

Introduction

On behalf of General Counsel Arthur Rosenfeld I would like to convey greetings and best wishes for this seminar. He regrets that his travel schedule, which has been very intense recently, precludes his being here in person today.

In the brief time that's available I would like to cover two topics. First I will summarize the procedures that the NLRB follows when it receives a petition that raises a question concerning representation. Second I will explain how the Office of the General Counsel manages the Regional Offices to ensure that these procedures function smoothly.

But before I do that, you may be wondering why I, as a staff member of the Office of the General Counsel, am addressing you today regarding representation cases. As you may know the General Counsel's primary responsibility under the National Labor Relations Act is the investigation and prosecution of unfair labor practice cases. But in addition, under the Act the General Counsel exercises general supervision over the staffs of the Regional Offices. And it is the Regional Offices where most of the day-to-day work in representation cases takes place. An important part of this general supervision consists of making sure that our field staff has the tools they need to get the work done. Another big part is monitoring their work to make sure they are keeping up with the caseload.

First, the procedures. Let me say at the outset that what I am about to tell you is a very basic overview. However, it is one that covers the vast majority of cases. There is a huge body of law and practice that has grown up around these procedures and now, thanks to the Internet, much information on these topics is readily available to anyone with a computer. The NLRB has an excellent website, www.nlr.gov, on which some important reference works are available. These include the Case Handling Manual, which is the “bible” for our Regional Offices in their day to day work on these cases. Another important reference is the “Outline of Law and Procedure in Representation Cases.” Again, both of these are available on our web site.

Statistics

Before walking you through the actual procedures, let me give you some statistics. In the most recent fiscal year, which ended September 30, 2002, approximately 5,300 representation cases were filed in the NLRB's 32 Regional Offices. These led to the holding of nearly 2,900 elections. The overwhelming majority—over 86 percent—of those elections were conducted based on the agreement of the parties—typically the union and the employer—and did not require complex preelection hearing and decision procedures, which I will describe shortly. In those cases where preelection hearings were held, Regional Directors issued their decisions in a median time of 36 days. In all cases, hearing and nonhearing, the median time from the filing of the petition to the holding of the election was 41 days. Even better, over ninety percent of all initial representation elections were conducted within 56 days of the filing of the petition. This is a record that we are very proud of and I think justifiably so.

Petition; Investigation

The Board's powers and duties in representation cases are derived from Section 9 of the National Labor Relations Act. Section 9(b) identifies the three possible triggering events for an election:

- A petition filed by employees seeking to be represented ("RC" petition)
- A petition filed by an employer, who has been presented with a demand for recognition by a labor organization ("RM" petition); and
- A petition filed by an already-represented group of employees seeking to decertify their union ("RD" petition).

In the earliest years under the Act, the full Board in Washington was involved in practically every representation case. However, beginning in 1961, the Board delegated to its Regional Directors the power to hold hearings and make decisions on all relevant issues, subject to review by the Board at its discretion.

As the process now unfolds, when a petition is received in a Regional Office, it is given a case number and assigned to a field agent. The first thing the agent does is to check the “showing of interest.” The “showing of interest” is what the Board requires of a petitioning labor organization to show that there is substantial support for representation among the members of the requested bargaining unit. Under the Board’s longstanding rules this showing requires the support, usually expressed by signed cards, of 30 percent of the unit.

Additional questions addressed early in the investigation are jurisdiction—that is, is the employer covered by the National Labor Relations Act; and whether there exists any bar to the holding of an election. For example, the Act prohibits the holding of an election within one year of an earlier, valid election. (This does not include elections that are rerun because they were invalid the first time around—usually because one or the other party has engaged in improper conduct.)

In addition, the Board has developed a set of rules that bar the holding of an election in certain circumstances. The most notable of these is where there is a collective-bargaining agreement that has been in place for less than three years. There are others; I will not attempt to go into them all now.

As I indicated earlier, most cases do not require a preelection hearing. Indeed, the Act makes clear that the parties to the case may waive the hearing, and that is what happens in the overwhelming majority of cases—about 85 percent of the time, in fact. In those cases the parties sign a document called a “stipulation” that sets out the essential parameters of the election. The principal one of these is the bargaining unit—who gets to vote and to be represented if the vote comes out in favor of the union.

