

# NLRB Representation Case Rule Changes



**2015**



## About this presentation....

- **Purpose is to provide general information about the changes**
- **More information and details will be provided to practitioners and the public before the final rule becomes effective**



# Overview of Presentation

- **Procedural History**
- **Changes**
  - Filing the Petition
  - Initial Processing
  - Pre-Election Hearing
  - Decision and Direction of Election
  - Election
  - Post-Election
  - Blocking Charges
- **Implementation**



# Procedural History of Rulemaking

- **Proposed:** June 22, 2011 (NPRM)
- **Public Hearing:** July 18 and 19, 2011
- **Final Rule Issued:** December 22, 2011
- **Final Rule Effective:** April 30, 2012 to  
May 14, 2012

## Procedural History (cont.)

- **Proposed:** February 6, 2014 (NPRM)
- **Public Hearings:** April 10 and 11, 2014
- **Final Rule Issued:** December 15, 2014
- **Effective Date:** April 14, 2015



# Changes: Filing the Petition

- **Petition form will include Petitioner's requested election date, time, place and method** (Sec. 102.61)
- **Petition *can* be e-Filed** (Sec. 102.60)
- **When filed, Petition must be accompanied by:**
  - **Showing of Interest** (may be e-filed or faxed if originals provided to Region within 2 business days) (Sec. 102.61)
  - **Certificate of Service** showing service on all parties named in petition (Sec. 102.60)

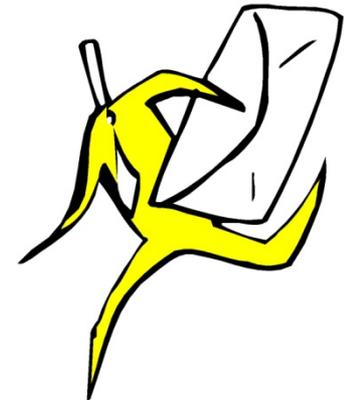




# Changes: Filing the Petition

**Petitioner must serve the parties named in the petition with:**

- **A copy of the Petition**
- **Statement of Position form (new)**
- **Description of Procedures in R Cases (updated Form 4812)**



**(Sec. 102.60)**

*The Statement of Position and Description of Procedures will be available on the NLRB website and in Field Offices.*



# Changes: Initial Processing

## Region will serve:

- **Notice of Hearing** which sets
  - **Hearing date**
  - **Statement of Position due date** – generally will be noon of business day before hearing is set to open
- **Notice of Petition for Election** – similar to current Form 5492 but specifies the proposed unit
- **Description of Procedures in R Cases**
- **Statement of Position form**
- **Copy of the petition**





# Changes: Initial Processing

## Employer *must* post Notice of Petition for Election (Sec. 102.63(a)(2)):

- Within 2 business days of service of Notice of Hearing
- In conspicuous places, including all places where notices to employees are customarily posted



## Must also distribute Notice electronically *if* Employer customarily communicates with employees electronically

- Failure to post or distribute *may* be grounds for setting aside election





# Changes: Initial Processing

## Statement of Position form will include:

- Jurisdiction and commerce (completed commerce questionnaire)
- Whether Employer agrees proposed unit is appropriate. If not:
  - Basis for contention it is not appropriate
  - The classifications, locations, or employee groupings that should be added or excluded
- Individuals whose voting eligibility the Employer intends to contest at the pre-election hearing

(Sec. 102.63(b))



# Changes: Initial Processing

## Statement of Position form (cont.):

- Any election bar asserted by Employer
- Other issues Employer intends to raise at the pre-election hearing
- Employer's position on election details:
  - Type (Manual, Mail, Mixed Mail/Manual)
  - Date(s)
  - Time(s)
  - Location(s)
  - Payroll Period information (length and last ending date)
  - Eligibility period (e.g. special eligibility formulas)



# Changes: Initial Processing

## Statement of Position form (cont.):

- **Contact information for Employer's authorized representative**
- **List(s) of employees:**
  - (a) **With full names, work locations, shifts and job classifications of all individuals in proposed unit**
  - (b) **If Employer claims unit is inappropriate, the full names, work locations, shifts and job classifications of all individuals Employer claims should be added to the unit**
- **Employer must also indicate those individuals whom it believes should be excluded from the proposed unit to make it an appropriate unit**



# Changes: Initial Processing

## Date for Pre-Election Hearing (Sec. 102.63(a)(1)):

Except in cases presenting unusually complex issues, the Regional Director will set the hearing for

- a date 8 days (excluding intervening Federal holidays) from the date of service of the Notice of Hearing
- or the next business day thereafter if the 8<sup>th</sup> day falls on a weekend or Federal holiday

Sun	Mon	Tue	Wed	Thu	Fri	Sat
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						



# Changes: Initial Processing

- **Postponement of Hearing** (Sec. 102.63(a)(1)):

The Regional Director may postpone the hearing for

- *up to 2* business days upon request of a party showing **special circumstances**
- *more than 2* business days upon request of a party showing **extraordinary circumstances**.



# Changes: Pre-Election Hearing

## Hearing (Sec. 102.64):



- Purpose of the hearing is defined - to determine if a question of representation exists.
- Duty of the hearing officer defined - to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under Section 9(c) of the Act.



# Changes: Pre-Election Hearing

## **Hearing** (Sec. 102.64):

- Although appropriate unit must always be established, disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated.

RD has discretion to postpone litigation of eligibility issues. RDs likely to do so as long as issue(s) effect a small percentage of employees in the unit. No mandatory 20 percent rule.



