

Federal Labor Laws

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IX. Improper election conduct and unfair labor practices during organizing campaigns – Procedural Issues

A. Relationship between objections and unfair labor practices

1. Many of the tactics used during election campaigns may be either grounds for objections to the outcome of the election, unfair labor practices, or both.
2. If only objections are filed, the representation or "R" case procedures apply. If it is determined that objectionable conduct has interfered with the laboratory conditions of an election, the standard remedy is to set the election results aside and to conduct a new election.
3. If unfair labor practice charges are filed, but it is unnecessary to file objections to the election, the unfair labor practice or "C" case procedures apply. The broad range of remedial powers of the Board will determine the outcome of the case.
4. In the common case of conduct which prompts the union to file both objections and unfair labor practice charges, some important procedural and remedial issues arise, which are discussed in this outline.

B. Time Limits for Filing Objections and Charges

1. The time limit for filing objections after an election is seven days. Unfair labor practice charges must be filed within six months of the alleged illegal activity.
2. Because of the different time limits, it is necessary to act promptly to remedy any violation that may constitute both an objection and an unfair labor practice. Because the alleged unfair labor practices may also be grounds for objections if the union loses the election, the objections and charges can be filed together.
3. It is possible for unfair labor practices to be committed at any time, before, during or after an election campaign. However, only activity that occurs after a petition is filed and before the completion of a Board election can serve as grounds for objections.

C. Consolidation of "R" and "C" Cases

1. If conduct leads to both election objections and unfair labor practice charges, the "R" case and "C" case may be consolidated for purposes of hearing and review.
2. The consolidation of cases is important for remedial purposes as well as procedural efficiency. Certain remedies are available in "C" cases that would not be possible in "R" cases. Theoretically, the entire dispute will be resolved more expeditiously if the cases are consolidated.

D. Remedies for unfair labor practices committed during an election campaign

1. If objections are upheld, the normal procedure is for the Board to direct a new election. Under many circumstances this is inadequate because of the severity of the employer's conduct, the delays which result from exhausting Board procedures, and the psychological damage which can be done to the union activists.
2. If unfair labor practices are involved in the challenged employer activities, additional remedies may be available which come closer to providing an adequate result.
3. The normal remedy for an unfair labor practice is a "cease and desist" order directing the guilty party to refrain from further violations of the law. Additional remedies have been used which attempt to restore conditions to what they would have been, but for the unfair labor practices.
4. Some of the remedies which have been ordered against employers whose conduct interfered with organizing drives include:
 - a. Directing the employer to mail notices to all employees concerning the employer's misconduct.
 - b. Requiring that the employer post and read the Board order to employees on company time.
 - c. Granting union organizers access to workers during working time on company property.¹
 - d. Requiring that the company pay the litigation costs of the Board and the union which result from frivolous and dilatory appeals.
 - e. Ordering the employer to reimburse the union for the additional costs of combating the employer's flagrant unfair labor practices.²

¹ *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026 (1979).

- f. Issuing a bargaining order, even if the union has lost the election.³
5. Under some circumstances, the Board can order an employer to bargain with a newly organized union even if no election has been held or if the union has lost an election.
- a. Technically, bargaining orders are remedies for serious unfair labor practices committed during an organizing campaign which make it improbable that a fair election could be held.
 - b. The basic tests for determining whether a bargaining order is an appropriate remedy are described in *NLRB v. Gissel Packing Co.*:⁴

When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, unless he has knowledge independent of the cards that the union has a majority, decline the union's request and insist on an election . . . If, however, the employer commits independent and substantial unfair labor practices disruptive of election conditions, the Board may withhold the election or set it aside, and issue instead a bargaining order as a remedy for the various violations. A bargaining order will not issue, of course, if the union obtained the cards through misrepresentation or coercion or if the employer's unfair labor practices are unrelated generally to the representation campaign.

- c. The Court discussed three levels of severity of unfair labor practices, with the level in a particular case determinative of whether a bargaining order would be appropriate:
 - 1) In *Gissel-III* cases involving only minor unfair labor practices or ULP's without a direct bearing on the election, no bargaining order would be appropriate.
 - 2) In *Gissel-II* cases, the Board may issue a bargaining order if the union had at some point established a card majority, but the "serious" unfair labor practices undermined that support or interfered with the ability to conduct a fair election. The bargaining order is based in substantial part on the showing that the

² *Heck's Inc.*, 215 NLRB 765 1049 (1974). See also, Morris, C. J. "The Role of the NLRB and the Courts in the Collective Bargaining Process: A First Look at Conventional Wisdom and Unconventional Remedies" in 30 *Vanderbilt Law Journal* at 676.

³ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁴ *Id.*, 395 US at 591-592.

union had obtained and subsequently lost the support of a majority of the workers in the unit. A *Gissel-II* bargaining order could be issued either if the union lost an election or if no election was held.

- a) In some cases, the actions of the employer are so clearly related to the outcome of the election to warrant a bargaining order. These are referred to as "hallmark" violations and usually involve direct employer action taken against workers.
 - b) In other cases, the Board weighs the impact of the unfair labor practices on the free choice of workers in the election process. A bargaining order will be issued only if the impact of the unfair labor practices on the election process is substantial.
- 3) The Court suggested that in "exceptional" cases, marked by the "outrageous" and "pervasive" unfair labor practices of the employer, it may be possible to issue a bargaining order on the theory that the employer's conduct not only made it impossible for a fair election to be held, but also made it impossible for the union to obtain the support of a majority.
- 4) Under the current Board interpretation of the *Gissel* case, *Gissel-I* orders will not be issued. Although the Board membership differs on the reasons why such orders should not issue, a majority of the membership has voted to overrule a previous decision authorizing such orders.⁵

⁵ *Gourmet Foods*, 270 NLRB 578 (1984).