Even though hearings are held in only about 15 percent of cases, in order to keep the process moving along, the Regional Office typically prepares a notice of hearing, to be held seven days from the filing of the petition, and faxes it to the parties, almost immediately after the case is filed.

After this initial review is completed, the field agent contacts the parties to the case to discuss any potential issues and to try to resolve them. Even when the Region is unsuccessful in persuading the parties to enter into a stipulation, the process serves to narrow the issues, which can be of considerable benefit when preparing for a hearing.

Hearing

When mediation efforts are unsuccessful, a hearing must be held. The Hearing Officer is typically a senior field agent, sometimes an attorney, sometimes not. Hearings usually involve complex legal and/or factual issues, often vigorously presented by contentious counsel. The average hearing takes one to two days and generates 250 to 500 pages of transcript. The most common issues for hearing are the scope of the bargaining unit—for example, whether it should comprise one or more locations—and whether certain groups of employees should be included in or excluded from the petitioned-for unit.

Once the hearing is completed, the transcript is assigned to a Board attorney (who must be someone other than the Hearing Officer) to write a decision for the Regional Director's review and signature. The decision usually directs the holding of an election, although in rare circumstances it dismisses the petition, for one of the reasons mentioned above (lack of jurisdiction, election barred). If an election is directed, the decision specifies the bargaining unit and other relevant details such as the voter eligibility cutoff date, so that brand-new hires cannot vote and the date of the election.

Either party, if it disagrees with the Regional Director's decision or any part of it, may request that the Board review it. Before the election is actually held, the Board rules on whether or not it will consider the request for review. It is relatively rare for the Board to agree to review a Regional Director decision, but it does happen on occasion.

Election

For every election that is scheduled, either by agreement or by Regional Director decision, the employer is required to file with the Regional Office a list containing the names and addresses of all employees in the bargaining unit. The Regional Office then gives this list to the union so that the union may contact all unit employees and persuade them to vote for it. In addition, the Board prepares a document called a Notice of Election that the employer is asked to post in conspicuous places at its facility. Failure to post the notice can result in the election being rerun.

As for the voting itself, the important features are these:

- Normally the location is the employer's facility, during the regular working hours of that employer. For some employers, those hours may include the middle of the night, or weekends. The important thing is to ensure that everyone in the bargaining unit has an opportunity to vote. As a result the turnout is normally very high. On rare occasions balloting will be conducted offsite. In either of these situations the voting is supervised by a Board agent, or in large elections, a team of Board agents. In addition, there are situations in which voting is done by mail balloting, where the ballots are sent to the voters' homes and they fill them out and return them to the Regional Office. These have become somewhat controversial in recent years and their use is carefully monitored.

- Historically the Board has used paper ballots for voting. These are prepared specially by the Regional Office for each election. Often ballots are prepared in one or a number of languages if the voting group includes a substantial number of non-English speaking voters. Or, the ballot may include the same question in multiple languages. We are beginning to look into the feasibility of electronic voting, using computers instead of paper ballots. These would be used in conformity with the long-standing principle of onsite voting.

- Each side is entitled to have an observer. The observers' function is to assist in seeing that only those who are eligible to vote have the opportunity to do so. In addition they verify that the secrecy of the balloting has been maintained. Observers also may challenge voters if there is a substantial question regarding their eligibility to vote. Challenged voters place their ballots in an envelope so that they can be counted or not, depending on how the challenge is resolved.
- Normally the ballots are counted immediately following the end of the voting and the results are announced. However, if the number of challenged voters is sufficient to affect the outcome of the vote, the results are not final and further investigation and possibly a hearing must be conducted.

Post election

After the election, if there are no determinative Challenges and no Objections, the Regional Director issues a certification approximately 10 days after the vote. If the union has won the vote—that is, obtained a clear majority of those eligible employees who actually voted—the Regional Director issues a Certification of Representative. If the union obtained less than a majority, the Regional Director issues a “Certification of Results.” A tie vote goes against the union.

However, in a substantial number of cases there are enough challenges to affect the outcome of the vote. In addition, any party may file objections to conduct either before the voting or during the voting that may have impaired the integrity of the vote. In such cases, the challenging or objecting party presents written evidence and legal argument to the Regional Office. The Regional Office then conducts any necessary investigation. Where there are disputed facts, it may be necessary to hold a hearing.

