfair labor practice has been committed and that immediate action is required to prevent harm that could occur before further Board action is taken.
2. An injunction must be based on a court's determination that sufficient evidence exists to show reasonable cause to believe that an unfair labor practice has been committed, that the legal theory relied upon by the regional director is presentable, and that the injunction is a reasonable means of preserving the status quo pending final resolution of the unfair labor practice issue.<sup>8</sup>
3. The use of injunctions under Section 10(j) has depended recently upon the political make-up of the Board. Because Board members are appointed by the President, the Board's outlook will change to reflect that of the incumbent. From the 60's to the mid 70's, the number of injunctions utilized stayed fairly consistent. Beginning with Carter, there was a dramatic increase in their use, followed by a decline with the Reagan and Bush administrations. There was once again a dramatic increase in the use of the 10(j) injunction under the Clinton administration.<sup>9</sup>
4. Section 10(j) injunctions are often (but not exclusively) against employers. Labor organizations are generally served Section 10(l) injunctions. The Board is required to seek an injunction if it determines that a union is in violation of certain provisions of Sections 8(b)(4) or 8(b)(7), covering secondary pressure and organizational picketing. It also is utilized under Section 8(g), which covers unlawful picketing of a health care institution.

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<sup>8</sup> *Union de Tronquistas de P.R., Local 901 v. Arlook*, 586 F.2d 872 (1<sup>st</sup> Cir. 1978).

<sup>9</sup> Northrup, H. R. and Dennard, H. L., Jr. "The Return of 'Government by Injunction'? Public Policy and the Expansive Use of Section 10(j) of the NLRA" in *Employee Relations Law Journal*: Summer 1996, Vol. 22, Issue 1, at 101. For the types of cases where Section 10(j) injunctions will be applied, see Winkler, K. "Baseball, Apple Pie and Section 10(j): The Americanization of Injunctive Relief under the NLRA" in 46 *Labor Law Journal* 504 (1995). For a discussion on a recent high profile use of the Section 10(j) injunction, see Gould, W. B., IV. "Detroit Newspaper Strike: NLRB Chairman's Opinion Authorizing the General Council to seek a Section 10(j) Injunction" in 48 *Labor Law Journal* 383 (1997).

#### **D. Complaint, Answer and Intervention**

1. The formal enforcement procedures in unfair labor practice cases begin with a Complaint and Notice of Hearing filed on the charged party. The complaint serves as the Board's formal charges against the employer or union alleging that unfair labor practices have occurred.<sup>10</sup>
2. Upon receipt of a Complaint, a charged party has 14 days to file an Answer, admitting or denying the allegations, and raising any defenses which are used to justify the action.<sup>11</sup>
3. It is possible for persons other than the charged party to intervene in the case, subject to Board approval.<sup>12</sup> For example, if an individual employee filed the original charge against an employer, the individual and his or her union may seek intervention. Intervention allows the union to participate actively in the hearing process, to assure that all evidence is presented and all arguments are made.

#### **E. "C" Case Hearing Procedures**

1. A formal, adversarial hearing is held in unfair labor practice complaint cases. The hearing is held before an Administrative Law Judge.
2. The hearing is a full evidentiary hearing in which a formal record is made. The Federal Rules of Evidence apply to the hearing procedures.<sup>13</sup>
3. The burden of proof in unfair labor practices is on the General Counsel, who must prove by a preponderance of the evidence that an unfair labor practice has been committed.
4. Upon completion of the hearing, the Administrative Law Judge issues findings of fact and a recommended order.<sup>14</sup> If no appeal is filed to the Board within twenty-eight days, the Administrative Law Judge's recommended order becomes the final order of the Board automatically.<sup>15</sup>

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<sup>10</sup> *Rules and Regulations* §102.15, note 1, *supra*.

<sup>11</sup> *Id.*, §102.20.

<sup>12</sup> *Id.*, §102.29.

<sup>13</sup> *Id.*, §102.39.