# Changes: Pre-Election Hearing

## **Hearing** (Sec. 102.64):

- **Statement of Position is received in evidence (RD may allow it to be amended in a timely manner for good cause)**
- **All other parties will respond on the record to each issue raised in the Statement of Position before introduction of further evidence. (RD may allow responses to be amended in a timely manner for good cause)**



# Changes: Pre-Election Hearing

## **Hearing** (Sec. 102.66):

- **The hearing officer will not receive evidence concerning any issue as to which parties have not taken adverse positions, except**
  - **evidence regarding the Board's jurisdiction and**
  - **other evidence the RD decides is necessary, such as evidence concerning the appropriateness of the proposed unit**



# Changes: Pre-Election Hearing

## **Hearing** (Sec. 102.66):

- **Offers of Proof:** Not required, but hearing officer may solicit offers of proof. RD will decide what issues will be litigated.
- **Preclusion:** A party is precluded from:
  - raising any issue,
  - presenting evidence relating to any issue,
  - cross-examining any witness concerning any issue, and
  - presenting argument concerning any issue

that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response.



# Changes: Pre-Election Hearing

- **Preclusion:** If a party contends in its Statement of Position that the proposed unit is not appropriate but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from:
  - raising any issue as to the appropriateness of the unit,
  - presenting any evidence relating to the appropriateness of the unit,
  - cross examining any witness concerning the appropriateness of the unit, and
  - presenting argument concerning the appropriateness of the unit.

(Sec. 102.66 (d))



# Changes: Pre-Election Hearing

## Hearing (Sec. 102.66):

- **Election Details:** Prior to the close of the hearing the Hearing Officer will:
  - solicit the parties' positions on the type, date(s), time(s), and location(s) of the election, and the eligibility period;
  - solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the Region should transmit the Notice of Election if the RD directs an election;
  - inform the parties what their obligations will be if an election is directed and the time for complying with such obligations.
- **Briefs:** Parties are entitled to oral argument but not allowed to file post-hearing briefs unless RD grants special permission.



# Changes: Decision and Direction of Election

## Direction of Elections (Sec. 102.67):

- **Election Details:** If the RD directs an election, the D&DE will ordinarily specify the type, date(s), time(s), and location(s) of the election and the eligibility period.
- **Election Date:** The RD will schedule the election for the earliest date practicable. The 25-day waiting period – to allow Board to rule on a request for review - has been eliminated.
- **Service:** Region will send the direction and notice of election to the parties and their representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided).



# Changes: Decision and Direction of Election

## Direction of Elections (Sec. 102.67):

- **Request for Review:** Parties may file a request for review at any time following the decision until 14 days after a final disposition of the proceeding by the Regional Director.
  - Can file before the election or wait until after the election and see if the election results moot an appeal.
- **Stay of Election, Expedited Consideration, or Impounding of Ballots:** May be requested, but will only be granted upon a “clear showing that it is necessary under the specific circumstances of the case.”



# Changes: Election

**Voter List Due: Employer must provide a voter (*Excelsior*) list**

- **Directed Election:** Absent extraordinary circumstances specified in the D&DE, within **2 business days** after issuance of the direction  
(Sec. 102.67(I))
- **Stipulated Election:** Unless the parties agree otherwise, within **2 business days** after approval of the election agreement  
(Sec. 102.62(d))



# Changes: Election

## Voter List Contents:

- Employer must provide (electronically, if feasible) the parties and the Region with a list containing the following information for all eligible voters:
  - Full names
  - Work locations
  - Shifts
  - Job classifications
  - Contact information (including home addresses, available personal email addresses and available home and personal cell telephone numbers)

(Sec. 102.62(d) and Sec. 102.67(I))



# Changes: Election

- **Voter List Contents – Voters to be Challenged:**  
The Employer shall also include in a separate section of the voter list the same information for those individuals who will be permitted to vote subject to challenge based on the parties agreement or the direction of election.
- **Use of Voter list:** Parties shall not use the voter list for purposes other than:
  - the representation proceeding
  - Board proceedings arising from it and
  - related matters.

(Sec. 102.67(I))



# Changes: Election

- **Notice of Election:** Will ordinarily be transmitted with the D&DE or sent promptly after election agreement approved. Employer must post for 3 full working days and now must also distribute electronically if it customarily communicates with employees in the unit electronically.
- **Election** – At the election, a party generally can challenge someone whose eligibility was not contested at the hearing. (Sec. 102.66(d))





## Changes: Post-Election

- **Filing Objections:**

Must be accompanied by a written offer of proof except that the Regional Director may extend the time for filing the offer of proof upon request of a party showing good cause.

(Sec. 102.69(a))

- **Post-election Hearing:**

Unless parties agree to an earlier date, will open 21 days after preparation of tally of ballots or as soon thereafter as practicable.

(Sec. 102.69(c))



# Changes: Post-Election

- **Hearing Officer Reports:**
  - All HO recommendations must be made to the Regional Director
  - Exceptions to HO Report must be filed with Regional Director
  - Except is consent election agreement cases, all RD post-election reports will be subject to discretionary review by the Board

(Sec. 102.69(c))



# Changes: Blocking Charges

(Sec. 103.20)

- **Offer of Proof:** When a party to a representation proceeding files a ulp charge together **with a request that it block** the processing of a petition or requests that its previously filed charge block further processing of a petition, the party shall simultaneously file, but not serve on any other party, a written offer of proof in support of the charge.

The offer of proof must provide the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony.
- **Witnesses:** The party seeking to block the processing of a petition must also promptly make available to the Region the witnesses identified in its offer of proof.



# Implementation of Final Rule

**Committee is working on detailed implementation guidance. Current plans include:**

- **Guidance memorandum available to the public**
- **Training for Field personnel**
- **Outreach for practitioners and the public that will include a presentation on the final rule and Q's and A's**
- **Revised forms on the NLRB website**