In such cases, like the pre-election hearings I talked about earlier, an experienced Board agent serves as the hearing officer. He or she takes evidence and then issues a report, which includes credibility findings and a recommendation for each objection and/or challenge. Most post-election hearings require one to five days of testimony and generate 250 to 1000 pages of transcript.

If no party appeals any of the Hearing Officer's findings or conclusions, the Board simply adopts the Hearing Officer's recommendations. If an appeal is taken, the Board will review all the transcripts, the appeal and the Hearing Officer's decision and issue an Order. This order can require challenged ballots to be counted or an election to be rerun if there was substantial improper conduct. If the Board concludes that the results of the election should stand, it issues either a certification of representative or certification of results.

Certification; test

Technically, the representation case ends when a certification—of either representative or of results—issues, or in some cases when the petition is dismissed without an election being held. There is no opportunity for an employer to obtain judicial review of anything that happened in the representation case until the Board has issued a certification of representative. And, to obtain judicial review, the employer must refuse to bargain with the union. This triggers an unfair labor practice case, which normally results in a quick, summary order of the Board directing the employer to bargain with the certified union. The employer may then petition for review in a federal court. Or it may simply do nothing and wait for the Board to go to court to get its order enforced.

Performance Measurement

That, in summary form, is how the NLRB processes representation cases. I would now like to spend a few more minutes talking about how the Office of the General Counsel monitors the performance of Regional Offices in keeping the cases flowing through the pipeline.

The system that we now have in place has actually existed for many years—in fact, since the 1960's. We have modified and refined the performance standards from time to time, but the basic system remains the same.

Essentially what we have is a set of time targets within which the Regional Offices are expected to complete various phases of the case. We do not require that each and every case conform to the time targets, because every case carries the possibility of issues and contingencies that cause delay. Rather, cases are viewed in the aggregate. Here are some of the standards that we use:

- Each Region is expected to conduct about 90 percent of all representation elections within 56 days of the filing of the petition. (I say “about” because we adjust the number a little from year to year to take account of case intake and staffing trends.)
- Each Region is expected to issue 85 percent of all reports on objections and challenges within 100 days after they are filed (usually within 7 days following the election).
- Beginning next year, we will expect Regions to issue certifications in a median time of 60 days from when the petition is filed. (The actual experience in 2002 was better than this—54 days—but since this is a new measure we are being a little generous.

In addition to the time targets, we have another measure that is intended to keep the Regions focused on obtaining pre-election agreements, in order to try to cut down on the number of hearings, which as I mentioned earlier are time-consuming and expensive. That measure is what we call the “stip rate” and by that I mean we expect Regions to achieve voluntary election agreements in 85 percent of cases. Of course, this target may not be met for reasons entirely beyond the Region’s control, since these agreements ultimately depend on the voluntary cooperation of the parties. But we look very carefully and expect good reasons when the target is not met.

The Regions are expected to file electronic reports on a monthly basis that show whether or not they are meeting these standards. Performance on each is then compared with that of all the other Regions and rankings are posted on the Agency's internal website, available to all Agency staff. This disclosure of each Region's relative standing is a powerful incentive to keep performance up.

The Office of the General Counsel has a staff in Washington, whose principal job is to monitor and review the Regional Offices in their case processing. They keep a close watch on these statistics and are ready to jump in when a Region's performance starts to go awry.

Moreover, these measures are incorporated into the Region Directors' individual performance plans. If a Director falls short on too many of these case-handling benchmarks in a given year, his or her performance evaluation reflects that fact and there may be monetary consequences.

Our experience over the years has been that these reporting and monitoring systems have done an excellent job in promoting top performance from our field offices. As a result the public in the US has come to expect a very high level of efficiency from us and I am proud to say that overall we deliver quite well. And, as our record-keeping and reporting becomes increasingly automated, it has become easier and easier to spot little problems and correct them before they become big problems.

So that, in a nutshell, is representation cases as seen from the NLRB's field offices. On behalf of General Counsel Arthur Rosenfeld and the entire staff of NLRB's Office of the General Counsel, I thank you for your interest