<sup>14</sup> *Id.*, §102.45.

<sup>15</sup> *Id.*, §102.48(a).

5. The recommendation of the Administrative Law Judge will be either to dismiss the charge or to order the charged party to "cease and desist" and to provide other appropriate remedies.

**F. NLRB Review of Hearing Report and Recommended Order**

1. The hearing report and recommended order of the Administrative Law Judge may be reviewed by the Board if any party files "exceptions" within twenty-eight days of receipt of the recommended order.
2. Although it is possible for the Board to conduct oral arguments,<sup>16</sup> most reviews are conducted on the basis of the record and briefs filed by the parties.<sup>17</sup>
3. Decisions of the Board may be made by panels of three of the five members.
4. The final order of the Board will either:
  - a. Dismiss the charge,
  - b. Order the charged party to "cease and desist" from the unlawful activity and provide other remedial relief, or
  - c. Remand the case for further action.
5. A final order of the Board is not self-enforcing. It is possible for a person to ignore a Board order unless a court has ordered compliance. However, the role of the courts in reviewing a Board order is limited.

**G. Judicial Review or Enforcement of the Board Order**

1. There are two procedures in which court review of a final Board order may occur:
  - a. The Board may petition a circuit court of appeals of enforcement of its order, or
  - b. Any person aggrieved by the Board's order may petition for review by a circuit court of appeals.
2. An appeal or enforcement petition may be filed in the Circuit Court for the District of Columbia or in any other circuit court having jurisdiction over the appellant or respondent. Generally, this means the circuit in which the employer is located or in which the unfair

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<sup>16</sup> Id., §102.46(i).

<sup>17</sup> Id., §102.48(b).

labor practice was committed. There are twelve regional circuit courts in the United States.

3. The NLRB is not bound by previous decisions of any given circuit court. While a court may disagree with the interpretation of the Board in a particular case and refuse to enforce an award, that is not binding on the Board in its future decisions.
  - a. The result of the relationship between the circuit courts and the NLRB is that the parties can and will engage in forum shopping, seeking review of a particular order in a circuit with a sympathetic record.
  - b. Circuit courts review only the record, with any appellate briefs and arguments presented. There is no right to submit new evidence or to have an appellate court rehear the evidence. The Board is presumed to be the proper fact-finder.
4. A circuit court may enforce the Board's order, vacate the order, remand the order for further Board action or consideration, or modify the order and enforce it as modified.

#### **H. Appeal to the U.S. Supreme Court**

1. There are very limited and discretionary grounds on which a circuit court decision may be appealed to the Supreme Court.
2. The Supreme Court will normally grant a Petition for a Writ of Certiorari (the primary form for seeking Supreme Court review) only if one of the following issues is involved:
  - a. A unique or substantial question of legal interpretation is involved,
  - b. Two or more circuit courts have resolved legal issues in conflicting manners, or
  - c. A substantial question of Constitutional interpretation is involved.
3. A Supreme Court decision interpreting the law is binding on both the circuit courts and the NLRB.

#### **I. Compliance Procedures**

1. The basic remedy in an unfair labor practice case is a "cease and desist" order, which basically orders the charged party to stop doing whatever was wrong and to refrain from doing it again. However, the courts have recognized the broad discretion of the Board in

fashioning specific remedies to undo the damage of an unfair labor practice.<sup>18</sup>

- a. The remedies of the Board are compensatory, not punitive.
  - b. The goal of the Board in fashioning remedies is to make the victims whole, to put the victims back in the position they would have been but for the unfair labor practices.
  - c. Specific remedies may include reinstatement with back pay (less interim earnings), posting notices of violations, restoration of practices unlawfully terminated, etc.
2. The Board, through the Regional Offices and the General Counsel retain jurisdiction over a case after a final Board and court order is issued.
  3. It is the responsibility of the General Counsel, through the regional offices to assure compliance with the final order. Only the General Counsel can return to court to force compliance.

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<sup>18</sup> *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).